

IVR 2019 – Special Workshop No. 147: Challenges of Causation in Law and Moral Philosophy

Tuesday 9 July, 08.30-13.00, 4.B54

Convenors: Thomas Grosse-Wilde (Bonn, Germany) & Katja Stoppenbrink (Münster, Germany)

Workshop Description

While variants of ‘but for’-tests are currently still widely used to determine causation in the law, counterfactual approaches to causation have come under increasing pressure in philosophy. The explication of counterfactual conditionals mostly relies on ‘possible worlds semantics’. However, what could be termed the ‘essentialist turn’ in metaphysics, has recently challenged the metaphysical foundations of causation as well. When harm is caused to victims by multiple injurers, many actually or seemingly difficult issues arise in determining causation of, legal responsibility for, and allocation of liability for those harms. One area of special concern and difficulty encompasses situations, such as child pornography and sex trafficking, in which individuals have been sexually victimized over extended periods of time by hundreds or even many thousands of distinct injurers, with multiple and often overlapping victims of each injurer (see f.e. the US Supreme Court Case *Paroline v United States* 572 U.S. 434 (2014)). Another famous example is the Love Parade Disaster, a pending German criminal (and civil) law case with several involved parties accusing each other in a circular manner, where it seems to be unclear which individual failures caused the accident with 21 dead and more than 600 injured visitors. In this Special Workshop we would like to take a fresh look at causation in the law, explore some alternative proposals such as the NESS account and examine their implications and possible applications in adjacent disciplines such as moral philosophy and applied ethics.

Schedule

1. 8.30-9.10 h

Richard W. Wright (Chicago), Causation and Allocation of Liability Among Multiple Responsible Causes

2. 9.10-9.50 h

Ingeborg Puppe (Bonn), Double Prevention and Omissions as Causal Problems

3. 9.50-10.30 h

Thomas Grosse-Wilde (Bonn), Criminal Responsibility and Sentencing Among Multiple Negligent Actors within Redundant Safety Systems, illustrated by the Love Parade Case

10.30-11.00 h

Coffee Break

4. 11.00-11.40 h

Katja Stoppenbrink (Münster), Public Health Matters in the Courtroom? – A German Perspective on Probabilistic Causation and the Law

5. 11.40-12.20 h

Thomas Meyer (Berlin), Condition and Change. Max Ernst Mayer's Account of Causation in the Law

6. 12.20-13.00 h

Pia Jauch (Münster), Multiple Agents – Moral Confusion? Causation and Moral Responsibility

Abstracts

Causation and Allocation of Liability Among Multiple Responsible Causes

Richard W. Wright (Chicago, US)

When there are multiple legally responsible parties for an injury, each of whose conduct or activity was either necessary or independently sufficient for the injury, the traditional rule in every country has been full (solidary/joint and several) liability to the injured party by each responsible party, after reduction by the injured party's percentage of comparative responsibility (if any), with each liable party having a right of contribution against the other legally responsible parties (including, in some regimes, a legally responsible injured party). Defendants and liability insurers in the USA and Australia have used market-generated disruptions in the unregulated liability insurance markets together with erroneous rhetorical arguments to convince many state legislatures (but not the US Congress) to replace this traditional liability regime with widely varying, nationally inconsistent regimes that only hold each legally responsible defendant liable for a share of the injured party's injury equal to the defendant's percentage of comparative responsibility. More difficult policy issues arise when a defendant's contribution to the injury was neither necessary nor independently sufficient. I hope to concentrate on the latter situations, after briefly discussing the more traditional situations.

Causation by Double Prevention and by Omission

Ingeborg Puppe (Bonn, Germany)

In philosophy as well as in jurisprudence it is highly debated whether we are allowed to use so-called negative facts in causal explanations. One of the most important argument against the use of negative facts is that it would multiply the facts necessary for causal explanation to infinity without any interest. For in every casual explanation we would have to mention the negation of every possible or impossible

constellation which would have prevented the effect. But we need to mention the negation of certain events which would prevent the damage in order to make a person responsible for the damage who had hindered a process which would have prevented the damage. We also need to mention the prevention of a rescuing process if there is some person who is obliged to initiate this process. I am going to suggest a further rule for the inclusion of negative facts in causal explanations in order to prevent infinite multiplication of negative facts in causal explanations without excluding both negative sentences, which we need to make the person responsible for the damage who prevented a rescuing process or who didn't initiate a rescuing process according to his obligation. Every causal explanation starts from a certain state of the world. We don't need to mention the absence of a fact or a process in a causal explanation if its presence is not possible in this state of the world. The consequence is that double prevention is a form of human causation, but in nature there is no double prevention. By this we can solve some other problems which some scholars take for reason by several philosophers to reject the whole concept of causal explanation by the NESS-account, namely the double double prevention for we now are able to decide which of two or more double preventions occurring in causal process is causal and which is a substitute cause.

Criminal Responsibility and Sentencing Among Multiple Negligent Actors within Redundant Safety Systems, illustrated by the Love Parade Case

Thomas Grosse-Wilde (Bonn, Germany)

When several actors behave somehow (criminally) negligent but not in accordance with one another (either acting simultaneously or temporarily one after another) and all contribute to a certain indivisible harm (f.e. the death of a person), German Criminal Law Doctrine is unsettled how to allocate criminal responsibility among them. Should only be the "most culpable" or the "most causal" held responsible for the outcome, the first or the last actor or all of them? Should liability be separated according to "social spheres of responsibility" and if two or more actors are held liable should the "multiplicity of causation" be deemed as a mitigating factor in sentencing? These vexed questions should be addressed in my talk, illustrated by two famous multi-causation cases, the Love Parade Case of a crowd disaster with 21 fatalities and more than 650 injured people on the one hand and the Überlingen Mid-Air Collision with 71 fatalities on the other hand. In both cases several actors behaved negligently and contributed to the devastating results, those who were accused of negligent homicide i.a. tried to escape criminal responsibility by playing a kind of "blame game" by referring to the responsibilities of others that if the others had exercised due care, the catastrophe wouldn't have

happened. That this kind of strategy cannot be successful for all actors and leads to a vicious circle of irresponsibility seems obvious, however there is still the pressing question whether criminal negligent responsibility for some diminishes or even fades away confronted with other eventually even more criminal actors who made a “bigger” contribution to an injury. While for the purpose of criminal conviction I argue that all negligent actors are responsible for an outcome who contributed to an indivisible injury (the so called “unitary concept of negligent perpetration”), sentencing negligence is more flexible and can take into account “how much” one contributed to an injury, however not always in terms of causation. Anyhow this general rule does not apply for special cases of redundant safety systems, in which responsibility is not diminishing according to the number of involved negligent actors, but in which responsibility is doubled or even tripled according to how many redundancies there are within the system to keep it safe in order to protect important legal interests (life and limb) in the first place.

Public Health Matters in the Courtroom? – A German Perspective on Probabilistic Causation and the Law

Katja Stoppenbrink (Münster, Germany)

The permissibility of statistical evidence in court has been an apple of discord for at least half a century. After the landmark publication by L. Jonathan Cohen, “The Probable and the Provable” (1979), no agreement has so far been achieved despite attempts from legal scholars and philosophers alike. However, there is not a single bone of contention but a number of intricate questions of – in the end – provability, causal imputability and legal morality involved. It is my aim in this paper to disentangle some of these often (wrongly, as I submit) interwoven and (I fear) confused questions at the interface of ontology and epistemology. In the scholarly literature both in philosophy and law it is nowadays widely accepted that there are ‘probabilistic causation’ and ‘probabilistic knowledge’ as variants to what may be termed ‘full causation’ and ‘full knowledge’ respectively. However, the meaning of each of these phenomena is not at all clear. The acceptance of probabilistic causation presupposes ontological preconditions not all might be willing to buy in. Likewise, for a long time, probabilistic knowledge was rejected as a form of knowledge within epistemology (for an utterly different position, see, e.g., Sarah Moss, *Probabilistic Knowledge*, OUP 2018). – If we shift our inquiry from mere philosophical debates on how best to make sense of probabilistic

knowledge and probabilistic causation *per se* to the – perhaps more down-to-earth – questions of how to treat them in court, we face even greater disagreement. Translated into statistical evidence, it is utterly unclear which – if any – relevance should be attributed to probabilities in civil procedures and criminal trials alike. David Enoch & Talia Fisher (2015) have listed what they term the “proposed solutions to the statistical evidence puzzle” (ibid., pp. 565–571). The reasons why statistical evidence should or should not be introduced in trials and be considered in judicial decision-making range from mere policy issues and purely moral considerations to the rejection that there is causation in the first place. (See, e.g., Richard W. Wright 1988.) While for some the concept and phenomenon of causation itself is at stake others merely refer to the pragmatics and/or the morality of legal proceedings and the regulatory framework (procedural law) in place. It is here that we have to distinguish probabilistic knowledge (statistical evidence) from probabilistic causation (arguably no evidence at all but possibly full knowledge of a certain degree of causal connection). I will assess some of the different claims and work out a solution which both fits our moral intuitions that persons should be judged according to their degree of ‘implication’ (non-technically speaking) in a wrongdoing and at the same time acknowledges demands for a ‘proper’ causal connection. For illustrative reasons I will refer to a recent criminal case from Germany which has received large media coverage (and even its own entry to the German-speaking *Wikipedia*: https://de.wikipedia.org/wiki/Medizinskandal_Alte_Apotheke_Bottrop). Here, available health insurance data for a reference group of mammal cancer victims was not introduced and would not have been accepted into criminal proceedings so that a pharmacist who had sold ‘watered down’ cancer medication (cytotoxic agents) to patients’ health care providers could only be convicted of crimes other than homicide. Statistically, however, his doings contributed to extinguish the lives of two affected patients. Still, as the public prosecution was not able to establish the required individuation of victims, a homicide charge was denied, and finally the pharmacist was held responsible for fraud on a commercial basis, attempted bodily harm and offences against the Medicines Act. I claim that our moral intuitions play a trick on us and go awry if we deplore this trial outcome. Instead, I hold that on an ontological rather than a mere evidential basis this solution is morally justified – however undesirable or inefficient it may be from an incentive-based, prevention-oriented public health perspective.

Condition and Change. Max Ernst Mayer's Account of Causation in the Law

Thomas Meyer (HU Berlin, Germany)

Theories of Causation in the Law mostly rely on a counterfactual analysis taking a cause to be in a strong sense necessary for its effect. Due to several problems conditional theories rely on weak necessity whereas a cause is only necessary for the sufficiency of a minimally sufficient set of conditions. These theories are able to deal with some of the most difficult problems, especially cases of over-determination and pre-emption. Such theories of sets of conditions are non-discriminatory in the sense that they do not discriminate between different kinds of entities that are part of such sets of conditions. For certain metaphysical, explanatory but also normative reasons non-discriminatory theories of causation should be – or so I will argue – enriched by a discriminatory theory of causation. An early proponent of such an idea, the German philosopher and theorist of criminal law, Max Ernst Mayer (1875-1923), developed a two-level theory of causation in the law, using the terms condition and change (dissertation 1899). Mayer held a Millian theory of sets of conditions whereas at least one of these conditions needs to be a distinguished kind of entity to make causation intelligible. Such a distinguished condition Mayer calls a change or alternatively an event. In my talk I will present Mayer's account in a slightly transformed version.

Multiple Agents – Moral Confusion? Causation and Moral Responsibility

Pia Jauch (Münster, Germany)

According to the standard model there are four necessary conditions of the ascription of moral responsibility to an individual agent: (a) causal influence, i.e. the wrong in question is brought about by the agent's action ϕ , (b) agential control, (c) foreseeability and (d) absence of a moral claim to the agent's ϕ -ing. A fifth condition (e) is rather controversial: the absence of a morally acceptable alternative to the agent's ϕ -ing. The latter problem is centre stage in the debate on so-called Frankfurt cases, the questioning of the principle of alternate possibilities and the claim that responsibility ascriptions are possible even if the agent could not have done otherwise. I will leave this problem aside and assume (e) in order to concentrate on the challenges arising from collective contexts. By a 'collective context' I understand the fact that condition (a) is fulfilled by more than one agent with respect to one and the same wrong. While I will not elaborate upon the individuation of a 'wrong' here, the problem I will be concerned with is incidents of multiple causation, i.e. causal influence exerted by more than one individual agent. For my purposes it is not required, however, that ϕ is what could be

termed a 'collective action'. Rather, I am interested in causal 'collusion' (understood as a non-technical term) of more than one agent to bring about a wrong – by a multitude of individual actions $\phi \dots n$.

In moral philosophy a variant of a central problem occurring in these situations is sometimes termed the 'I-We-Problem'. It refers to the tension between the negligible contribution of each of the individuals involved and the significance of their respective contributions for the collectively caused wrong. At the extreme A's contribution might not make a difference at all so A might claim that her impact on the wrong in question equals zero or – at least – is an insignificant negligible quantity (*quantité négligeable*). This scenario seems at hand if it comes to questions of responsibility in the area of climate ethics: Does A's driving an SUV have any impact on climate change at all? Referring to such cases it is often argued that the transposability of the standard model of individual responsibility ascriptions to collective contexts is not possible. – I will briefly examine four criticisms levelled against this transposability: (i) the absence of causal influence objection, (ii) the objection from group agency, (iii) the competence objection in its two variants, (α) the absence of individual imputability objection and (β) the institutional competence objection. There may be further problems such as, e.g. an objection on grounds of fairness. I will rebut objections (i) to (iii) with special attention given to problems of causal influence, especially cases of overdetermination and alternate causation. With Braham/Van Hees I submit that "the important consideration is not whether a person could have realized a different outcome but whether he could have avoided making a causal contribution to it". (The citation refers to: Braham, M. & Van Hees, M. (2012). An Anatomy of Responsibility. *Mind* 121: 601–634, at 604.)