A Critique of Criminal Causation

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> [T]he principles [of causation] to be found in the common law . . . are reasonably well settled and can be stated quite shortly.[1–2]
>
> hitherto the judges have made little progress in establishing [the] principles [of imputation]'[3]

Introduction

What happened between 1983 and 1989 to occasion this turnaround in the fortunes of the criminal law's conception of causation? The answer is nothing, and the argument of this paper will be that Williams' assessment of the position is much closer to the mark than that of the Law Commission. As a result, the Law Commission's own recent analysis, in restating the common law, only succeeds in replicating its confusions.[4] To take the discussion of the refusal of a live-saving blood transfusion — one of two crucial examples on supervening cause[5] — the Commission's argument does not properly support the conclusion advanced, that an original assailant has caused ensuing death. It is argued that the refusal is not sufficient in itself to be the legal cause of death, even if it is unforeseen and not reasonably foreseeable.[6] While it is obvious that a refusal to accept blood can only form part of a causal sequence leading to death where some prior act has occasioned a serious condition of bleeding, so that the refusal by itself can never be the sufficient cause of death, this is an observation concerning *factual*,[7] not legal, causation, and does not address the question of whether the causation is to be imputed to the accused *in law*. What if the victim refused the transfusion out of spite for the accused? Would the Law Commission still maintain that the assailant had caused the death, given that the wound would remain a necessary condition, and the refusal could still not be said to be sufficient to cause death? Some indication of what might be the relevant means for breaking the factual chain of causation in such a case is necessary in order to distinguish, for example, the religious from the spiteful victim, but the Law Commission do not provide it.[8]

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1–2 The Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989), comment to Clause 17, p 188.

3 G. Williams, *Textbook of Criminal Law* (London: Stevens, 2nd ed, 1983) p 382.

4 For comments on causation in the Code Bill, see Williams, '*Finis* for *Novus Actus*?' [1989] CLJ 391, and C. Clarkson and H. Keating, *Criminal Law: Text and Materials* (London: Sweet and Maxwell, 2nd ed, 1990) p 430.

5 The other example, medical maltreatment, is discussed below at p 699. This paper deals with the problematic issue of supervening cause alone.

6 Law Commission, *op cit* p 188, comments, para 7.17.

7 The Law Commission say (example 17(iv), p 156): 'The refusal of the transfusion may be unforeseen by D and not reasonably foreseeable, but it is not sufficient in itself to cause death. *The death would not have occurred without the wound inflicted by D*' (emphasis added). In other words, this is a case of 'but for' causation.

8 One answer, though I shall argue an inadequate one, is given by Hart and Honore, who claim that the relevant consideration is whether or not the victim's act was voluntary: *Causation in the Law*

I suggest that in this example (and in the case of medical maltreatment, which is discussed below) the problem is that the Law Commission has sought to restate the common law principles as they emerge from the leading cases, believing them to be essentially adequate. In so doing, however, they can only include the difficulties that exist within the law. What is the answer to this problem? Traditionally, lawyers and academics have sought to resolve the problems of legal doctrine by engaging in deeper conceptual rationalisations and reconciliations of the surface tensions and contradictions of the law. The outstanding illustration of this in the field of causation is the work of Hart and Honore, which is examined below. More recently, however, some academics have begun to question the value of such an approach, and to argue that it would be more fruitful as a means of understanding the nature and development of legal doctrine to recognise that the surface contradictions of the law are not to be overcome by a more sophisticated ratiocination, but are rather founded upon deeper tensions and contradictions within the form of law itself. This position, which is adopted here,[9] draws its conviction from the observation that even the most sophisticated traditional treatises are often unsuccessful in overcoming the problems in law that they identify. Thus, it will be argued that for all its analytical strength, Hart and Honore are unable to provide a sound philosophical basis for the criminal law of causation in their *Causation in the Law*, and that another, more critical, analysis is required to explain, if not to rationalise, the vagaries of the law in this area.

A Critical Approach to Criminal Law

It is surprising that criminal law, unlike, for example, the law of contract,[10] has attracted little critical attention. The most noteworthy argument is that of Kelman[11] whose claim is that for all the intellectual enquiry that has gone into the criminal law, the attempt to present it as a potentially rational process of law creation and application is bogus. In reality, criminal law is essentially contradictory, and the contradictions are only managed by a set of rhetorical and conceptual devices[12] that

(Oxford: OUP, 2nd ed, 1985) p 361. The relevant case, *R* v *Blaue* [1975] 3 All ER 446 is also discussed below at p. 695.

9 This article is part of a broader critical enquiry into the conceptual foundations of the criminal law and the philosophy of punishment. With Hart (*Punishment and Repsonsibility* (Oxford: Clarendon, 1968)) I agree that there is a deep homology between the work of the philosopher and the lawyer, but against him, I argue that the connection revolves around the repetition of unresolved contradictions, not their resolution through rationalisation. See my *Law, Ideology and Punishment* (Dordrecht: Kluwer, 1991). This present paper will appear in different form in a book entitled *Crime, Reason and History*, to be published in the Weidenfeld Law in Context series.

The analysis rests upon a non-atomistic view of social life as involving an analytic duality of individual powers and social causes. A theoretical underpinning for this perspective is provided philosophically by R. Bhaskar, *The Possibility of Naturalism* (Brighton: Harvester, chs 2, 3, 1979); and in psychology, by the work of Rom Harre (R. Harre, *Personal Being* (Oxford: Blackwell, 1983); R. Harre, D. Clarke, N. De Carlo, *Motives and Mechanisms* (London: Methuen, 1985)), though these are not referred to in the text.

10 H. Collins, *The Law of Contract* (London: Weidenfeld, 1986); J. Adams and R. Brownsword, *Understanding Contract Law* (London: Fontana, 1987).

11 'Interpretive Construction in the Substantive Criminal Law' (1981) *Stanford Law Review* 591. See also D. Nelken, 'Criminal Law and Criminal Justice: Some Notes on their Irrelation' in I. Dennis, *Criminal Law and Justice* (London: Sweet and Maxwell, 1987), and 'Critical Criminal Law' 14 *Jo Law and Society* 105; and N. Lacey, C. Wells and D. Meure, *Reconstructing Criminal Law* (London: Weidenfeld, 1990). Lacey *et al*, pp 26–27, briefly discuss causation in a way similar to the argument presented here. See also my *Law, Ideology and Punishment*, *op cit* chs 7(3), 8.

12 Kelman identifies 'unconscious interpretive constructs' involving the broadening and narrowing of time frames, the disjoining and unifying of accounts, and broad and narrow views of the defendant

lawyers use consciously or unconsciously to cover the gaps in their accounts. Legal reasoning is essentially an open process in which decisions are reached in a haphazard way as judges and academic lawyers choose, on non-legal grounds, to go one way or another on the basis of the rhetorical devices.

Kelman's approach is a salutary corrective to the predominantly rationalist and positivist accounts of criminal law, and the methodology employed below owes something to it. Its weakness, however, is that it provides us with little more than a negative mirror image of the dominant approach, a form of intellectual 'trashing'[13] which may be enjoyed for itself, but does not advance the critical analysis very far. It would be interesting to ask, for example, *why* the law adopts these concepts and rhetorics, and *why* does it get itself into the fixes that Kelman identifies? Why is it unable to overcome its contradictions? Kelman recognises the questions, but does not get beyond a crude answer that it is to do with questions of power and social class in a capitalist society.[14] More precise connections between doctrine and broadly brushed sociological views are not properly specified. If we are going to advance critical analysis and provide answers to the questions posed above, we need a more historically rooted and theorised approach which can locate the legal problems in a broader intellectual context.

To help address this problem,[15] it is worth considering Horwitz's analysis of the decline of the 'objective theory of causation' in tort law, an approach popular in the United States in the nineteenth century because of its individualist emphasis on the existence of one 'natural' cause for every event that occurs.[16] Such a belief made it possible to assert individual liability for torts and to locate the law of tort firmly within the area of private law, but it came increasingly under attack from both the Millian doctrine of the multiplicity of causes and from the legal doctrine of foreseeability. The leading proponent of the objective doctrine, Wharton, argued that the idea of a multiplicity of causes would lead to a selection of the legal cause of the tort on anti-capitalist grounds,[17] and he also opposed the growth of a foreseeability doctrine on related grounds. With regard to the latter, the growth of modern industry carried with it certain inherent risks to life and limb, so that

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and of her intent. Using these rhetorical constructs, judges are able to flip one way or another in terms of the responsibility of the accused. Thus, the broader the time frame, the more likely it is that the judge will be able to identify a conscious act setting a course of events in motion leading to a crime, while the broader the view of the defendant that is taken, the more likelihood there is of identifying some factors in her biography that would allow for an excusing or mitigating defence. Behind these devices, there lie two conscious interpretive constructs within judicial discourse, freewill versus determinism, and rules versus standards. These concepts are more or less articulated within law as 'dilemmas' for the law in practice, but Kelman's point is that the decision to recognise an individual as free or determined, or whether to go for a broad or narrow rule, remains one that is underdetermined within legal discourse, and is therefore employed haphazardly to achieve a result desired on other, non-legal grounds.

13 One possible 'bottom line,' says Kelman, is that he has constructed a piece of 'winking dismissal: Here's what they say, this is how far they have gotten. You know what? There's not much to it.' (*ibid* p 673.)

14 *op cit* pp 611, 616, 640, 670–671.

15 A full account of what is required here would address the development of the different criminal law forms out of the ideology of the Enlightenment in the first half of the nineteenth century, and show the way in which this liberal individualist ideology was given specific shape by the construction of crime as a social problem concerning the conduct of the lower classes. I deal with this at some length in my forthcoming work, *Crime, Reason and History* (above, n 9). A sketch of the position will appear in 'Towards a Critique of Criminal Law' in I. Grigg-Spall (ed), *Critical Lawyers' Handbook* (London: Pluto, forthcoming).

16 M.J. Horwitz, 'The Doctrine of Objective Causation' in D. Kairys (ed), *The Politics of Law* (1982).

17 'Here is a capitalist among these antecedents; he shall be forced to pay.' (*ibid* p 205.)

statistically, it was foreseeable that a certain number of injuries would result. Again, it would be the capitalist who would bear the financial brunt. Beyond that, the recognition of the multiplicity of causes and the interconnection between the nature of the society and the incidence of injury called into question the whole concept of tort as an individualistic, private law concept. Did not the future lie in private and public insurance, and of a severing of the question of injury from the concepts of cause and fault?[18]

This analysis is highly suggestive for thinking about causation in criminal law. As in tort, the emphasis is upon individual responsibility, and the question is always one of attributing causation to a particular actor: why *this* individual should be said to have been the cause of a particular injury or other effect, and not another. In tort law, the early confidence in an objective doctrine of causation gave way to a realist scepticism about the possibility of separating out 'cause in law' from 'cause in fact' on rational grounds, with concepts such as 'proximity/remoteness' and foreseeability being seen as no more than rationalisations of decisions taken on other grounds. In the absence of genuine concepts and in an industrial-political world that is 'tortogenic,' decisions about fault could only reflect the interests of powerful social agents in the society at large. Cannot the same be said of criminal law? We know that crime is a social phenomenon, and that, particularly as it is processed by the state, it is primarily a product of particular socio-economic contexts and classes.[19] The question suggested by Horwitz for the criminal law is this: in a society that is as much criminogenic as 'tortogenic,' is it possible genuinely to 'fix' individual responsibility through a conceptually adequate concept of causation? Or does the individualist focus of the criminal law, excluding the social context and nature of crime, necessarily lay up a set of intellectual problems for legal doctrine and its rationalisation? Could this historically rooted contradiction between legal form and social context be the basis for the problematic nature of causation doctrine?

Through an analysis of the work of Hart and Honore, I will argue that it is. The position proferred in *Causation in the Law*, which I discuss more fully in the next two sections, is that the policy reductive argument against causation doctrine developed within American realism is wrong because it fails to take into account the existence of causal concepts employed in everyday life, and by judges, which properly capture a genuine morality of imputation and blame. To reductionism is counterposed a legal morality of individual responsibility.[20] My argument will be that the individualism of their analysis is an abstract individualism that identifies the individual responsibility of the agent only by refusing properly to take into account the social context without which any agency is in fact inconceivable, that is, by decontextualising it.[21] It is a form of responsibility-imputation that can only operate by discounting the multiple and socially structured nature of causation. Yet because individual agency is literally inconceivable without a social context, the latter continuously and persistently interrupts and has to be dealt with within their analysis. Accordingly, the only way to foreclose debates about the valid attribution of causal responsibility in individual cases is not to use causal concepts, which are ultimately inadequate for the task, but to import socio-political ('policy') grounds to establish

18 Holmes, for example, recognised 'the inclination of a very large part of the community ... to make certain classes of persons insure the safety of those with whom they deal.' (*ibid* p 211.)

19 cf Lacey, Wells and Meure, *op cit* pp 6–7.

20 *op cit* pp lxxvii–lxxxi.

21 For further discussion of decontextualisation and the mental element in criminal law, see my *Law, Ideology and Punishment*, *op cit* ch 7.

an artificial closure. Thus Hart and Honore are right, as against the policy-reductionist, to argue that there is a language of individual agency within the law which judges draw upon in their decisions, and which they therefore reflect in their own analysis, but they are wrong to think that that language is adequate to carry out the work of causal attribution. Because attribution lies on the fault line between the law's abstract view of individual agency, and the social contexts within which individual agency is rooted (and by which it can validly be said to be 'caused' in the Hart and Honore sense), the question of legal causation must always ultimately rely upon a closure of the issue brought about 'from outside,' by 'policy' argument.[22] This is the strength of the reductionist position, although it too quickly and erroneously identifies the part of the legal equation as a whole.[23]

Causation in the Criminal Law: The Hart and Honore Way

Hart and Honore extol 'the distinctive form which the legal control of conduct takes' as being 'its primary appeal to individuals as intelligent beings who are assumed to have the capacity to control their conduct.' Deferring its sanction until such an appeal has been revealed ineffective by the occurrence of crime, criminal law is a 'form of control that invites the subject's obedience and so, by preserving the possibility of disobeying, maximises freedom within the framework of coercive sanctions.'[24] This liberal theory of the maximisation of individual freedom requires a recognition of the role of individuals as causal actors within the world, whose voluntary interventions 'make a difference.'[25]

In causation, the central notion is of something which interferes with or intervenes in the course of events which would otherwise occur. Human beings are able to manipulate things, to move and change them, so that where an individual has acted, she is said to have caused any changes that occur, and responsibility for the changes can be imputed to her.[26] However, individuals become implicated in sequences of events, in chains of causes in ways that do not always permit us to impute responsibility. Where an *abnormal contingency* occurs after the act of an individual, or where there is a third party *voluntary intervention*, we no longer impute causal responsibility to the first actor. The intervention of an abnormal contingency reduces the agency of the first actor to that of a background factor: it is the abnormal contingency which now 'makes the difference.'[27]

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22 Hart and Honore recognise a role for policy argument at the edge of their account of the domain of causation (*op cit* pp xlii–lv, p 5). My argument is that if one probes their analysis, the socio-political judgment will be seen to be central to the constitution of the case law on supervening cause. In this paper, I use the terms 'policy,' 'political' and 'socio-political' interchangeably. 'Policy' is a common concept within criminal law which almost appears as a term of legal art, while being in reality an extra-legal 'fix' which closes down the range of possible determinations by what are necessarily open legal rules. It has the added merit of suggesting something consensual and apolitical, and conveniently masks the genuinely 'political' character of much judicial law-making. Such law-making is not, however, necessarily political in a narrow or explicit sense, hence the value of a broader term like 'socio-political.'

23 This is not simply an eclectic position that includes 'some individual causation, some policy.' It is an argument about the historical nature and structure of legal form as it has developed in a Western society.

24 *op cit* p lxxix. For a helpful review of Hart and Honore's work from a tort perspective, see J. Stapleton, 'Law, Causation and Common Sense' (1988) *Ox Jo Legal Studies* 8, 111.

25 cf Williams, *op cit* n 4; S. Kadish, 'Complicity, Cause and Blame: a Study on the Interpretation of Doctrine' [1985] *California Law Review* 324, 329–336.

26 *ibid* pp 28–32.

27 *ibid* pp 33–41.

The "abnormal contingency" refers to an unexpected or unforeseeable event that occurs after the initial act of the individual. This could be an abnormal act by a third party or an event involving the person who suffers harm, depending on the situation.

The focus is on the event itself, which unexpectedly alters the outcome, making it no longer possible to fully attribute responsibility to the first actor.

Similarly, the intervention of a third party voluntary act breaks the causal connection between the result and the first actor, for human agency has a special significance and finality to it.[28] Once we have a voluntary human act, we do not continue to trace back the causal enquiry beyond it: it operates as both 'a barrier and a goal in tracing back causes.'[29] Hart and Honore argue that where there is a 'free, deliberate and informed act or omission of a human being' intervening in a causal sequence, the initial causal chain is negated.[30] They operate with '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.'[31]

Hart and Honore's position is most plausible where they draw their examples from situations in which an individual, isolated and alone, acts to bring about some effect in nature, for example, the lighting of a spark which sets a forest on fire. But even here, the picture that is presented is one-sided, for we are told nothing about the conditions in which the act occurs, or how it is perceived.

This becomes clear in the crucial distinction they draw between abnormal and normal conditions. An individual is only the moral/legal cause of those events in the world that are accompanied by the normal range of attendant conditions. Where an abnormal condition ensues, it becomes the cause in place of the human intervention, which in turn becomes an antecedent condition to the abnormal element. The problem is that what is normal and what is abnormal, what is cause and what is condition, is a matter of judgment and perspective. Thus, to use one of the authors' own (slightly modified) examples,[32] the effect of a famine in a third world country might appear to a peasant as the consequence of drought, to a relief agency as the result of the inefficiency and corruption of government, to a charity activist as the product of the meanness of the industrialised countries, and to a radical as the effect of economic underdevelopment resulting from neo-colonialism. All these different factors could be singled out as the cause with the others regarded as the background conditions, each could be presented as the factor which 'makes the difference.' Hart and Honore acknowledge that 'the distinction between cause and condition may be drawn in different ways in one and the same case according to the context.'[33] But if the 'normal' is contingent and subject to development and change according to context, it is a weak, potentially unstable, foundation for legal and moral judgments. Individual responsibility ultimately relies upon a variable evaluation of what is 'normal' in social life.

A good illustration is provided by Lord Scarman in his report into English inner city riots in the early 1980s.[34] Speaking of the events leading to a particular riot, he stated that:

> Deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday's events was a spontaneous combustion set off by the spark of one particular incident.[35]

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28 *ibid* pp 41–44.
29 *ibid* p 44.
30 *ibid* p 136.
31 *ibid* p 138.
32 *ibid* p 35.
33 *ibid* p 37. Hart and Honore further suggest (*ibid* p 37) that the distinction depends upon 'the breadth of the perspective' applied, but they do not seek to explain why a broader or narrower perspective is legitimate from one field of enquiry to another. Cf S. Lloyd-Bostock, 'The Ordinary Man, and the Psychology of Attributing Causes and Responsibility' (1979) *Modern Law Review* 42, 143.
34 *The Brixton Disorders, 10–12 April 1981* (Cmnd 8427).
35 *ibid* p 37.

Which factor 'makes the difference,' the 'deeper causes' or the 'immediate cause'? If those 'deeper causes' (relating to poor social environment, racial discrimination, police harassment) are part of the 'normal' conditions of life in late twentieth-century England, are they *for that reason* excluded from our account of what caused the riot? It would perhaps be convenient for the law, with its emphasis on the individual, if they were. Elsewhere in his report, Lord Scarman did draw a distinction between the 'causes' and the 'conditions' of the riots,[36] and this shortly before he argued that the *conditions* of young black people cannot exclude their guilt for grave criminal offences which, as causal agents, they have committed.[37] If Hart and Honore are correct to say it is all a matter of perspective, the example of the Scarman Report reveals that the law's view is not the only one.[38]

Second, there is the question of the law's use of the concept of voluntariness. On the face of it, the idea of a new intervening voluntary act by a third party possesses a measure of solidity that the distinction between the normal and the abnormal does not. However, this is illusory since it all depends on how one defines 'voluntary.' Only a voluntary act will break the causal chain, so the act of a third party may not break the chain if it is adjudged 'involuntary.' Hart and Honore concede that there are narrower and broader uses of the terminology,[39] and much hinges upon their notion of what constitutes a 'fair choice.' This, they say, 'depends in part on what conduct is regarded from a moral or legal point of view as reasonable in the circumstances,' an issue that 'raises questions of legal policy.'[40]

This becomes apparent in their discussion of situations which are not regarded as voluntary by the law. These include, in addition to the more obvious situations of unconsciousness and physical duress, the policy influenced situations of preservation of property, safeguarding of rights and interests, including economic interests, and the carrying out of legal and even moral obligations.[41] All may be regarded as situations in which an individual did not act voluntarily. Just how broad the concept of the involuntary may go becomes apparent when the authors are discussing legal obligation:

> In ordinary speech we recognise that even a social obligation restricts our freedom, so that if I have accepted an invitation to dine with you I am 'not free' to dine with anyone else. So too in the law.[42]

With such wide notions of what might constitute involuntariness, the hope that the voluntary intervention of a third party might draw a line across a causal chain in a principled manner is impossible. The definition is too flexible, too open to broad and narrow interpretations of what the term means.

A second objection stems from the first. What is voluntary may be subject to a more or less individualistic interpretation. If it is a matter of looking at whether an individual was conscious when she acted, this is a narrow focus on the individual

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36 *ibid* p 16.
37 *ibid* p 14.
38 At this point, a functionalist defence of legal practice may be offered which rests its case on the very fact that law is just one form of social control among many that just happens to adopt an individualist approach (see, eg, G. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) p 800, and M. Moore, 'Causation and the Excuses' (1985) *California Law Review* 73, pp 1144–1148). The question, however, is not about what the law does, but whether it is justified in doing it. See my *Law, Ideology and Punishment*, *op cit* pp 158–159.
39 *ibid* p 138.
40 *ibid* p 142. Cf J. Stapleton, *op cit* p 124.
41 *ibid* pp 142–162.
42 *ibid* p 138.

and her mental state. If, on the other hand, it is a question of examining social or legal obligations, this locates the individual in a network of social relations and understandings, and presents a broad view of the voluntary/involuntary line. From this latter, more social view, rooting the individual in a context of interpersonal relations,[43] it is questionable whether the voluntariness of human agency should have any particular importance at all.

Hart and Honore's argument is that voluntary human agency has a special finality about it. While we may look for reasons why the poisoner did what she did in terms of motives like greed or revenge, we do not regard her motive as the cause of death, although we may consider it the cause of her action. The example is perhaps tendentious,[44] but the main point is that it draws upon the illustration of an isolated, asocial individual, alone with her private emotions, and does not locate individual agency in its broader context. A good counter-example is provided by J.B. Priestley's play, *An Inspector Calls*, in which the author persuades us to look behind the 'voluntary' act of the young woman's suicide to the conduct of the various members of the well-to-do family, who each in their own way have contributed to the girl's decision to take her life. Priestley forces the family to see that each of its members has in his or her own way caused the girl's death. They cannot conceal behind the girl's 'voluntary' act their own causal roles stemming from the interconnectedness of relations between rich and poor, which ensure that any focus on individual agency can only be falsely narrow. The girl's suicide is 'voluntary,' but it is still caused by the acts of the family, so that no special finality is given to her actions. 'Voluntariness' loses its special character when a broader view of events and actions is taken.

Hart and Honore's analysis is neatly dovetailed with the narrow individualism of the law itself, and it is this that provides its strength and its weakness. Its strength is its ability to rationalise the way in which judges do talk about causation in the criminal law, and to give effective expression to the concepts that are implicit and explicit in their judgements in a way that the policy reductionist critique cannot. For the reductionist, judicial distinctions are a veneer for decisions that can only be based upon policy grounds, for there is no plausibly effective language of causation (other than basic *sine qua non*) in a world where causation is everywhere. Hart and Honore reflect the individualist logic of the law which stipulates that individuals are practical actors who effectively act upon the world, who are producers of causes and consequences by their acts. Their weakness lies in their inability, like the law, to see the other side of individual agency, its inherent rootedness in social and political relations and structures. Because of this, the strength of their concepts, based upon the abstract individualist model, ebbs away when confronted with the broader context within which individuals operate. Thus, individuals are held to be causes until something abnormal intervenes, but what is abnormal depends upon social perception, and therefore upon a socio-political label being stuck upon it. Similarly, causation stretches as far as the new voluntary act of a third party, but what is meant by voluntary can be as narrow or as broad as one likes, depending upon how much one is prepared to recognise the social character of the lives of individuals.

43 I use this term in the sense of indicating the interconnectedness of social relations, not in the Hart and Honore sense of individuals providing opportunities for others to do wrong (see *ibid* pp 51–59). Their sense of the term implies the legal model of a pair of isolated individuals interacting with each other, not of individuals located in particular social contexts, structures and relations independent of their own making.

44 Surely it would depend with what perspective we asked the question, as, above, in considering what is normal and what is abnormal.

Hart and Honore's view is narrow because it focuses on individual actions in isolation, without accounting for the broader social context in which those actions take place.

My argument is that it is the limited, abstract individualist character of the law's causation analysis that makes it rely on 'policy' to draw the lines for it. The causation analysis is both genuine and operative in legal decision-making *and* fundamentally flawed by its focus on individuals in abstraction from social relations. Although she mistakes the part for the whole, it is this flawing that gives the policy-reductionist an *entrée* and which, we shall see, undercuts the rationality of the law. Hart and Honore's analysis is a paradigmatic, if late, expression of Enlightenment thought. Rooted in the philosophy of Hume and Mill,[45] it rests upon the analysis of the individual, engaging with other individuals and with nature as a self-contained monad, capable of producing effects in the world as a cause in him/herself. This is the law's approach too, but what is missing from both is any recognition of the way in which individual agency is fundamentally constructed and constituted within pre-existing social relations. It is the gap between the individual and the social that hounds the case law on causation.

Analysing the Causation Cases

The focus upon the individualism of the causal connection means that the language of causation in the criminal law is always artificially foreclosed by concepts that lack a valid theoretical grounding. In addition to the concepts of normal and abnormal, voluntary and involuntary, vague notions of reasonable and unreasonable and of natural and unnatural conduct have to be drafted in to decide the causal issue in a way that lacks rigour and generates contradiction as cases go in different directions. Thus, it is a 'foolish' or a 'daft' act of the victim that constitutes a supervening cause, an 'unreasonable' act that negates causal connection, while it is a 'natural' act that maintains the causal chain.[46] The language of causation is employed, but it can never do the whole job, it requires policy interventions to shut down or open up the grounds of causation in each case.

The Intervention of a New Voluntary Act

Because of the two-sided nature of actions as both individual and social, what appears from one point of view as a voluntary act can from another point of view appear involuntary, and vice versa. Much depends upon the focus of the enquiry.[47] The more narrowly one analyses the various actions and actors, the more likely it is that they will appear to be discrete, self-contained and autonomous phenomena. The more broadly one examines the facts, however, locating what happened within the wider context, the less an act is likely to appear voluntary. For example, Hart and Honore discuss the American case of *State* v *Preslar*[48] as one in which the language of voluntariness was determinative. A wife was beaten by her husband, and left the family home with her child to walk to her father's house. Two hundred yards from the latter's home, she lay down, stating she did not wish to continue until morning, and died of exposure. Hart and Honore, following the logic of the court, argue that 'since the wife had exposed herself without necessity and there

45 *ibid* ch 1.
46 *ibid* pp 327, 331, 332, 333, 335, 336, 342. At one point, Hart and Honore rely upon what they concede is a 'vague common-sense distinction' between accelerating and causing death, pp 344–345.
47 cf M. Kelman, *op cit* pp 640–642.
48 (1885) 48 NC 417, in *ibid* pp 326–327.

were circumstances showing deliberation in her leaving home,' her actions were to be treated as 'fully voluntary.'[49] If, as seems likely, the woman's acts were connected with the treatment she had received (Hart and Honore do not state otherwise), then the decision to leave the home, deliberated upon or not, could easily be construed as part of a scenario relating to self-preservation, an accepted ground for negating the voluntariness of an act,[50] and thereby extending the causal chain. Deliberation in itself counts for nothing if one considers the context within which the deliberation takes place. The basic facts do not determine the authors' conclusion. Similarly, in *Carbo* v *State*,[51] the defendant had created a risk of an explosion, about which a fireman ignored a warning. Entering the building, the latter was killed, but his 'foolish' act in so entering was held to be a superseding voluntary act. Again, an alternative account is available, in which the acts of brave firemen, often at risk of personal injury, are construed as the conscientious actions of employees fulfilling their obligations, and as such involuntary. As Hart and Honore point out themselves, in the law of tort, precisely such a narrative operates in order to permit employees working in dangerous conditions to gain damages for injuries received[52]; and, again in tort, where a rescuer acts from either legal or moral obligation, even in a way that is 'unreasonably brave,' the existence of the obligation removes the voluntary aspect of his/her actions.[53] The alternative scenario is readily available.[54]

Carbo can also be contrasted with *State* v *Leopold*,[55] where the accused was convicted of murder when the tenant of a house set alight by the accused sent his sons into the building in order to recover property. In this case, it was held to be 'natural' to recover property in this way, and there was therefore no voluntary act on the part of the victims. But it appears quite reckless, indeed 'unnatural,' to put the value of property above the value of one's children's life and 'foolish' to re-enter a burning building, so that the ground for saying that Leopold caused the death is not conclusive but contingent on the way in which one interprets the facts.

Nor is it simply a matter of how one frames the incident in question, it also depends upon a perception of what is and is not reasonable conduct within an incident. This is seen in particular in the cases where it is alleged that self-preservation negates the voluntariness of an action. Thus, in order to construe the actions of a woman as involuntary in those cases where minor molestation in a car in motion leads her to jump out to her injury[56] or even death,[57] it is necessary to have an understanding of the alarm experienced by women in sexual assault situations that judges do not always reveal. It is only if the victim does something 'daft' that her act is regarded as voluntary,[58] but 'daft' is what 'daft' does.[59]

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49 *ibid* p 327.
50 Either directly in the case of physical self-preservation (*ibid* pp 330–333) or indirectly, as in 'interpersonal transactions' (pp 51–57).
51 (1908) 62 SE 140, in *ibid* p 327.
52 *ibid* p 147.
53 *ibid* p 148.
54 And likely to be used. Suppose an accused had planted a bomb leading to the death of a bomb disposal expert who had been warned of the danger of entering the building where the bomb was located. Given the attitude of the courts to this situation in the law of intention to murder (Norrie, 'Oblique Intention and Legal Politics' [1989] *Crim LR* 793), it seems unlikely that the latter's acts would be interpreted as voluntary and breaking the causal chain.
55 (1929) 110 Conn 55, in *ibid* p 333.
56 *R* v *Roberts* (1971) 56 Cr App Rep 95.
57 *People* v *Goodman* (1943) 182 Misc 585, 44 NYS 2d 715.
58 Hart and Honore, *op cit* p 331.
59 Hart and Honore also discuss a Rhodesian case, *R* v *McEnery* 1943 SR 158, in which a white man entered a rail carriage reserved for blacks and began to assault them. One jumped from the train and

The role of policy in structuring the perceptions and establishing the breadth of the frame of analysis is perhaps most clearly seen in those cases where police officers kill third parties in attempts to control those involved in crimes of violence, and causal responsibility is imputed to the latter.[60] In a number of American cases, this has happened and is explained by Hart and Honore, under the two heads of self-preservation and legal duty, as cases where the officers have acted involuntarily.[61] This leads to what the authors concede is the counter-intuitive result that where an armed criminal is killed by a police officer, he can be said to have committed suicide.[62] On the other hand, in the case of *Commonwealth* v *Moore*,[63] it was held that a rioter was not causally responsible for the death of a bystander shot by a soldier quelling the riot.

The irreducibly political content of these decisions can be seen by comparing *R* v *Pagett* (see footnote 61) with the Northern Irish case of *R* v *Brown*.[64] The latter is a self-defence rather than a causation case in which the defendant shot and killed a police officer, arguing in his defence that he fired his gun only because he believed, mistakenly as it turned out, that the police officer was 'unjustifiably or unwarrantably' going to kill him. The court held that this defence was unsound because 'the law throws, without any such refined reservations, a protecting mantle over persons preventing or assisting in preventing crime.'[65] If self-defence is not available in this situation for the policy reasons given, then an argument on the ground of causation, that the accused's act of self-preservation was involuntary so that the policeman caused his own death, is unlikely to get off the ground. Yet the only difference, it seems, between this case and the others is the political one of who is wearing the 'protecting mantle' of a uniform.

Finally, in the case of *R* v *Blaue*, a case in which a young woman died from stab wounds having refused a blood transfusion because it was against her beliefs as a Jehovah's Witness, Hart and Honore argue that the refusal does not break the causal connection, despite the fact that it was deliberate,[66] because the holding of such a belief is involuntary:

> the question to be decided is whether the decision to refuse treatment is not merely deliberate and informed (as it clearly was in the *Blaue* case) but also a free one. In view of the high value attached in our society to matters of conscience, the victim, though free to accept any belief she wished, is not thereafter free to abandon her chosen belief merely because she finds herself in a situation in which her life may otherwise be in danger. So it was not her free act to refuse a transfusion.

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was killed, the court holding that because he was surrounded by other blacks, his fear and need for self-preservation were ungrounded, and that therefore the causal nexus was broken. As with the example of molested women, the result of the causal inquiry depends not simply on the causation, but upon an ability or desire to empathise with the position of the victim.

60 For murder on a felony-murder doctrine, for a lesser form of homicide in its absence.

61 *ibid* pp 331–332, 334. This formulation was supported by the Court of Appeal in *R* v *Pagett* (1983) 76 Cr App Rep 279. The recent finding in a civil action (*The Guardian*, 4–5 December 1990) that the police had been negligent in their handling of the siege in which Gail Kinchen died, reveals the two-sided character of the causation issue in this case. Looked at narrowly, Pagett did use Gail Kinchen as a hostage and fire a shot to which the police responded, but more broadly, the police actions can be interpreted as caused by their own negligent handling of the siege, removing the element of justifiability from their actions and negating the imputation of causation to Pagett.

62 *ibid* pp 332, 334. Or even a rioter. It is not true, however, as Hart and Honore argue, that this conclusion follows from the artificiality of the felony-murder doctrine, since reponsibility for death, whatever the particular criminal label — murder or manslaughter — would be imputed to the accused.

63 (1904) 26 Ky LR 356, in *op cit* 334.

64 [1973] NILR 97.

65 *ibid* pp 109–110.

66 cf *State* v *Preslar*, above.

The authors add that 'An element of legal policy certainly enters into such a judgment,' but this is an unnecessary claim for them to make given that their definition of voluntariness is sufficiently broad to include moral obligation as a negating factor.[67] Why not simply argue that the case illustrates their argument on causal principle? The answer possibly lies in the fact that in a secular society, the contentious character of the assertion that religious persons are bound by their beliefs so that their actions are involuntary is clear. It is not that we do not understand the sense of 'involuntary' here, but rather that we equally recognise a sense in which those who take on moral commitments can equally well be said to have acted and to be continuing to act voluntarily. In this case, the problem is that different possible definitions of 'voluntary' are so near the surface of the argument, too obviously available in a secular society for us to be readily swayed by the claim that the victim in *Blaue* had 'really' acted involuntarily.[68] Perhaps for this reason, Hart and Honore concede, against their *own* very broad analysis of the meaning of involuntariness, that the decision has to be seen as involving a determinative element of policy. But I would argue that in so doing, they are only making explicit in *Blaue* what is implicit in the other cases: that policy is ultimately determinative in a causal analysis caught within the duality of human action as an individual and social phenomenon. The duality ultimately requires for its resolution reference to some extrinsic element such as 'policy.' Without this, it can only rely on fudge words which elide the conflict non-rationally.

The Intervention of an Abnormal Occurrence

Where an event occurs contemporaneously with or subsequent to the act of the accused that can be described as coincidental, it breaks the causal chain. A coincidental event is marked by four features: it is very unlikely (it is abnormal) by ordinary standards; it is significant or important; it occurs without human contrivance; it is independent of the other relevant act or event.[69] Such a coincidental event 'makes the difference' and therefore breaks the causal chain. However, the question of normality and abnormality implicit in this definition requires a contextual selection of the appropriate focus to be adopted before a result can be obtained in a particular case, ie requires that the issue of causation be foreclosed on 'policy' grounds external to the analysis. More seriously, there are rules in this area in which a socio-political judgment does not just *complete*, as it must, the individualist analysis of causation but goes further and actually undermines it.

67 *op cit* p 335.

68 It is interesting to think how a court following Hart and Honore might deal with a case in which the victim belonged to a religious sect with beliefs so eccentric as to be on the furthest fringe of religious life. Would they accept the idea that such a person was 'bound' by principles that appeared quite bizarre? If not, why not? Another problem would be raised in a situation where a child of a member of a sect had been stabbed, but had only died through the refusal of an informed parent to allow medical treatment. On the law of homicide, such a refusal would be intentional and voluntary, so that the parent would be responsible for the child's death. Would the original assailant also be responsible through, *inter alia*, the causation rules? If the answer, on *Blaue*, is yes, then it would mean that the parents' actions were voluntary *vis-à-vis* their own liability, and involuntary *vis-à-vis* the assailants. There is no obvious reason for claiming, as do Smith and Hogan, *op cit* p 320, that it would make a difference to the question of causation whether it was the victim or the victim's competent parent who refused the treatment.

69 *ibid* p 78.

The Medical Treatment Cases

Like the other major textbook writers, Hart and Honore treat these cases as a separate group, to some extent autonomously of their general principles, yet the empirical location of a set of cases ought not to disturb the conceptual analysis, if the latter is valid. In *R* v *Jordan*,[70] the victim died after receiving treatment that was described by a medical witness as 'palpably wrong,' and which was administered after the accused's stab wounds had mainly healed. The court held that death that ensued from 'normal' medical treatment would not interrupt the causal chain, but that the treatment in this case was not normal. While they did not directly define abnormal treatment, they explained the term by referring to the 'two separate and independent features of [the] treatment [which] were, in the opinion of the doctors, palpably wrong.' The inference appears to be that treatment that is either negligent or grossly negligent (it is not clear which) will break the causal chain, and this fits with the Hart and Honore analysis of normality and abnormality.

Yet the authors do not claim the decision as support for their own view, despite its apparent closeness conceptually, for they must also explain the subsequent case of *R* v *Smith*,[71] in which the court isolated the earlier decision, calling it 'a very particular case depending upon its exact facts.' In this case, the victim died as a result of stab wounds compounded by medical treatment that was described as 'thoroughly bad,' where, with proper treatment, he had a 75 per cent chance of recovery. The appellant's conviction of murder was, however, upheld on the basis that:

> if at the time of death the original wound is still an operating and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

This decision, it is submitted, employs the kind of metaphorical language beloved by the policy reductionists, and which Hart and Honore sought to replace with something conceptually harder. It makes no reference to the test of abnormality which the authors had suggested was a way of distinguishing cases where a new intervening act would break the causal chain. Within that context, the fact that a wound is still 'an operating and substantial cause' is relevant but inconclusive,[72] for the question should be whether the intervening cause 'makes the difference' to the outcome. Smith's victim was given 'thoroughly bad' (surely a synonym for

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70 (1956) 40 Cr App Rep 152.

71 [1959] 2 All ER 193.

72 There is a tension in Hart and Honore (*op cit* pp 356, 361) in their discussion of *Smith* and *Blaue*. They describe the court's method in the former, apparently supportively, as a 'common-sense causal approach,' whereas in relation to *Blaue*, they write:

> The fact that the physical process started by accused (bleeding) continued up to the moment of death is not conclusive. What if . . . the doctor had refused to administer [treatment], saying that he preferred to play a round of golf, so that the victim died? In that case, . . . the bleeding would have continued until death but death would surely have been caused by the doctor's callousness, not the original wound. (*op cit* p 361)

This example shows that *Smith*'s commonsense causal approach is not enough to conclude the imputation of causation where there is maltreatment. There can be further questions, discounted in *Smith*, concerning the nature of the medical negligence.

'palpably wrong') treatment and had a 75 per cent chance of recovery. It is hard not to say that the treatment 'made the difference' if the test of abnormality is applied.

The counter-argument is that the wound in *Smith* remained an operating cause, whereas in *Jordan*, it was more or less repaired, no longer operative and therefore only the setting in which maltreatment occurred. This argument only holds on a failure to see the facts in *Jordan* broadly enough, for it was the accused's actions that landed his victim in the hospital, and that led him to be treated in the way that turned out to be palpably wrong. Thus, his actions were a substantial cause of death as in *Smith*, the only difference being that one must look at the former case in a broader focus in order to see it.[73]

Part of the problem here concerns the meaning of an 'abnormal' course of treatment in such cases. It is one thing to fill this concept out with a description of medical treatment that is (grossly) negligent, for then one can point to the intervention of the actions of another individual who is blamed (the doctor — in tort) in place of the accused. But if we take the broader context in which negligent conduct occurs into account, it becomes difficult to apportion blame to individuals at all. In *Smith*, there is evidence of the poor medical provisions available to soldiers in a peace-time medical station in Germany. There were no facilities, for example, for a blood transfusion, which would have been, in the court's words, 'the best possible treatment.'

In their discussion of what constitutes 'the abnormal' in human affairs, Hart and Honore point out that this can change, amongst other things, when our perceptions of what is acceptable and not acceptable, permissible and not permissible, in society's provision for dealing with particular problems change.[74] From this point of view, one possible causal 'bottom line,' nowhere canvassed in the cases, might be the inadequacy of the state in its provision of medical facilities for soldiers overseas. The response to this is likely to be that no individual should be able to renounce her causal responsibility by so 'passing the buck,' but one might point out in reply that if the difference between Jack the soldier and Jill the civilian at home, both involved in assaults, is that Jill's victim survives only because of the availability of proper medical support while Jack's dies, then Jack's murder conviction rests on happenstance of time and place, and the causation 'principle' applied is ultimately a matter of bad luck for the accused.[75] If these matters were to be canvassed in

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73 Smith and Hogan go some way towards this point about the extendability of the 'operating and substantial cause' argument in *op cit* p 320, but their ultimate argument (p 323) is that the test is whether the medical treatment killed 'quite independently of the wound,' and that this test separates the two cases. This fails to see that, while in one sense the treatment was independent of the wound, in another sense it was not. Thus, in *Jordan*, the victim was, would and could only have been in hospital receiving treatment as a result of the assault by the accused. He was only treated because of the existence of the original wound. Even if that wound had virtually healed, it was still the reason why, and the *only* reason why the victim was treated. It therefore remained an operative and substantial cause of the treatment.

See now *R* v *Cheshire* (*The Times*, 24 April 1991) which appears to follow *Smith*, using a test of 'significant contribution' in place of substantial cause. The change of language does not, so far as one can tell, affect the issue.

74 *ibid* pp 35–38: 'what is taken as normal for the purpose of the distinction between cause and mere conditions is very often an artefact of human habit, custom, or convention ... [of] developed customary techniques, procedures, and routines to counteract ... harm ... When such man-made normal conditions are established, deviation from them will be regarded as exceptional and so rank as the cause of the harm' (p 37).

75 If a death from a wound had occurred during the recent ambulance strike because the troops used in substitution for the regular ambulance crews had got lost in the streets of London, would the assailant have been causally responsible? Presumably she would on *Smith*, but the case is eminently arguable on the Hart and Honore principles. On the role of 'bad luck' on moral judgments about punishment,

a subsequent criminal case, they could only be resolved by a political *prise de position* as to what was to be regarded as the normal and abnormal in the state's running of medical affairs.

Another part of the problem in *Smith* is that, as with the 'eggshell skull' rule discussed below, judicial policy does not just complete the causal analysis, but rather undercuts it in the sense that the retreat to the 'substantial cause' argument plus the isolation (not, note, the overruling) of *Jordan* are means to allocate responsibility to an individual by ducking the question raised in the latter about the relevance of a new intervening abnormal act. In *Smith*, the court evades consideration of the intervening act doctrine entirely, preferring comfortably vague terms like 'substantial cause' in place of a straight confrontation of the argument raised by *Jordan*. Because they do this, they are forced to distinguish the earlier case as a particular one, decided on its facts, which is not to distinguish it at all.

To return at this point to the Law Commission and their discussion of medical negligence, we are told that maltreatment is unlikely but not unforeseeable, and is not, save in an exceptional case, sufficient in itself to cause death.[76] But no analysis is provided of what the 'exceptional case' might be and what would distinguish it from the normal case. The argument again rests upon the concept of the sufficiency of the maltreatment by itself, and therefore on the concept of an 'operating and substantial cause' of death, but this language suffers from the same problem as talk of 'remote' or 'proximate' cause — it is too vague to do anything other than allow courts and juries a free hand in deciding cases on non-legal grounds.[77] It is also inadequate, as Hart and Honore point out, for it fails to specify when intervening maltreatment *could* amount to a supervening cause.[78] The Law Commission's discussion, like Hart and Honore's, reflects the two cases of *Smith* and *Jordan*, but these cases have never been satisfactorily reconciled so that the sense in which the wound in the one case remained 'operating and substantial' but not in the other depends, as I have argued, on the way in which one looks at the facts.

The 'Eggshell Skull' Case

One particular problem stems from the 'take the victim as you find her' rule that operates in most legal systems. In the classic death from an eggshell skull case, it could be argued that the particular physical character of the victim is coincidental on the Hart and Honore criteria, and therefore the accused should not be said to have caused the death. It is, after all, very unlikely that a victim will have a very thin skull, it is very significant, it occurs without contrivance, and it is independent of the accused's acts.

Hart and Honore, however, argue that the rule is a legitimate one:

> An abnormal *condition existing at the time* of a human intervention is distinguished both by ordinary thought and, with a striking consistency, by most legal systems from an abnormal event or conjunction of *events subsequent to that intervention*; the former, unlike the latter, are not ranked as coincidence or 'extraneous' causes when the consequences of the intervention come to be traced . . . *The scope of the principle which thus distinguishes contemporaneous*

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see N. Lacey, *State Punishment* (London: Routledge, 1988) p 68, and my review in *International Journal of Sociology of Law* (1990) p 112.

76 *ibid* p 156, example 17(v). The detaching of probability from foreseeability in the argument makes for a very broad rule of causation excluding many situations that would otherwise be seen as involving supervening cause. Cf Williams, *op cit* n 4, pp 402–404.

77 cf Hart and Honore, *op cit* pp 3–5. They argue that vague language like this obscures genuine principles which they uncover. The Law Commission remain content with the language the courts have provided.

78 *op cit* p 361, see relevant passage quoted at n 72.

> *abnormal conditions from subsequent events is unclear*; but at least where a human being initiates some physical change in a thing, animal, or person, abnormal physical states of the object affected, existing at the time, are ranked as part of the circumstances in which the cause 'operates.' In the familiar controlling imagery these are part of 'the stage already set' before the 'intervention.'[79]

Note first that the distinction drawn between conditions present *at the time* and *subsequent* circumstances and events is irrelevant since a coincidence may occur, on the authors' own definition,[80] contemporaneously with the act of the accused. It may, however, be argued that a condition like the eggshell skull gains its significance from the fact not that it is contemporaneous with the act of assault, but from the fact that it pre-exists the act in question: it is part of 'the stage already set' as Hart and Honore put it.

If this is the genuine ground for the distinction, it too is inadequate, because, as the authors themselves acknowledge, the issue still has to be faced as to whether or not the pre-existing condition is normal or abnormal.[81] A condition is irrelevant to causal attribution where it is a 'mere' condition, that is, one that is 'present both in the case of the disaster and of normal functioning,' or is a 'normal feature[ ] of the thing in question.'[82] The 'mere' condition is the one that does not 'make any difference'[83] between the accident and things going on as usual. But in the eggshell skull case, it is indeed the existence of the exceptionally thin skull that makes the difference between the 'normal' assault and its 'abnormal' result, the death. It is not a 'normal feature' of the skull, and it is not present in both the 'normal functioning' case and the disaster case. It most certainly does 'make the difference.'

It is not surprising that the precise scope of the abnormal physical condition rule is not clear, for it cuts across the basic principle that Hart and Honore propose. Of course, the assault that occasions death in the eggshell skull case is a *causa sine qua non*, but for the authors to claim that 'ordinary thought' would not regard the physical characteristics of the victim as a coincidence is both highly questionable psychologically,[84] and wrong on their own analysis. There is not even here the respite of arguing that the case may look different from different perspectives. What we have is a rule of judicial policy, one of the most firm and well-known of causal rules, that cuts across and cuts down an attempt to advance rational grounds for causal distinctions on an individualist basis.[85]

Summary

Conclusion

The individualism of the causal analysis reflects the individualism of legal practice. But it is necessarily an abstract individualism which seeks to attribute causation to individuals in situations of multiple and socially structured causation. The causal

79 *ibid* pp 79–80, emphasis added.
80 *ibid* pp 77–78.
81 *ibid* pp 33–35.
82 *ibid* p 34.
83 *ibid* p 35.
84 One abiding memory of first year undergraduate criminal law for me was my feeling of the harshness of this rule. Cf J. Stapleton, *op cit* pp 130–131.
85 This is even more the case where in a New Zealand case, *R* v *Storey* [1931] NZLR 417, the court was 'prepared to treat the victim's physical location as a coexisting circumstance which the wrongdoer took at his peril' (Hart and Honore, *op cit* p 347). The authors cite this case as illustrative of their approach without demur despite its obvious conflict (see text above at ns 80–82) with their analysis at pp 33–35.

responsibility of *individuals* rests on, first, a concept of *voluntariness* which cannot be easily pinned down since broader and narrower concepts of voluntariness are possible in a situation of individual and social contextualisation of action, and second, a concept of actions 'making the difference' and being 'foregrounded' only by virtue of a socio-political ('policy') conception of what is normal and abnormal. Legal individualism requires constant supplementation by 'policy' considerations to reach decisions in individual cases, and this is unavoidably at the cost of a case law which is essentially unstable and irrational. Cases can go one way or the other, according to how the political reading of voluntariness or normality is conducted.[86]

Causation is not, therefore, a matter of policy, it is a matter of attributing causation to actors according to the individualist ideology of law, but that is only possible by means of a socio-political ('policy') closure of an essentially open and contestable definitional process. The delimitation of causal agency as an individualistic phenomenon involves a political construction of the limits of individual responsibility in a social world. Causal agency can only be artificially located in individuals in abstraction from their place in social relations, structures and belief systems; therefore, the work of location must ultimately be carried out by a *fiat* based upon non-individualistic, socio-political criteria. Both the policy reductionist and moral individualist analysts tap into important elements in the constitution of legal causation, but because neither is able to analyse the fundamentally abstract nature of legal individualism in modern Western society, they are unable to see how legal causation involves an *unstable interface between individualistic and political considerations*. It is because of the instability of the basic components of the legal form that Williams is correct to argue, in contrast to the Law Commission, that the 'judges have made little progress' in the understanding of legal causation.

86 On occasion, the political element reveals its ultimate determinacy through overriding rather than supplementing the individualistic criteria, as in the eggshell skull case and *R* v *Smith*.