Testing for Causation in Tort Law

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The traditional, intuitively appealing, test for causation in tort law, known as 'the but-for test' has been subjected to what are widely believed to be devastating criticisms by Tony Honoré, and Richard Wright, amongst others. I argue that the but-for test can withstand these criticisms. Contrary to what is now widely believed, there is no inconsistency between the but-for test and ordinary language, commonsense, or sound legal principle.

Introduction: Overdetermination and the but-for test

There is a widespread intuition that to say that one thing causes another is to make a certain counterfactual claim; roughly, the claim that if the cause had not occurred, neither would the effect.[1] In philosophy this intuition has motivated a variety of counterfactual analyses of causation.[2] In legal literature, especially that focusing on tort law, the same intuition has given rise to the 'but-for' test. Tony Honoré explains the legal significance of this test in the following passage:

> Tort lawyers have traditionally held the view that, whatever the meaning of causal connection, the way to test whether it exists in a given case is to ask whether in the circumstances the harmful result would have occurred in the absence of the wrongful act. This is the widely adopted 'but-for' test ...[3]

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1 This is rough because there are some things which seem to stand in causal relations (eg unchanging states and facts) despite being poor English to describe them as either 'occurring' or 'not occurring'.

2 David Hume's claim that one object causes a second when the counterfactual "if the first object had not been, the second never had existed" is true, has inspired these attempts, see *An Enquiry Concerning Human Understanding*, Section VII. David Lewis is largely responsible for the recent enthusiasm for the idea, see 'Causation' in his *Philosophical Papers* Vol 2 (Oxford, 1986) 159-213. Hereinafter, 'Causation'.

3 Tony Honoré, 'Necessary and Sufficient Conditions in Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press: Oxford, 1995) 363-386 at 383. Because of their more immediately practical concerns, legal scholars have been inclined to use counterfactuals to test for the presence of causation, rather than to explicate the meaning of

While conceding that the but-for test works well in most cases, Honoré, and other contemporary legal scholars, have argued that there are cases in which it will find an act not to be a cause, even though it clearly is.[4] I will argue that, properly understood, none of these cases provide a good reason for rejecting or modifying the but-for test.

The alleged counter-examples to the but-for test are usually called cases of *overdetermination*. In tort law a case of overdetermination is a situation in which two wrongful acts are followed by a harm; and if either of the wrongful acts had occurred without the other, the harm would still have occurred; but if neither of the wrongful acts had occurred, the harm would not have occurred.[5] The but-for test does seem to lead to counter-intuitive results in some cases of overdetermination. I believe, however, that this appearance is deceptive and can be explained away. Previous attempts to defend the but-for test have tried to do so by arguing, in effect, that there is no such thing as overdetermination. I will argue that these attempts to 'get rid of' overdetermination are misguided. The but-for test is quite compatible with the existence of genuine cases of overdetermination.

Trying to get rid of overdetermination

Rollin Perkins, when considering a hypothetical in which someone is struck simultaneously by two bullets, each of which would have been instantly fatal by itself, claims that the but-for test will accurately find that both shooters cause the victim's death:

> Whenever *that* would not have happened *when and as* it did happen, had it not been for *this*, *this* is an actual cause of *that*.[6]

'causation'. Otherwise the philosophical and legal debates have been remarkably similar.

4 Honoré, ibid 383-84; Richard W Wright, 'Causation in Tort Law' (1985) 73 *California Law Review* 1735-1828 at 1775-76; Richard W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramblebush by Clarifying the Concepts' (1988) 73 *Iowa Law Review* 1023-28.

5 The same terminology has entered the philosophical debate about causation through David Lewis, see 'Causation: Postscript E' 199. This debate is closely analogous to that in tort law, although naturally the philosophical debate is not restricted to causation between wrongful acts and harms. Although it is possible that more than two wrongful acts could overdetermine a harm, I think we can assume that such cases will be quite rare. Furthermore it is easy to extend what I say to them. Consequently I will restrict my comments to cases in which there are only two wrongful acts.

6 Rollin Perkins, *Criminal Law* (2nd ed, Foundation Press, New York, 1969) 689 (emphasis in original).

According to Perkins, both bullets count as causes, on the reasonable assumption that the absence of either of them would have made some difference to the way in which death occurred. Similarly, Arno C Becht and Frank W Miller have argued that in a case in which there are two fires, one started by the defendant, and each of which would have destroyed the plaintiff's house in the absence of the other, the defendant's actions would probably be a cause, since the smoke, ashes and some parts of the ruins would probably have been somewhat different without it.[7]

This approach can be described as 'dissolving' cases of overdetermination, by taking the harm in question to have very stringent conditions of occurrence. In other words Perkins, Becht, and Miller construe any counterfactual supposition according to which a harm occurs in a different manner and/or at a different time as in fact being a supposition according to which a different harm occurs. In such circumstances they advise us to avoid saying that the harm would have occurred differently, and say instead that a different harm would have occurred. This is a practice allowed by ordinary thought and language. For example, one can say: if the driver had been wearing a seat belt, his injury would have been different (ie, less severe). One can just as well say, with the same meaning: if the driver had been wearing a seat belt he would have received a different injury (ie, a less severe one).

I do not think that Perkins, Becht or Miller would or should claim that this strategy eliminates all logically possible cases of overdetermination. It is reasonable to suppose that cases can be coherently described in which it would have made *absolutely* no difference to the harm whether both of the wrongful acts had occurred or only one of them. The following passage from David Lewis seems to be an adequate response to this possibility:

> Maybe so; but probably those residual cases would be mere possibilities, far-fetched and contrary to the ways of this world. Then we could happily leave them as spoils to the victor. For we could plausibly suggest that commonsense is misled: its habits of thought are formed by a world where every little thing that happens spreads its little traces far and wide, and nothing that happens thereafter is quite the same as it would have been after a different past.[8]

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7 Arno C Becht and Frank W Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Washington University, St Louis, 1961) 18. Becht and Miller explicitly endorse what Perkins says about the two-bullets case. See Becht and Miller, ibid 17. They are quoting from the first edition, but the quote remains the same.

8 Lewis, 'Causation: Postscript E', above n 5, 197-98.

Even if you disagree with Lewis's position that a philosophical analysis of causation can be satisfied with getting intuitively correct answers only in 'real world' cases, it seems hard to fault a practical legal test for restricting its ambition in this way.

Nonetheless I do not endorse this strategy. The real problem with it is that it is inconsistent with many intuitively appealing negative causal judgements, because it counts anything that influences the time and/or manner of a harm as a cause of it. This problem is evident in a hypothetical discussed by Becht and Miller in which an inattentive driver hits a pedestrian who runs into the path of the driver's car: if the driver had been attentive, he could have swerved a little, but not enough to avoid causing the pedestrian an equally serious injury. If we adopted the Perkins, Becht and Miller strategy of ascribing very stringent conditions of occurrence to harms, the but-for test would find the driver's inattention to be a cause of the harm. This follows from the fact that they would have to count the injury caused by the actual inattentive driving and the counterfactual injury caused by attentive driving as different harms. Nonetheless, Becht and Miller concede that the intuition of most laymen and lawyers is that the inattentive driver in this example causes no harm.[9] While insisting that this intuition "is actually not true", they are understandably sceptical about the prospects of their position being widely accepted.[10] Finally they decide to speak with the vulgar after all; saying that the driver's inattention "was not a cause" after all, and calling the process by which they arrived at this conclusion "equating the injuries".[11] Richard W. Wright has objected, surely correctly, that this "introduces an inconsistency into their theory that undermines their use of the minute-detail approach to support a finding of causation in the merged-fires case."[12]

Becht and Miller might reply that the different treatment of the inattentive-driver case on the one hand, and the merged-fires and simultaneous-bullets cases on the other, is justified by the distinction between causation by an omission in the former case and causation by a positive act in the latter two. But there is no textual support for this suggestion and it seems to lack any independent motivation. I conclude that the need to preserve a distinction between merely affecting how or when a harm takes place, on the one hand, and causing it, on the other, implies that

9 Becht and Miller, above n 7, 29.

10 Ibid.

11 Ibid.

12 Wright (1985) above n 4, 1775. Wright describes the Perkins, Becht and Miller approach as a "modification" of the but-for test. I think it is better to see it as combination of that test with a particular view about the identity conditions of harms; namely that an actual harm could not have occurred at a different time nor in a different manner.

we should not always take harms to have extremely stringent identity conditions. Nor should we modify the but-for test to make the issue whether the harm would have occurred at the time and in the manner it did in the absence of the wrongdoing, rather than whether the harm would have occurred at all in those counterfactual circumstances.[13]

The two cases of overdetermination that have been considered so far have both been instances of what Wright calls *duplicative causation*.[14] In such cases the causal status of the wrongful acts are symmetrical with respect to the harm they overdetermine; that is, they each have an equal claim to being causes of it. Intuitions tend to differ in such cases about whether we should say that both wrongful acts cause the harm, or whether we should say that neither does, but at least it is clear that there is no reason to say that one does, whereas the other does not. Because it is unclear what to say about such cases they are poor guides to the adequacy of any proposed test for causation. Some laymen and lawyers, for example, will follow Becht and Miller in thinking that both fires in their merged-fires example are causes, some will follow Wright in denying this.[15] Intuitions seem equally unclear in the two-bullet case, despite the following argument by Perkins that we must accept that both shooters cause the death:

> In the two-bullet case posed, if either shooter can claim correctly that his shot was not *in fact* a cause of death, so may the other. The unavoidable conclusion would be that the deceased did not *in fact* die as a result of being shot - which is absurd.[16]

But this conclusion is avoidable. It does not follow from the premise that the victim did not die as a result of being shot by either shooter that he did not die as a result of being shot by the combination of them; a combination which one can think of in either set-theoretical or mereological terms. Unless there was a conspiracy or other incitement, there seems to be nothing counter-intuitive about the conclusion that neither shooter caused the death. That is not to say that there is anything particularly intuitively appealing about this conclusion either. Intuitions about cases of duplicative causation just seem to be too indecisive to bear the weight of theory. Consequently, the but-for test is compatible with the existence of genuine cases of duplicative causation.

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13 These two tests would amount to the same thing for all practical purposes; differing only over the metaphysical issue of the identity conditions of harms.

14 Wright, (1985) above n 4, 1775. In the philosophical literature these would be called 'symmetrical overdetermination' or 'symmetrical redundancy'.

15 Ibid 1779.

16 Perkins, above n 6, 689.

Preemption

But not all cases of overdetermination are symmetrical. In a subset of cases of overdetermination which have come to be known as cases of *preemption* our intuitions seem more decisive. Intuitively it seems reasonably clear that one of them, *the preempting cause*, does the causing; while the other, *the preempted alternative* does not: the alternative is not a cause; though it would have been one, if it had not been preempted.[17] I will argue that a correct understanding of the identity conditions of harms in general will show that many putative cases of preemption are not cases of overdetermination at all. In such cases the but-for test will correctly find the so-called preempting cause to be a cause, and the so-called preempted alternative not to be a cause. In other cases I think the intuition that the so-called preempting cause is a genuine cause can be explained away.[18] Which approach will be best may depend not only on the facts of the case, but the extent of the harm being claimed by the plaintiff.

The key to understanding *most* cases of preemption in the literature is, I submit, is to focus on the fact that the preempting cause is a hastener of harm. This approach will not work, however, for the well-known McLauglin Hypothetical, since, as we shall see, it is not essential to it that the preempting cause does hasten harm. Below, I have developed a strategy for handling the normal cases in which the preempting cause is a hastener of harm. A different strategy will inevitably be required for the McLaughlin Hypothetical.

Preemption as causing by hastening

In most examples of preemption in the legal literature, it is essential to the story that the harm (usually a death) occurs earlier than it would have without the preempting cause.[19] A couple of examples: the defendant

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17 Wright (1985) above n 4, 1775; Wright (1988) above n 4, 1024. The same terminology has entered the philosophical debate about causation through Lewis, see 'Causation: Postscript E', above n 5, 199. Just as cases of preemption have been held to undermine the but-for test by much of the legal literature, cases of preemption have been held to refute 'naive' counterfactual analyses of causation by much of the philosophical literature. For an argument against this philosophical orthodoxy see my 'Preempting Preemption' in Jonathan Collins, LA Paul, and Ned Hall (eds), *Causation and Counterfactuals* (MIT Press, Boston, 2001).

18 Although my position is that strictly speaking there is no such thing as preemption, in what follows I will use the term 'preemption' to refer to putative examples of preemption.

19 This is also true of the parallel philosophical literature. The widespread use of examples of killing to illustrate theories of causation is easier to understand in the legal literature.

mortally burns the victim but before the victim dies of the burns someone else kills him with a blow to the head;[20] the defendant pushes the victim from a tall building but on the way down the victim is shot and killed instantly by another.[21] In response to such examples I will return to the idea of ascribing stringent, though not this time too stringent, identity conditions to the harm. In such cases there is no need to appeal to a detailed description of the manner in which it occurred; an idea which has already been undermined by drawing attention to the distinction between causing an event and merely affecting how it happens. Instead we can restrict ourselves to a detailed description of the time at which the harm occurs, since *it* would have been different, but for the preempting cause.

However, we must be careful. We do not want to say, for example, that a counterfactual death that occurs at any time other than an actual one is *ipso facto* a different death. That would entail that saving a person's life was causing that person's eventual death; since *that* death would not have occurred but for the life-saving action. Just as there is a distinction between affecting the manner of a death and causing it, there is a distinction between affecting the time of a death and causing it.

Arguably this distinction is only legitimate in one temporal direction. Although we typically do not want to say that delaying death is causing it, we typically do want to say that hastening death is causing it. Someone who brings it about that instead of dying now you die later is usually a life-saver, rather than a killer, and someone who brings it about that you die an "untimely" death is usually a killer, even though you would have died later anyway. We can accommodate this asymmetry by distinguishing actual deaths from any counterfactual deaths which would have occurred later than them, while identifying actual deaths with counterfactual deaths (of the same person) which would have occurred earlier than them. This will mean that the but-for test will find the preempting causes (which have been considered so far) to be genuine causes, without the undesirable side-effect of finding life-saving actions to be causes of the deaths they delay.

In the following passage Tony Honoré makes it clear that he would reject this suggestion:

> What has to be shown in a tort action is that the defendant's wrongful act caused the harm, in this case the victim's death. We know from the way in which the law structures actions for wrongful

20 *State v Scates*, 50 N.C. 409 (N.C. 1858).

21 Jerome Hall, *General Principles of Criminal Law* (1st ed, Bobbs-Merrill, Indianapolis, 1947) 262.

> death that what is legally relevant is death, not death at this or that time or place or by this or that process.[22]

This seems to assume incorrectly that we can individuate harms independently of when, where or how they occur. It is particularly clear in cases in which the harm is death that we cannot draw a clear-cut distinction between causing it on the one hand, and causing it to occur at a certain time and place or by a certain process on the other. This is why a lawyer cannot legitimately argue that his client's so-called causing of death was *instead* a hastening of death; that he is guilty *merely* of causing death at a certain time and place and by a certain process, rather than many years later in bed and of old age.

We ordinarily think that the earlier death occurs, all else being equal, the more of a harm it is. Furthermore, we ordinarily think of causing death to occur at an earlier time than it otherwise would have as causing death *simpliciter*. It is true that some lawyers and lay people may be reluctant to describe a person who hastens death by a matter of minutes or hours as a killer, especially if he or she does so with a benevolent motive. This reluctance may be increased, if the hastening of death is the result of an omission rather than a positive act. Does a nurse kill a patient by taking him off life-support at his request when it is clear that he is going to die soon anyway? Does a doctor kill a patient when she slightly hastens that patient's death by giving him a dose of morphine with the sole intention of relieving his pain? Of course people opposed to such practices will say 'Yes!'. I submit that those who are in favour of them should overcome their reluctance and agree. This shared use of terminology makes a meaningful debate about whether or when mercy killing can be justified possible. Sometimes we are justifiably reluctant to say something, because it is false. At other times, and I think such cases illustrate this, we may be reluctant to say something, because it suggests a falsehood. We may be reluctant to describe some death-hastener's act or omission as killing, because that would imply that he or she did something wrong, or failed to do something right, because death is usually a very significant harm.

My suggestion that a counterfactual death which occurs later than an actual one should always count as a different death is not an *ad hoc* stipulation designed to protect the but-for test against troublesome cases of

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22 Honoré, above n 3, 378. Honoré cites Wright (1985) above n 4, 1777-8 and Wright (1988) above n 4, 1025-6, as authority for this claim about the way in which the law is structured. I will leave it to the reader to determine whether this is a reasonable interpretation of Wright's position in those passages. I do not think it is; though it is easy to see how they could be interpreted that way.

preemption. Quite independently of this, it is supported by the plausible view that to hasten death is always to cause death.[23]

But of course not all harms are deaths. Hart and Honoré have discussed a hypothetical in which the defendant starts a fire which would have destroyed the victim's property were it not for a flood which puts out the fire and destroys the property instead.[24] Because each of us undergoes exactly one death, it is particularly clear that causing death is (at least typically) hastening death. This point about hastening is, however, not true of harms in general. One can cause harm without hastening harm.[25] I submit, however, that one cannot hasten harm without causing harm; which is not to say, of course, that one cannot hasten harm in order to avoid a greater harm. Consequently I propose the general thesis that to hasten harm is to cause harm. This accords with the human propensity for "time-discounting", that is, of considering a harm in the immediate future to be *ipso facto* a greater harm than an otherwise similar harm in the more distant future. Many philosophers consider time discounting to be a species of irrationality.[26] Legal theory cannot afford, however, to treat actual human attitudes and values so lightly, just as it cannot afford to allow consideration of the inevitability of death to persuade it that there are no such things as killers.

Of course hastening is a matter of degree. In the case under consideration, the destruction of the house is presumably hastened only very slightly by the flood. Hart and Honoré claim that a person whose negligence was responsible for the flood should bear sole liability for the destruction of the property. I think that person could legitimately respond that the destruction of a property that was about to burn down anyway is little or no harm at all. It would only be a harm, if the property would have been of benefit to the victim during the interval between the time it was in fact destroyed and the time it otherwise would have burnt down. Similarly, in the other cases of preemption we have considered, the killers could concede that they caused death, but plausibly argue that the death in

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23 I say that hastening death is a sufficient condition for causing death. I am tempted to say that it is also a necessary condition. I will not commit myself to this stronger position however. Depending on how some of the details are filled out, the McLaughlin Hypothetical, which I will shortly discuss, may be a case in which a killer delays, rather than hastens, death.

24 H L A Hart and T Honoré, *Causation in the Law* (2nd ed, Clarendon Press, Oxford) 239.

25 For a more general discussion of the relation between hastening and causing see Penelope Mackie, 'Causing, Delaying, and Hastening: Do Rains Cause Fires?', (1992) 101 *Mind* 483-500.

26 See Norman Daniels, *Just Health Care*, (Cambridge University Press, Cambridge, 1985) 99, and Robert Goodin, *No Smoking: the Ethical Issues*, (University of Chicago Press, Chicago, 1989) 22-3.

question was not a great harm, since the victim would have died shortly afterwards anyway.

The McLaughlin Hypothetical

Not all cases of preemption in the literature are amenable to this treatment. In the well known McLaughlin hypothetical: person A seeks to kill person C by poisoning water needed by C to cross a desert, but, before C has occasion to have a drink, person B drains the poisoned water from the keg and C dies of thirst.[27] The standard view of this case is that B, and not A, causes C's death; that is, that B's action is the preempting cause and A's action is the preempted alternative. It is not essential to this hypothetical, however, that B's action hastens death. In fact it will make the case more interesting if we assume that the poison was sufficiently fast-acting that B's action delayed C's death.[28]

Not everyone, however, shares the standard view of this case. Hart and Honoré have long held that neither A nor B cause death. Honoré has recently recanted and joined the standard view. His reason for changing his mind is, however, not convincing:

> My current reasoning is that B's conduct introduces a condition, lack of water, that in the circumstanees, including the absence of an alternative water supply, is sufficient to bring about and does bring about C's death from dehydration.[29]

But it appears that A's conduct also introduces a condition that in the circumstances is sufficient to bring about C's death, although not his death from dehydration.[30]

This illustrates the fact that our considered judgements about the causes of what seems pre-theoretically to be a single event (or state, or

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27 (1925-6) 39 *Harvard Law Review* 149, 155 fn 25. In McLaughlin's original example B empties the water keg and fills it with salt. Hart and Honoré's *Causation in the Law* are responsible for the story as I am presenting it. This is the form in which it is now usually discussed.

28 The possibility of the preempting cause being a delayer rather than a hastener is characteristic of what the parallel philosophieal literature has called early preemption, in which the alternative (ie, preempted) process is cut off as a result of a side-effect of the main (ie, preempting) process. This contrasts with the previous examples of late preemption, in which the alternative is cut off by the premature occurrence of the effect itself. See Lewis 'Causation: Postscript E' above n 5.

29 Honoré, above n 3, 378.

30 I leave it to the reader to decide how or whether Honoré's appeal to the fact that death was by dehydration can be reconciled with the previous quotation, drawn from the same page, in which he says that "what is legally relevant is death, not death at this or that time or place or by this or that process."

omission) can depend on how *it* is described. For example, you close the door while in a bad mood; as a result of your bad mood you slam the door. It seems your bad mood caused the slamming, but not the closing, even though it also seems that there is a sense in which the closing and the slamming are one and the same event.[31] Similarly, we can and should distinguish between the causes of C's death and the causes of C's death by dehydration, and between both of these and the causes of C's death in the desert. It is plausible to suppose that neither A nor B causes C to die in the desert (though the combination of their actions does), whereas B alone causes C to die of dehydration.[32] I do not think there are any legitimate intuitions or legal principles that can decisively determine whether B causes C's death *simpliciter*. Our criteria for distinguishing between causing an event and merely influencing how and when it occurs lead in different directions when we consider C's death *qua* death. Ordinarily we do not think that delaying death, unlike hastening it, is causing death. This suggests that neither B nor A are causes. On the other hand, we do ordinarily think that having a significant enough influence on the manner of a death constitutes killing. This suggests that B alone causes C's death.

Consequently conceptual clarification alone seems unable to determine whether B is guilty of murder or only guilty of attempted murder. It is not surprising then that legal scholars and philosophers disagree about the issue. It seems plausible that the matter can only be resolved by considerations of policy, rather than metaphysics.[33] That would require a

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31 The example is from Jaegwon Kim, 'Causes and Counterfactuals' (1973) 70 *Journal of Philosophy* 570-572.

32 This phenomenon has given rise to a philosophical debate. See Alvin I Goldman, *A Theory of Human Action*, (Prentice-Hall, New Jersey, 1970) ch 1, would claim that it means that C's death and C's death by dehydration are in fact different events. Others would claim that, since C's death and C's death by dehydration are obviously the same event, the most fundamental kind of causal relation must be between something other than events. Thus Jonathan Bennett has claimed that it is a relation between facts, see *Events and Their Names* (Hackett, 1988), and Christopher Hitchcock has claimed that it is a relation between events-in-contrast-to-alternatives, see 'The Role of Contrast in Causal and Explanatory Claims' (1990) 85 *Synthese* 395-419. I would argue that we can (and should) accept that there is a sense in which C's death and C's death by dehydration are different events, while also doing to justice to the intuition that they are the same event, see my 'Preempting Preemption' above n 17. Some sense of how this is possible can be gained by comparing it to the 'issue' of whether London and Greater London are different cities.

33 The last-wrongdoer rule, for example, which was explicitly justified entirely in terms of policy, states that the wrongdoer closest in time to the effect was alone responsible for it. This implies that B is guilty of murder. The last-wrongdoer rule is discussed in Laurence Eldredge, 'Culpable

detailed discussion of the subtle problem of why we treat unsuccessful assassins more leniently than successful ones, which is beyond the scope of this article.[34] The but-for test does not help us to resolve the issue of whether B is a killer, but at least there seems no reason to believe that it would lead to a mistaken verdict.

If I am right that legitimate intuitions about the causes of an event may depend on how that event is described, then we should be prepared to make a distinction between the factors which cause C to be harmed (the concern of tort law), and the factors which cause C to die (the concern of criminal law), even though the harm in this case is death. I think that whether or not B causes C harm depends on the prosaic issue of whether or not death by dehydration is more of a harm than death by poison. If it is, then B causes the harm in question; if it is not, then neither A nor B cause it. If death by poison were sufficiently painful, B could plausibly argue that he did not cause any harm to the already doomed C. I have left open the possibility that B could be have killed C, without doing C any harm. This may seem strange, but the concept of mercy killing already makes it plain that there is room for this possibility.

Conclusion

I have tried to show that cases of overdetermination can be reconciled with the but-for test without giving up any compelling intuitions or legal principles. In cases of duplicative causation we want to say that both wrongs cause the harm, or that neither does. It is tempting to grab the former horn of this dilemma, because it may seem that otherwise we would be committed to the absurd view that the harm is uncaused. This conclusion can be resisted, however, by insisting that although neither of the wrongs causes the harm, the combination of them does.

Whether a case is an instance of overdetermination or not may depend on the extent of the harm being claimed by the plaintiff. In many cases of preemption we should say that one of the wrongs causes harm, because to hasten harm is to cause harm. In such cases the preempting cause is responsible for a lesser harm than he or she would be, if it were not for the preempted alternative. This lesser harm is not overdetermined; consequently the but-for test will correctly find the preempting cause to be responsible for it.

Intervention as Superseding Cause' (1938) 86 *University of Pennsylvania Law Review* 121.

[34] See Leo Katz, 'Why the Successful Assassin is More Wicked than the Unsuccessful One' (2000) 88 *California Law Review* 791-812.

This approach may not be applicable to the McLaughlin Hypothetical. But if the details are filled out in such a way that the victim's death would have been just as significant a harm were it not for B's action, I submit that we should say that B did not cause the victim any harm. This can be hard to see, because there is considerable (though not, I think, decisive) intuitive appeal to the idea that B alone causes C's death. Hence we may be tempted to argue that since C's death was a harm, B caused that harm. The persuasive power of the argument will be undermined, however, if we remember that legitimate intuitions about an event's causes can depend on how that event is described. We should be ready to distinguish between the factors that caused C to die, and those that caused C to be harmed.

Wright has called appeals to the details of the harm in cases of overdetermination nothing more than "proof by tautology"; suggesting that prior to deciding which details are relevant and which are not one must already have made a decision about the issue the test is supposed to determine, that is, the causal status of the wrongs.[35] have tried to show that Wright is mistaken. Instead we should decide which details of the harm are relevant, by considering its identity conditions *qua* harm. I submit that once we do so any appearance of conflict between our best causal judgements and the determinations of the but-for test will disappear. In the landmark case of *March v Stramere* the Australian High Court held that the but-for test was not conclusive. Instead it was decided that causation should be determined by ordinary notions of language and common sense.[36] If I am right, there is no conflict between the but-for test and ordinary language or common sense.

35 Wright, (1985) above n 4, 1777-78, and Wright, (1988) above n 4, 1025.

36 (1991) 171 CLR 506.