

# OMISSIVE OVERDETERMINATION: WHY THE ACT-OMISSION DISTINCTION MAKES A DIFFERENCE FOR CAUSAL ANALYSIS

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*Analyses of factual causation face perennial problems, including preemption, overdetermination, and omissions. Arguably, the thorniest are cases of omissive overdetermination, involving two independent omissions, each sufficient for the harm, and neither, independently, making a difference. A famous example is Saunders, where pedestrian was hit by a driver of a rental car who never pressed on the (unbeknownst to the driver) defective (and, negligently, never inspected) brakes. Causal intuitions in such cases are messy, reflected in disagreement about which omission mattered. What these analyses mistakenly take for granted, is that at issue is the 'efficacy' of each omission. I argue, on the contrary, the puzzle of omissive overdetermination favors taking the act/omission distinction seriously. Factual causation, properly understood precludes omissions (i.e. omissions are not causal). Of course, the law also attaches liability to omissions, but this works differently from liability for real causes (e.g. omissions have a duty requirement, they also respond differentially to difference-making considerations). The manner in which liability attaches for omissions differs from that of straightforward causal liability, and is entirely dependent on the underlying causal structure. Attention to that structure (e.g. that the driver's hitting the pedestrian with his car is what actually caused the injury) sheds light on which omissions matter (e.g. driver's failure to press on the brakes) and why (because that failure removes a defense the driver would have to liability for the accident he caused). Other cases, where the parties' connection is entirely omissive (e.g. two physicians fail to detect independently lethal conditions), come out differently (tracking moralized elements). The analysis offered makes better sense of both why omissive determination cases are puzzling and how to resolve them.*

## I INTRODUCTION

Driver absent mindedly drives a rental car through an intersection, failing to press on the brakes, and hits Pedestrian as she is crossing. Unbeknownst to Driver, the brakes don't work properly, a fact that the rental agency should have discovered and fixed before leasing him the car, but did not, due to negligent

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inspection.<sup>1</sup> Driver's negligent failure to brake made no difference, since the brakes wouldn't have worked. The agency's failure to repair the brakes made no difference either, given Driver's failure to brake in the first place. Who is responsible for Pedestrian's injuries, Driver or the agency (or neither or both)?

Questions of omissive overdetermination<sup>2</sup> have long bedeviled courts and commentators. They involve two omissions, each sufficient, and neither, independently, necessary for the harm. Similarly structured scenarios to *Saunders*, upon which the opening paragraph is based, are legion: a drug company or a manufacturer fails to properly warn of the risks of a drug or product while the doctor or installer fails to consult the poorly worded warning label on a drug or a product;<sup>3</sup> a hospital performs a vaginal delivery on a patient, whose previous caesarean section puts the baby at risk, a fact which the first hospital failed to file in the medical records that the second hospital failed to request.<sup>4</sup> In these cases, more than one party wrongfully omitted. In other cases, only one party wrongfully omitted, but, in order to determine whether the omission mattered, courts ask whether the second party, too, would have omitted nonetheless. For example, when a passenger drowned after falling overboard from a ship that was not equipped with a life preserver (would the preserver actually have been used?);<sup>5</sup> when an inebriated victim was injured falling down an insufficiently lit staircase<sup>6</sup> or slept through a fire alarm in a burning building with no fire-escape (would better lighting or a fire escape have made a difference?)<sup>7</sup>. In failure to warn cases, would the warning have been heeded?

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<sup>1</sup> Based on *Saunders System Birmingham Co. v. Adams*, 117 So. 72 (Ala 1928).

<sup>2</sup> I borrow this label from Michael Moore, see Michael S. Moore, "Four Friendly Critics: A Response". (2012) 18(4) *Legal Theory*, 491. Other labels exist in the literature. Wright refers to these as "over-determined multiple omissions" (Richard W. Wright, "Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility", (2001) 54 *Vanderbilt Law Review* 1071, 1123) or "overdetermined negative causation" (Richard W. Wright, "The NESS Account of Natural Causation: A Response to Criticisms" in Richard Goldberg (ed), *Perspectives on Causation* (Hart, 2011), 285-322, 316. Others have referred to them without reference to their over-determining nature, using terms such as "Concurring Omissions" (David A. Fischer, "Causation in Fact in Omission Cases", (1992) *Utah Law Review* 1335, 1349), "Concurrent Omissions" (Amy Vyhldal, "Note, Concurrent Omission: How Should Liability Be Allocated? Haag v. Bongers" (1999) 256 *Nebraska Law Review* 925), or "Double Omissions" (Sarah Green, *Causation in Negligence* (Hart, 2014) 65). Depending on how these are analyzed, the distinction between concurrent and non-concurrent omissions might matter.

<sup>3</sup> See discussion and list of cases in Restatement of the Law (Third) of Torts: Liability for Physical Harm § 27, Reporter's comments (i).

<sup>4</sup> *Elayoubi v Zipser* [2008] NSWCA 335.

<sup>5</sup> *New York Central R.R v. Grimstad*, 264 F. 334 (2d Cir. 1920).

<sup>6</sup> *Reynolds v. Texas & Pacific Railway*, 37 La. Ann. 694 (1885).

<sup>7</sup> *Weeks v. McNulty*, 48 S.W. 809 (Tenn. 1898). This involves prevention: alcohol consumption prevents the use of proper caution.

A straightforward application of the but-for test leads to the awkward conclusion that neither ommitter caused the harm, since neither omission was necessary: in neither case is it true that the harm would have been prevented had the defendant done his duty. That these cases run into trouble with but-for is not surprising. Notoriously, but-for has trouble with *all* cases of over-determination:<sup>8</sup> two negligently set fires combine, destroying plaintiff's property, neither was necessary, but each was sufficient, for the harm;<sup>9</sup> two independent perpetrators stab the victim, where one wound is independently sufficient to kill, and the other insufficient but still contributes.<sup>10</sup> In such cases, courts have not followed the but-for test. Instead they have applied alternative analyses, including "substantial factor"<sup>11</sup>, sufficiency,<sup>12</sup> or material contribution<sup>13</sup> If cases of omissive overdetermination really were just instances of standard overdetermination, we should expect the law to treat them as such, finding each ommitter liable. Yet that is not what courts and commentators have done. In *Saunders*, for example, the leasing agent's negligence was rendered causally irrelevant, since the driver never attempted to brake.<sup>14</sup> The case law governing omissive overdetermination has

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<sup>8</sup> These problems echo, almost exactly, the difficulties encountered in Philosophy by the counterfactual theory of causation, the locus classicus of which is David K. Lewis, "Causation" (1983) 70 *Journal of Philosophy* 556. For further discussion see Peter Menzies and Helen Beebe, "Counterfactual Theories of Causation" *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), Edward N. Zalta (ed) <https://plato.stanford.edu/archives/win2020/entries/causation-counterfactual/>.

<sup>9</sup> The general rule is that both fires are seen as causes, regardless of whether both are the result of wrongdoing. This is the rule set in *Anderson v. Minneapolis, St. P. & S. Ste. M. Ry.*, 179 N.W. 45 (Minn. 1920). There is a rival view (espoused in *Cook v. Minneapolis, St. P. & S. Ste. M. Ry.*, 74 N.W. 561, 566 (Wis. 1898) more common in English law) according to which both forces must be tortious, otherwise defendant escapes liability. See also: *Kingston v. Chicago & N.W. Ry. Co.*, 211 N.W. 913, 914 (Wis. 1927) and discussion in Restatement (Third) §27, reporter's comments (d) providing authority for both views in US law. For discussion defending the contrary position, see Green (n 2) 66-71.

<sup>10</sup> *People v. Lewis*, 57 P 470, 473 (1899).

<sup>11</sup> Restatement of Torts §431; Restatement (Second) of Torts §431.

<sup>12</sup> Restatement (Third) prefers this solution. See §26-27.

<sup>13</sup> *Bonnington Castings v Wardlaw* [1956] AC 613.

<sup>14</sup> Similar cases include: *Rouleau v. Blotner* 152 A. 917 (N.H. 1931) (a driver's negligent failure to signal before turning was not cause of an accident if the oncoming driver was not looking); *Weeks v. McNulty* (n 7) (negligent failure to furnish a hotel with a fire escape didn't cause death if the decedent couldn't have used it anyway), as well as *Grimstad* mentioned above (n 5). On the other hand, there are cases in which courts have found such omissions to be "substantial factors" and hence grounds for liability, e.g *Kitchen Krafters Inc. v. Eastside Bank*, 780 P.2d 567 (Mont. 1990). See also Fischer (n 2) for an extensive discussion.

been inconsistent, leaving commentators divided over the appropriate resolution and, in some cases, what lessons these cases have for causation more generally.<sup>15</sup>

## II THE USUAL PROBLEMS FOR BUT-FOR ANALYSIS: PREEMPTION, OVERDETERMINATION, AND OMISSIONS

### A *Overdetermination and Preemption*

Overdetermination cases come in several flavors. In particular, it is helpful to distinguish preemption from other overdetermination cases. Both involve multiple conditions whose occurrence renders the other, in some sense, superfluous, and therefore not a *sine qua non*. Typically, in preemption, only the preempting condition is grounds for liability,<sup>16</sup> whereas in overdetermination, both parties are liable. Regardless, in both preemption and overdetermination cases, the actions of tortfeasors whose actions fail the but-for test, are rendered causes nonetheless. What distinguishes preemption from true overdetermination is that, while both involve redundancy and the failure of but-for, in preemption, only one of the conditions is in fact a cause; indeed, it is usually also clear which one that is

When switching from but-for to other causal tests in overdetermination cases, the law is rarely clear as to whether it finds the wrongdoer liable: (i) despite his *not having (factually) caused the outcome* (because he is not a but-for) or (ii) because he is a (factual) cause, despite not being a *sine qua non*.<sup>17</sup>

(i) preserves the integrity of the but-for test. The idea would be that, as a matter of justice “as between the parties”, it is better that the loss falls upon a definite wrongdoer than on a definite victim of wrongdoing. (ii), would mean that either: (a) for some reason but-for doesn’t apply as a criterion for causation in cases of overdetermination or (b) the but-for test never really was the criterion for causation after all. Perhaps but-for is merely an effective heuristic for detecting genuine causation, but genuine causation itself is not a matter of

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<sup>15</sup> See extensive discussion in Restatement (Third) §27, Comment i and Reporter’s Notes to Comment i.

<sup>16</sup> The extent of liability is sometimes limited, however, especially if the preempted condition was not one of wrongdoing (*Dillon v. Twin State Gas & Electric Co*, 163 A 111 (NH, 1932)). Richard Wright calls this the “no worse off limitation” on liability: Richard W. Wright, “The Grounds and Extent of Legal Responsibility” (2003) 40 *San Diego Law Review* 1425.

<sup>17</sup> The same can be said for preemption.

counterfactual dependence.<sup>18</sup> The latter route is preferable, in my view, as but-for is generally hopeless as a complete philosophical account of causation as well.<sup>19</sup>

### B Omissions

Additionally, a point not always appreciated as relevant to the law's causal doctrines, the law treats actions and omissions differently: while, strictly speaking, the law purports to treat both acts and omissions as causal (the law seeks "causal connections" between wrongful acts or omissions and harm as a precondition for liability), negative duties not to cause harm are far more prevalent than positive duties to act or prevent harm, and duties not to harm via action are more prevalent than duties not to harm via omission.<sup>20</sup> Omissions (and preventions) require a prior duty to act (whereas actions are not said to require a duty not to omit).<sup>21</sup>

A further asymmetry between acts and omission concerns the potency of the wrongful act. As preemption and overdetermination cases show, both

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<sup>18</sup> Restatement (Third) §27 comment C ("rationales"), comes close to suggesting this "...while the but-for standard provided in §26 is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section [allowing recovery in overdetermination cases] comports with deep-seated intuitions about causation and fairness in attributing responsibility." Movement away from but-for as the criterion of causality has recently been suggested by the UK Supreme Court in *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC. Given Lords Hamblen's and Leggatt's rejection of a scientific or metaphysical view of causation (citing *Yorkshire Dale Steamship C Ltd v Minister of War Transport* [1942] AC 691, 706) (see par. 167 of the decision), in favor of a common sense view, as well as the general running together of cause-in-fact with proximate causation, which follows from such a common sense position, it is difficult to glean from the decision which of the two possibilities here the court is endorsing.

<sup>19</sup> Another reason to prefer the latter route is that the rationale for the former route leads to abandoning the causal requirement in torts more generally. If the rationale is simply to ensure that losses are diverted from victims to perpetrators of wrongdoing, there is no special reason why a particular victim needs to be compensated by the perpetrator who caused his particular wrongdoing. This is the claim made by corrective justice theorists against instrumentalist views of torts, more generally.

<sup>20</sup> This is true both in Anglo-American common law systems as well as in Continental systems. Continental systems are perhaps more inclined to impose positive duties (famously in bystander rescue cases), but the general principle that positive duties require special legal sanction, and that they are the exception, rather than the rule, still stands.

<sup>21</sup> E.g. US Model Penal Code §2.01(3): "Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law. Similarly, the German Strafgesetzbuch (StGB) §13.

conceptually and as a matter of law, one can be causally liable for a wrongful action, even when abstaining from this action would have made no difference. This far less clear with omissions.<sup>22</sup> With omissions, both conceptually, and as a matter of law, the very meaning of attributing causal status to an omission is to attribute some difference-making feature to the omission: the omitted act would have had a relevant impact (whether by fully preventing – thus satisfying but-for, or by materially contributing to the concrete circumstances in some manner). Omissions, therefore require the satisfaction of but-for<sup>23</sup>, or, even when but-for is not required (as, arguably in the UK, following the controversial *Bailey* decision)<sup>24</sup>, they must still make a difference to the actual positive process that caused the harm.<sup>25</sup> The omission "caused" condition X, which caused the harm.

Similarly, harms wrongfully caused (in the active sense) are not rendered "overdetermined" by the omissions of the multiple agents who didn't prevent them (even those that could have). It is only when both "contributions" are both wrongful and omissive that the temptation to treat a singularly ineffective omission as causal has purchase.

Additionally, omissions rarely function as intervening causes that break a causal chain. If A pollutes the stream and B diverts the stream to the town's reservoir, B's actions might negate A's. But if C, an onlooking security guard, fails to prevent either action, this omission does not sever the connection between B's actions and the result.

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<sup>22</sup> This, perhaps, explains why liability was denied in *Piqua v. Morris*, 120 NE 300 (Ohio 1918), where negligence to maintain a dam was rendered causally irrelevant given the overwhelming flood that it would not have prevented anyway. In this way it differs from an active causal case, such as *People v. Lewis* (n 10) 473. The distinction between causal and omissive liability is well developed in Michael S. Moore, *Causation and Responsibility* (Oxford University Press, 2009).

<sup>23</sup> For an explicit affirmation of this principle in German law, See 6 BGH 7.2.2012, VI ZR 63/1.

<sup>24</sup> *Bailey v Ministry of Defence* [2008] EWCA Civ 883 involved negligence that left the patient in a weaker state when she later aspirated. While it was not shown that she wouldn't have aspirated but for her weakened state, the court reasoned that the weakened state materially contributed to that result.

<sup>25</sup> See discussion in Sandy Steel, *Proof of Causation in Tort Law* (Oxford University Press, 2015) 24. The *Bailey* decision has been criticized in Green (n 2) 109. Green suggests that *Bailey* was not an overdetermination case, but one of material contribution to injury. I think that *Bailey* can be explained as being more similar to *Lewis* than to *Piqua*, in that the negligence was a difference maker to physical conditions underlying the Plaintiff's injury. Had the hospital done its duty, plaintiff would have been stronger. Steel diagnoses *Bailey* similarly, as a case in which the hospital's negligence contributed to the weak physical state of plaintiff's condition. For criticism along similar lines, see Jane Stapleton, "Unnecessary Causes" (2013) 129 *Law Quarterly Review* 39. Stapleton and Steel both propose a two-pronged test for cause in fact (each prong serving as a sufficient, rather than necessary condition): (i) but-for and (ii) positive productive contribution. Notice that, given these two prongs, omissions that are not counterfactual supporting have no causal status.

If omissions can be full-blooded causes, these asymmetries seem anomalous.<sup>26</sup> I'll be arguing below that these anomalies are best accounted for by treating omissions and preventions as non-causal, or more accurately, as quasi-causal. In so doing, I'll be following a tradition in philosophy that denies the causal status of omissions, and in legal philosophy that takes the act/omission distinction seriously in understanding causation in the law. This tradition has been defended recently, most notably by Michael Moore.

### C Omissive Overdetermination

Omissive overdetermination cases combine the difficulties of both overdetermination and omissions. If standard overdetermination involves two positive causes, these involve one or more negative conditions, that jointly (but not severally) made a difference to the outcome. As said, the law has hesitated to follow the logic of other, active overdetermination cases here in finding both omitters liable.

While the law struggles with forming the correct counterfactuals in these cases, the difficulties suggest something amiss in the setup. With overdetermined active forces, it is easy to conceptualize how each (redundant) force is part of the final product, contributing to a larger force that more forcefully causes the result. This is more difficult with omissions.<sup>27</sup> Furthermore, and more tellingly, take the difference between preemption and overdetermination. In preemption, the redundancy doesn't confuse us at all. We understand that the preempting cause is causally connected, whereas the preempted one is not, to the result: rock<sub>1</sub> hit the window, rock<sub>2</sub> did not, but would have. It is clear which rock broke the window.

It's not clear how any of this works with omissions. In what sense do more omissions overwhelm the result? What does it mean for one omission to preempt the other, at least without the reverse being true as well? Is there even a relevant distinction between preemption and overdetermination in the case of

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<sup>26</sup> See discussion of these asymmetries in Moore (n 22).

<sup>27</sup> This is perhaps not so in a case of material contribution, such as *Bailey* (n 24), where the effect that wasn't prevented itself had impact. Green (n 2) thinks that this renders the case not one of overdetermination. For our purposes, it's enough to show that *Bailey* involves positive causation that could have been prevented. In this it differs from *Saunders* (the case I opened with involving brakes) (n 1).

omissions?<sup>28</sup> Preemption cases, involving omissions as the preempting condition, either of an active cause or of another omission, are difficult to conceptualize. The same goes for preventions, which are closely related. In fact, without counterfactual dependence (of some sort) or a physical point of contact between the condition and the harm, it is not clear what makes it the case that a particular omission is in fact "operational" rather than preempted. This issue will be a sticking point in our discussion of NESS and omissive overdetermination, below.

It is, therefore, not surprising that omissive overdetermination creates special trouble. After all, it contains elements of two independently difficult domains for causation: omission and overdetermination. Furthermore, these domains pull in *opposing* directions. Overdetermination cases are resolved by ignoring counterfactual dependence. In preemption and overdetermination cases, an action can be a cause-in-fact, despite the lack of counterfactual dependence (i.e. despite the failure of but-for) between the action and the harm. Requiring such dependence would undermine liability in overdetermination cases. Omission cases, on the other hand, are all about dependence. For an omission to be "causal" just is for a dependence to hold (either between the omission and the harm, or between the omission and some intermediate state or factor which caused the harm). In a preemption case, for example, we can identify the preempting condition as truly causal, despite the lack of counterfactual dependence. It is by no means clear what it would mean to do that in an omission case. This might go some way to explaining why liability for omissions is defeated when the omission made no difference.<sup>29</sup>

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<sup>28</sup> L.A. Paul & Ned Hall, *Causation: A User's Guide*, (Oxford University Press, 2013) 186-190. In the legal literature, this point is emphasized by Michael Moore. See e.g. Moore (n 22) 140, 466-7.

<sup>29</sup> This asymmetry has support in moral philosophy as well. See Peter Van Inwagen, *An Essay on Free Will* (Clarendon Press, 1983); J.M. Fischer "Responsibility and Failure" (1985-6) 86 *Proceedings of the Aristotelian Society* 251; Carl Ginet, "In Defense of the Principle of Alternative Possibilities: Why I don't find Frankfurt's Argument Convincing" in D. Widerker and M. McKenna (eds), *Moral Responsibility and Alternate Possibilities: Essays on the Importance of Alternative Possibilities*. (Ashgate, Aldershot, 2003) 75-90, Carolina Sartorio "The puzzle(s) of Frankfurt-style omission cases" in D. Nelkin and S. K. Rickless (eds) *The Ethics and Law of Omissions* (2017) 133; Randolph Clarke *Omissions: Agency, Metaphysics, and Responsibility* (Oxford University Press, 2014). The asymmetry has been rejected by Alison McIntyre "Compatibilists Could Have Done Otherwise: Responsibility and Negative Agency" (1994) 103 *The Philosophical Review* 458; J. M. and M. Ravizza, *Responsibility and Control* (Cambridge University Press, 1998); Randolph Clarke "Omissions, Responsibility, and Symmetry" (2011) 82 *Philosophy and Phenomenological Research* 594. Sartorio's view is complicated in that she accepts that inability to do otherwise defeats outcome responsibility in omissions (but not actions), but she thinks that an ommitter is responsible for an outcome in a case of omissive overdetermination.



### III SUFFICIENCY AND NESS

An alternative to but-for is to look to sufficiency, rather than necessity, to establish causal connection.<sup>30</sup> On a sufficiency test, what matters is whether each contribution was sufficient for the harm: if each sufficient contribution was not a but-for cause, only because of the presence of an additional independent contribution,<sup>31</sup> the overdetermination does not defeat the causal connection.

Sufficiency accounts normally take a *set* of causes as sufficient.<sup>32</sup> Properly speaking, a factual cause of the harm is a set of circumstances which, together, jointly suffice for this effect. But we can single out any action as a cause if it is a non-redundant member of such a set. Each such member itself is not sufficient but is part of a set that is.

An influential, and justly celebrated, theory of this sort is Richard Wright's NESS<sup>33</sup>: a cause is a Necessary Element of a Sufficient Set of conditions for the outcome.<sup>34</sup> NESS and but-for agree in most cases, but NESS is said to improve

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<sup>30</sup> Again, the *Restatement (Third) of Torts* §27: "When an actor's tortious conduct is not a factual cause of physical harm under the standard in §26 only because another causal set exists that is also sufficient to cause the physical harm at the same time, the actor's tortious conduct is a factual cause of the harm". Some authors, notably Richard Wright, interpret the Restatement (Third) as essentially adopting the NESS criterion (see below), since, in the simple case, NESS and but-for agree (Wright, 2001 (n 2) 1103), see also Anthony Sebok "Actual Causation in the Second and Third Restatements: Or, the Expulsion of the Substantial Factor Test" in M. Infantino & E. Zervogianni (eds), *Causation in European Tort Law* (Cambridge University Press, 2017) 60. This seems too quick, however, since the Restatement (Third) is reluctant to adopt Wright's NESS solution to: overdetermination cases involving de minimis causal contribution (e.g. throwing a match into an existing forest fire); cases in which one condition is sufficient, whereas the other is not; cases in which one condition overwhelms the other in terms of magnitude (even though both are sufficient); and cases of concurring omissions (i.e. omissive overdetermination). See Restatement (Third) §27 Reporter's Notes to comment i ("Special Cases Involving Multiple Sufficient Causal Sets and Preempted Conditions").

<sup>31</sup> If the wrongdoers are not acting independently, they may be seen as a corporate body for the purposes of liability.

<sup>32</sup> Individual conditions are themselves, rarely sufficient (if ever). For example, striking the match is not sufficient for fire, without the additional presence of oxygen.

<sup>33</sup> Richard W. Wright, "Causation in Tort Law" (1985) 73 *California Law Review* 1737. The account is inspired by Hart & Honoré, *Causation in the Law* (Clarendon Press, 1959) and *Causation in the Law: (Clarendon Press, 2<sup>nd</sup> ed, 1985)* and by Mackie's INUS condition, see John L. Mackie, *The Cement of the Universe* (Oxford University Press, 1974).

<sup>34</sup> NESS operates on Mill's idea that complete causes are sets of conditions. The idea is that a cause needn't be, strictly speaking, either necessary or sufficient for the effect; rather causes are necessary to the sufficiency of the set (i.e. necessary elements of a minimally sufficient set of conditions). NESS first appeared in Hart and Honoré, 1959 (n 33): "A condition may be necessary just in the sense that it is one of a set of conditions jointly sufficient for the production of the consequence: it is necessary because it is required to complete this set". This "weak" sense of necessity is contrasted with the

upon but-for, precisely in the sorts of cases in which but-for gets into trouble: pre-emption and overdetermination.<sup>35</sup> In those cases, neither party is a but-for cause, whereas either, or each, may be a NESS. Just as there can be more than one sufficient condition, there can be multiple NESS conditions. In the twin fires case, each fire (given the world, but absent the other fire) is sufficient for the outcome, and is therefore a NESS. The idea is that a concrete existent circumstance, of which the fire is an essential part, existed, and sufficed for the burning. Even though, in the actual world, in which there were two fires, neither fire itself was necessary, the actual world contained severable parts (that can be described independently of one another) that can be constituted as sets of conditions, each set of which on its own was sufficient for the result.

In a case in which only one fire is sufficient, the smaller fire is still a NESS, because the smaller fire is part of a larger set that includes *part of* the larger fire, which, combined, form a set sufficient for the outcome.

NESS's focus on sufficiency allows it to ignore the difference between acts and omissions, at least on Wright's view. The gardener's failure to water the plant is a NESS of the plant's death: the sequence of events that did transpire (including the failure to water the plant) is only sufficient for the death when it includes that failure. Remove the failure and the sequence no longer suffices. Had the gardener watered the plant, the sequence of events that transpired would not be sufficient for the plant to die.<sup>36</sup>

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"strong" sense of necessity: necessary for every set of sufficient conditions. Much of the exposition of this idea in the law draws on Mackie's INUS conditions.

<sup>35</sup> If a condition is a necessary condition (i.e. a but-for) it is also a NESS, but the reverse is not true. Technically, if a condition is a sufficient condition it is a NESS condition as well, but, the whole point of Millian analyses, like NESS, is that no single condition ever is a sufficient condition. It is only a complete set of antecedent conditions that suffices for the effect.

<sup>36</sup> This move is questionable. A sequence of events that made no mention of the gardener, but merely mentioned the biochemical process that began before the gardener "failed" to water the plants would, itself, be sufficient for the plant to die. Thus, the gardener's omission was not necessary for the sufficiency of *that* set. In other words, if the set consisting of the biochemical process and omitting any mention of the gardener is sufficient, then the gardener's omission is redundant. If, on the other hand, the biochemical process without mention of the gardener is *not* sufficient, because, in order for the set of circumstances to describe the antecedent of a causal law we need to specify what the gardener did, then this would be true of each "actual" omission, not just the gardener's, but everyone else's as well. If this is so, if we need to specify of every potential interferer, that it was not interfering, it is not clear how we can take a subset of any sort short of a complete state description of the universe (including the movements of each individual or object in it, stating at the very least that it did not water the plant). If this is so, the ability to isolate multiple sufficient subsets of this world state is not possible. This would destroy NESS's solution to standard overdetermination cases. Take a case of two fires. Fire one is sufficient to burning the house, but is not necessary if fire two is on its way. Can we omit mention of fire two? Don't we need to be specifying what it is up to, to ensure that its presence doesn't defeat either the sufficiency or necessity of fire one? Furthermore, it is not clear how the

In Wright's more recent formulation, the focus is on causal laws:

an actual condition *c* was a cause of an actual condition *e* if and only if *c* was a part of (rather than being necessary for) the instantiation of one of the abstract conditions in the completely instantiated antecedent of a causal law, the consequent of which was instantiated by *e* immediately after the complete instantiation of its antecedent, or (as is more often the case) if *c* is connected to *e* through a sequence of such instantiations of causal laws.<sup>37</sup>

NESS impressively slices through preemption and overdetermination cases, yielding a persuasive and compelling test to identify causes. In preemption cases, the preempting cause is, given the conditions present at its operative time, sufficient for the outcome, whereas the preempted cause lacks a condition necessary for its operation (e.g. the second fire is only sufficient if there is a house to burn down when it arrives). Overdetermination, on the other hand, will involve both conditions as NESS. Each fire is a member of a set of antecedent conditions that is sufficient for the burning of the house.

Yet, while NESS is an excellent heuristic for identifying factual causes, it is not clear that NESS gives the correct analysis of what causation is. I'll set aside for now, whether NESS handles omissions correctly, since treating NESS's act/omission neutrality as a fault, rather than as a virtue, might be question-begging.<sup>38</sup> Omissive overdetermination creates trouble for NESS regardless.

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gardener's not watering the plant is part of any actual sequence at all. Perhaps the sequence involving the omission is simply a different causal set from the sequence making no mention of the omission, and thus the gardener's failure is necessary to the first set (since removing that omission defeats the sufficiency of that set). This way the gardener's omission is a NESS of one sufficient set, which is enough. But this would require a special reading of "removal". To remove the omission from that set means to replace it with a non-omission, namely a commission, rather than just leaving it out and running the entailment. This runs contrary to the type of causal entailment (rather than a most-similar possible world type counterfactual) involved in causal sufficiency that Wright explicitly endorses (this method is explained in Michael Strevens, "Mackie Remixed", in Joseph Keim Campbell, Michael O'Rourke and Harry Silverstein (eds), *Causation and Explanation* (MIT Press, 2007) 93). The idea is supposed to be that the subset, which is sufficient, *entails* the result via a causal law.

<sup>37</sup> For example, see Wright (2011) (n 2) 291.

For what it's worth I also think that NESS (or any sufficiency test) can be restated without appeal to omissions. This would involve recognizing a productive notion of sufficiency (causes necessitate or determine their effects). The point is that omissions, on a sufficiency account, function only in terms of a general governing 'ceteris paribus' (in the absence of other defeating conditions) clause. These are fundamentally different from the sufficient causal conditions themselves. Such an account, however, will no longer sustain Wright's solution to omissive overdetermination.

Wright treats sequential omissive overdetermination cases, such as *Saunders*, as preemption.<sup>39</sup> As we have seen, the trouble in omission cases is with identifying which preempts which.<sup>40</sup> In *Saunders*, Wright argues that the driver's omission preempts the omission of the rental agency.<sup>41</sup>

When running the NESS analysis on *Saunders*, arguments can be forwarded that either ommitter (or neither or both) is a NESS. The agency negligently fails to repair the brakes (the "first omission"); the driver negligently fails to apply to brakes (the "second omission"), thereby crashing into the pedestrian.

Is the first omission a NESS? There is an actual sequence of circumstances in the world, including the first omission and the driver in motion, headed towards the pedestrian, sufficient for the crash. At this point, nothing the driver can do will stop the crash (certainly not braking). Furthermore, the first omission is necessary for the sufficiency of that set. Had the brakes been in good repair, that set would not be sufficient (it would depend on the driver's braking). So, the first omission is a NESS.

What about the second omission? There is an actual sequence of circumstances consisting of the driver driving the car and failing to press the brakes, also sufficient for the crash. The second omission is necessary for the sufficiency of *that* set. So, the second omission is a NESS.

Perhaps each omission is a NESS, making this example one of ordinary overdetermination. But this reading is odd. Imagine that the driver, just before braking, discovers the brakes are broken. Knowing this, he doesn't bother to brake. Is his failure still a causal contribution? Surely not. But it is hard to see how this sort of knowledge could affect the causal contribution (rather than the culpability) of the omission. Remember, we are talking about cause-in-fact, not whether the driver should be responsible for what he caused. Factual causation

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<sup>39</sup> This view is also endorsed by Green (n 2) 66, who is not a NESS theorist. Green argues that the preemption is due to the time lapse, rather than to the omissive nature, such that the second omission prevents the first omission from becoming "operative". In simultaneous omissions, on the other hand, Wright treats these as genuine overdetermination.

<sup>40</sup> See Fischer (n 2) and Michael S. Moore. "Causation Revisited" (2011) 42(2) *Rutgers Law Journal* 451, 480-1. Wright (n 33) argued that the failure to press the brakes preempts the failure to repair. A similar issue arises in the metaphysics literature, see Michael McDermott "Redundant Causation" (1995) 46 *British Journal for the Philosophy of Science* 523. Compare two cases: 1. A catches a ball, preventing the ball from shattering the window. Had A not caught the ball, B would have; 2. A catches a ball. Had A not caught the ball, it would have hit a brick wall. Had the wall not been there it would have shattered the window. In either case, did A prevent the shatter?

<sup>41</sup> Wright (n 33) 1801; Wright (2011) (n 2) 317-20.

should not depend on a mental state.<sup>42</sup> This suggests that the first omission preempts the second. The reverse of Wright's suggestion.

But now run it the other way. Suppose that the driver *intended* to hit the pedestrian. Surely, in this case, that the brakes were defective would be irrelevant (whether the driver knew or not). And surely in this case, the driver factually caused the harm. But this, too, cannot be the result of the driver's mental state. The causal sequence in the three versions of the case (absent minded accident, accident when the driver knows the brakes are out, and deliberate striking of the pedestrian) is the same.<sup>43</sup>

Wright argues that the second omission preempts the first: if we look at the braking sequence as it progresses in time, the driver's failure to brake preempts the efficacy of the agency's failure to repair. The agency's failure to repair is only "operative" if the driver attempts to brake in the first place.

As far as readings of preemptive causal structure go, either reading (the first preempting the second or the second preempting the first) seems plausible. But that is precisely the problem. We don't have this sort of puzzle in a standard case of preemption with *active* causes. The power of the preemption examples lies in the fact that we can unquestionably identify which cause preempts which.<sup>44</sup>

Similarly, we can construct an argument in each case that *neither* is a NESS.

Take the first omission. When the agency fails to repair the brakes, is this sufficient for the crash? No, only if an entire sequence of events plays out involving the driver driving the car at the victim. At any moment, if the car is stopped or if driver veers off path, the result will not occur. But in that case, the completed sufficient sequence also includes (as a matter of fact) the driver's failure to press the brakes, rendering the first omission superfluous (and thus not a NESS).

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<sup>42</sup> Steel (n 25) 32 fn 72.

<sup>43</sup> You might be tempted to retort that in this case (and perhaps in others) the driver's action is an intervening human act that breaks the causal chain between the rental agency and the accident. Even if this were so, it would not explain how the very same action/omission can become causal in the first place (it would, at best, explain why the agency's causal input is nullified).

<sup>44</sup> This needs a bit of care, in cases of preemptive prevention we have potential active causes: catching the ball or the impact of the brick wall. In such cases, we still deal with negative causation (prevention): what is being "caused" is an absence (the absence of the shattering). My point stands in cases like this: when causation proper is involved, we are not confused by preemption cases. When quasi-causation is involved we might be. The diagnosis suggested is that these are not cases of genuine causation at all.

Take the second omission: it is part of a sequence of events sufficient for the crash. But that actual sequence contains a car with no brakes. In other words, the removal of the second omission from the set changes nothing in the sufficiency of the set, rendering it not a NESS.

The problem, more generally, is that the attempt to render one omission as preempting another will not work. Either these cases are construed as overdetermination (in which case both are liable) or as cases in which neither omission is causal. The attempt to break the causal symmetry between these separate omissions fails.

More recently,<sup>45</sup> Wright has suggested an account that focuses on the frustrated potential preventing process. In order to ascertain which condition was operative we need to focus on the details of how a process sufficient to prevent the crash would have had to be brought about. Such a process itself is positive. The omission is simply the failure to execute such a positive process. The potential positive process requires both the application of the brakes and the good condition of the brakes, but the role of the latter as a NESS condition never comes about, because the good condition of the brakes only operate to prevent the collision after they are pressed. The omission to press on the brakes suffices to disrupt the potential process, therefore it alone, in this case, is the cause.

While this is a step in the right direction (it correctly identifies the causing process as the positive one, with the omission's causal characteristics downstream from the positive cause), it doesn't solve the problem. The braking process, had there been one, would have failed at the moment<sup>46</sup> the driver failed to brake, but it also would have failed to be a braking sequence at the outset, given the actual condition of the brakes.

#### IV MOVING BEYOND THE PURELY FACTUAL TO POLICY AND NORMATIVE CONSIDERATIONS: FISCHER AND STAPLETON

Several authors take the lack of a clean causal solution to suggest that cause-in-fact is more normatively loaded than is appreciated. This is not to go the full

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<sup>45</sup> Eg Wright (2011) (n 2). Wright's view on this matter has undergone development and evolution. See: Ingeborg Puppe & Richard W. Wright, "Causation in the Law: Philosophy, Doctrine and Practice" in Marta Infantino & Eleni Zervogianni (eds), *Causation in European Tort Law* (Cambridge University Press, 2017), 51–4; Richard W. Wright, "Identifying and Assigning Liability Among Multiple Legally Responsible Causes" (2021) *Rechtstheorie Journal* fn 18.

<sup>46</sup> We'll ignore the other obvious problem here that there is no such particular moment. The failure to brake spans the entirety of the duration of the crash sequence, or, at the very least, from the moment the driver noticed until the point of impact.

length towards the causal skepticism of the Legal Realists, but the idea is that that courts craft the correct standard for *factual* causation with an eye towards moral and policy considerations. Fischer, arguing that there is no clean causal solution, interprets the resolution of overdetermination cases with omissions as policy dependent, specifically criticizing the NESS account's ability to parse these cases.<sup>47</sup>

Stapleton wrestles with this in a series of articles, in which she has changed her mind about the correct solution to *Saunders*-like cases. Stapleton accepts the causal symmetry between each ommitter and suggests that the two options in such cases are to hold both or neither accountable. The argument for holding both accountable is that the plaintiff is the victim of wrongdoing. The injury is caused by the wrongdoing of both tortfeasors taken together. The difficulty with this option is that the two did not act as one. This is not an instance of conspiracy or accomplice liability. Yet joint liability might be the lesser evil, over leaving the victim uncompensated. In an earlier piece, Stapleton suggests a theory of "duplicate necessity", which is one of three methods of "causal" interrogation the law can apply to the world.<sup>48</sup>

In a later piece, Stapleton reverses course, preferring the other alternative: neither party is a cause.<sup>49</sup> The reason for this, she argues, follows from the law of obligations' respect for the separateness of persons.

Except under special doctrines such as vicarious liability, an individual defendant is only identified with and held responsible for the impact, relative to the hypothetical world in which he conforms to the legal norm, that his own violation of the norm had on the world as he found it. The law of obligations' responsibility model is 'individualistic' in this sense.<sup>50</sup>

A broader notion of causation (one that includes responsibility for the omissions of others) is metaphysically coherent and available, but is rejected on moral grounds. The law chooses to narrow the meaning of "causation" to respect the moral principle of separateness of persons. It is only with this understanding,

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<sup>47</sup> Fischer (n 2).

<sup>48</sup> Jane Stapleton, "Choosing what we mean by 'Causation' in the Law" (2008) 73 *Missouri Law Review* 433, 441.

<sup>49</sup> Whether the correct conclusion is that neither is liable, or that, at least in some cases, these should be exceptional cases of liability, is another matter.

<sup>50</sup> Jane Stapleton, "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations", (2015) 35(4) *Oxford Journal of Legal Studies* 697, 718.

Stapleton argues, that we can understand the choice to limit liability in omissive overdetermination.

I agree with Stapleton's identifying the issue as a moral one regarding separateness of persons. This is indeed the choice in cases of true omissive overdetermination. Such a choice is policy-based, not purely causal. Where we differ, and a key point of this article, is with her lesson that factual causation is limited by policy considerations. Rather, my argument is that omissive overdetermination is not cause-based liability in the first place. This is because omission liability is not causal liability either. The policy considerations governing omissive overdetermination follow directly from the policy considerations governing omissions. The choice between an individualistic rule of liability (as Stapleton suggests) or a joint one (as she used to suggest) is a choice about how this particular normative consideration should work. It does not affect causation, at all.

#### V ARE OMISSIONS CAUSES?

The causal status of omissions is philosophically controversial. While some philosophical theories of causation allow causation by omission, there are reasons to be suspicious of omissions, as of absences more generally. For one, omissions seem to involve action at a distance, that is, if omissions have a location at all. More generally, causation by omission generates puzzles about: transitivity; the existence and identity conditions of omissions; and whether omissions truly move things around in the world. One way of putting this is that omissions, absences, and other negative "causes", don't produce.<sup>51</sup> Production theories of causation, therefore, take omissions as something secondary, not truly causal. Philosophers who endorse productive theories, either deny the causal status of omissions entirely, or, more pluralistically, treat omissions as manifesting a distinct form of causation that is not productive (frequently in terms of counterfactual dependence or a related notion).<sup>52</sup> Importantly, on productive theories, causation and counterfactual dependence are distinct (albeit related) notions. This cannot be emphasized enough: counterfactual dependence is

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<sup>51</sup> The term is used this way in John Stuart Mill, *A System of Logic* bk III ch V s 3. Mill points out that a guard's falling asleep caused the army's surprise at the enemy's attack, but it doesn't produce it: "His being off his post was no producing cause, but the mere absence of a preventing cause: it was simply equivalent to his non-existence. From nothing, from a mere negation, no consequences can proceed. All effects are connected, by the law of causation, with some set of positive conditions".

<sup>52</sup> Ned Hall, "Two Concepts of Causation" in John Collins, Ned Hall and LA Paul (eds), *Causation and Counterfactuals* (MIT Press, 2004), 225, 253, 260.



neither necessary nor sufficient for causation. Something can be a cause, without the effect depending on it (e.g. in a preemption case); more controversially, a condition can be a *sine qua non*, without being a cause (as in an omission).<sup>53</sup>

Productive theories come in many varieties. These include *physical connection* theories (process theories<sup>54</sup>, conserved quantity<sup>55</sup>, transference<sup>56</sup>, and other mechanistic theories<sup>57</sup>), *primitivist* or *non-reductive* theories, and *determining*, or *nomic sufficiency* theories (of a certain sort). These differ in terms of what is taken to be central to the notion of productive causation. Getting into these differences is beyond the scope of this article, but, centrally, causation involves positive acts, entities, facts, or events, exhibiting the properties of (i) *locality*: causes are spatio-temporally proximate to their effects (this proximity can be chained); (ii) *transitivity*: if A causes B and B causes C, then A causes C; and (iii) *intrinsicness*: A's being a cause of B depends entirely on the intrinsic properties and relations between A and B, and will not depend on a third party (the causal status of A's throwing a rock at the window is not affected by the fact that C threw a rock a moment later).

More generally, productive theories seek the causal push or "oomph" between causes and effects, thereby ruling out omissions entirely. As Phil Dowe puts it, we have a strong "intuition of difference" between actual positive causing on the one hand and omissive allowing and failing to prevent.<sup>58</sup> Take a case of preemption. The preempting cause will be ruled as causal because of the physical connection between the cause and the effect. That connection is incomplete, in the case of the preempted cause. The rock that hit the window travelled with force across a trajectory from the toss until the window, where a causal interaction occurred. The preempted rock that arrived moments later bears no such physical continuity with the crash.

Omissions themselves produce nothing over and above the positive causes in the world. Given a set of positive (productive) causal facts, the rest of the counterfactual dependences are thereby determined. Claims about omissions are

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<sup>53</sup> Two influential exponents of productive views of causation in the law are Michael S. Moore (see Moore (n 22) and Richard Epstein (see Richard A. Epstein, "A Theory of Strict Liability" (1973) 2 *Journal of Legal Studies* 151).

<sup>54</sup> Wesley C. Salmon, "Causality without Counterfactuals. (1994) 61 *Philosophy of Science* 297.

<sup>55</sup> Phil Dowe, *Physical Causation* (Cambridge University Press, 2000).

<sup>56</sup> David Fair, "Causation and the Flow of Energy" (1979) 14 *Erkenntnis* 219.

<sup>57</sup> E.g. Stuart Glennan, *The New Mechanical Philosophy* (Oxford University Press, 2017).

<sup>58</sup> Dowe (n 56) 124-9.

made true, and are explained, by these more basic, positive facts. For example, the doctor's failure to treat the poisoned patient makes a difference to the outcome, but only because of an active causal process between the poisoning and the patient's death. Given the existence of that process, it might be true that certain treatments would have prevented that process from further developing. The process explains the efficacy of the omission; the reverse is not true. The process, as long as it culminates, is sufficient for the effect and grounds whatever dependence relations obtain between the omission and the effect.

Another reason to be suspicious of causation by omission is that it is inescapably normative. What distinguishes the failure of the lifeguard to jump into the water to save the drowning swimmer from the failure of all the other swimmers on the beach, or for that matter, from yours and from mine? If omitting to save is equivalent to causing, all of us have caused the drowning. While one could perhaps admit that many of us regularly thus cause death by omission, a more plausible read is that normative considerations themselves render one omission more relevant rather than others.<sup>59</sup> Thus, even though the swimmer would have survived had someone else jumped in (so counterfactual dependence between the third party's omission and the drowning obtains), we only count as causal the failure of the lifeguard, who had an obligation to jump in. This distinction (between the lifeguard and the third party) is normative.

What matters for our purposes are two things: first, that if omissions are indeed causes, this normative move would render causation a normative, rather than purely factual or natural matter;<sup>60</sup> secondly, that this move is not required in cases of actions. We don't need norms to explain which positive process actually caused the effect.<sup>61</sup>

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<sup>59</sup> Sarah McGrath, "Causation by Omission: A dilemma" (2005) 123 *Philosophical Studies* 125.

<sup>60</sup> To be clear, the point here (and my objection thereto) is not merely that we need norms to suggest which causes to cite for purposes of blame and explanation. That would be a version of the causal selection problem. That issue is plausibly resolved by norms if one adopts the first path, treating all omissions as causes. The point here is that if we reject the claim that you and I caused the swimmer's death by omitting to jump in, but simultaneously accept that the lifeguard caused the death by omitting to jump in, and explain this difference by appeal to norms, we are allowing normative facts to determine what causes what. On such a view, metaphysics are downstream from norms.

<sup>61</sup> But cf Christopher Hitchcock and Joshua Knobe, "Cause and Norm" (2009) 106 *Journal of Philosophy* 587, arguing otherwise. See also Joshua Knobe and Scott Shapiro, "Proximate Cause Explained" (2021) 88(1) *The University of Chicago Law Review* 165. Knobe and Shapiro argue that the normativity is endemic to all causal analysis. Their purpose is to show that this needn't lead to the causal skepticism of the realists. For a reply to the Hitchcock and Knobe point, see Michael Strevens, "Causality Reunited" (2013) 78 *Erkenntnis* 299. My analysis of omissions below also shows the problem in norms analysis: it conflates explanation and responsibility with causation.

It's one thing to say that omissions are not properly causal. But if so, how do we account for the fact that some omissions are grounds for responsibility, liability, and blame? If they don't cause, that explains why we are not blameworthy for many of our omissions, but what explains why we are blameworthy for the ones that we are?

The law only looks to omissions when the actor had a duty. This suggests that omissions are not properly causal (after all, there is a general duty to avoid or minimize actively causing harm, why not the same for preventing harm?), but suppose I do have a duty to act and I fail to, then what? If omissions are not causal, I cannot cause harm by failing to act. Having a duty doesn't change that. On what grounds am I responsible for the harms I've failed to prevent?

Understanding how this works requires precision about what omissions and preventions are. Phil Dowe's "would-cause" counterfactual semantics are illuminating in this regard.<sup>62</sup>

Take a simple case of prevention. For example, if the gardener waters the plant, he prevents the plant from dying. What was prevented, the plant's dying, is not an actual event (after all, the plant survived), whereas the preventing event is an actual event. How are these related? Dowe suggests the following:

*A prevented B if:*<sup>63</sup>

1. A occurred; (in our case, A: the [gardener's] watering of the plant)
2. B did not occur; (in our case, B: the plant dies)
3. There occurred an x, such that there is a causal interaction between A and the process due to x, such that
4. Had A not occurred, x *would have caused* B. (x being the [lethal, to the plant] biochemical process that was terminated by the watering of the plant)

Notice that this counterfactual ("would have caused") is a counterfactual about causation, rather than an analysis of causation as counterfactual. The biochemical process that would have killed the plant would have caused the plant to die. The gardener, by watering the plant, interacts with that process to *prevent* that causing.

With an analysis of preventions, we can elucidate omissions.

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<sup>62</sup> Phil Dowe, "A Counterfactual Theory of Prevention and 'Causation' by Omission" (2001) 79 *Australian Journal of Philosophy* 216.

<sup>63</sup> Dowe's analysis is a sufficient condition, but not a necessary one. Depending on the semantics of the counterfactual, these could be preempted.

The gardener fails (omits) to water the plant. The plant dies. Did the gardener cause the plant to die (did he kill the plant)?<sup>64</sup> Not on a production account. Rather, the gardener “quasi-causes” the plant to die (by failing to prevent its death), but doesn’t cause it.

*Not-A quasi-causes B (by omission), if:*

1. A did not occur;
2. B occurred;
3. There exists an x, such that x caused B, and, had A occurred, it *would have prevented* B from interacting with x.

The analysis of *would have prevented* refers to prevention (as defined above). Once again, there is a biochemical process that, had the gardener watered the plant, his watering would have prevented the plant from interaction with that process (and the plant would have lived). He omitted to water the plant, and thus failed to prevent that interaction. This is what omission consists in.

Using Dowe's semantics, the relationship that an ommitter or preventer has to the outcome is “quasi-causal” rather than properly causal. This quasi-causal relationship is inherently grounded in counterfactuals, but these are counterfactuals about causal relations. When I omit to do my duty, I can be said to have “caused” the result by omission when, had I done my duty, it would have prevented the result (more accurately: would have prevented the cause of the result from causing the result). This quasi-causal relationship is different from a bona fide causal relationship, and goes some way to explaining the intuition of difference.

What remains, though, is explaining how we distinguish some ommitters from others. In fact, a quasi-causal relation of omission can be said to exist between everyone and the effect.

This, I suggest, is where the law's duty requirement comes in. A quasi-causal relationship, unlike a properly causal relationship, is a merely necessary condition for a certain kind of liability. It is only when we add the duty requirement, that we can hold you liable for omissions and preventions. This is not true of ordinary causes. In these, involving active causing, there is no extra question about a duty not to cause harm. The grounds for liability in an ordinary causal claim are the causation itself.

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<sup>64</sup> For purposes of this example, I’m assuming the equivalence of “killing” and “causing to die”. This equivalence is not universally accepted. The difference doesn’t matter to the example, which concerns “causing to die”.

Factual causation is not sufficient for causal liability: we still have the usual requirements of scope of liability.<sup>65</sup> But it is necessary, and, when one is liable, it forms the grounds of what you are liable for. For this reason, redundancy doesn't defeat causal liability.

Quasi-causal liability, on the other hand, is another matter. There is no general duty not to "quasi-cause" harm. But sometimes, there is a specific duty. When that duty exists, you are responsible to the addressee of that duty to put them in the position they have a right to be, namely where they would have been had you done your duty. This right is analyzed using counterfactuals of the sort just elaborated. This liability, however, is limited in its very nature, by facts about whether doing your duty would have made the relevant difference. Redundancy does defeat quasi-causal liability, precisely because quasi-causal liability is counterfactual in nature.

In other words, if you have (culpably) caused harm, you are liable for the harm you have caused. There is no need for special duties to single you out (as a cause) or to hold you responsible. The grounds for your liability are that you caused it.<sup>66</sup> With quasi-causation (omissions, preventions), on the other hand, you are not under a general duty to prevent harm.<sup>67</sup> When you are under such a specific duty, you are liable for the harm you failed to prevent.<sup>68</sup> The latter category is inherently counterfactual.<sup>69</sup>

Suppose that the gardener had a duty to water the plant. The plant owner had a right to the plant's being watered. Instead, the gardener failed to water the plant and it died. The appropriate question is *not* "what did the gardener's not watering the plant *cause*?" The answer to that question is: *nothing* (at least nothing

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<sup>65</sup> Or legal cause, proximate cause, or remoteness, depending on the terminology.

<sup>66</sup> Of course the extent you are liable for might be limited by other factors that render your causing redundant to the circumstance the plaintiff finds herself in. See discussion of *Dillon* in (n 16) above.

<sup>67</sup> My analysis here differs from Moore (n 22), who solves omission liability by appealing to a general background consequentialist obligation, which entails a (weaker, non-deontic) duty to prevent harm.

<sup>68</sup> Or, in Dowe's terms, the harm you quasi-caused.

<sup>69</sup> Quasi-causal liability is counterfactual in two possible senses: first, quasi-causation itself is counterfactual in nature (you only quasi-caused x if in the counterfactual scenario you would have causally interacted with the relevant causal process), secondly, the grounds for liability are counterfactual in that your responsibility is for how things should have gone (and would have, had you done your duty). To see the difference between these two construals, take the following scenario: had lifeguard been at his station watching the beach, the swimmer wouldn't have drowned, because she would have flirted with him instead. As it happens, he didn't man his station (he took a nap) and she entered the water and drowned in an accident that he couldn't have prevented. In such a case, counterfactual dependence holds, but quasi-causation doesn't (lifeguard's doing his duty would not have interacted with the process that killed the swimmer).

relevant to plaintiff). Rather, we ask: had the gardener performed his duty (i.e., watered the plant) what would have happened (what would *have been caused*)? The plaintiff has a right to be in *that* world (in that position). When she sues the gardener, she is vindicating a right to be where, had he fulfilled his duty, she (causally) would be. The law determines, normatively, what world Plaintiff has a right to be in, and determines that, had Defendant not breached, he would have brought about (caused her to be in) *that* world. This explains why liability attaches to the gardener and not to third parties who also failed to water the plant. The gardener's liability in this case is not, strictly speaking, causal (it is not for what he caused) but for what he had a duty to bring about. In this sense, liability for omission is similar to Expectation Damages in contracts.

The vantage-point from which the causal analysis runs in omissions cases is not actual causation in this world (from which no omission could ever cause). Rather it is the normative construction of a "perfect" world in which duty was met. That is the world plaintiff is entitled to. Failure to be in that world is the basis for omissive liability. In the proper causal case, on the other hand, while the extent of liability can be limited by a no-worse-off provision, the grounds for liability and blame are not. If I cause you harm, that fact alone is grounds for my liability. True, I can deflect the cost of that liability by the extent of loss you would have suffered anyway, if that loss would not have been the product of wrongdoing. This explains the limits on liability in cases like *Dillon*. But, in cases in which the preempted cause is one of wrongdoing, it is the preemptor alone who bears the entirety of the cost. And in overdetermination cases, I cannot deflect my responsibility for your loss by pointing to the redundancy of my contribution. Both of these are explained by the fact that it is the causing of harm itself that is the grounds for liability. And it is precisely this element that is missing, if omissions are not causes, in redundant omission cases.

The basic point, though, is this: the causal structure of the world is described entirely with positive causes. Omissions are not part of that structure. Rather, they pertain to that structure in terms of counterfactual dependences. When A fails to water the plant, the plant is not killed by the omission. Rather, the omission is a failure of A's to interfere with the process that kills the plant. Liability for an omission is parasitic on the causation on the basic, positive level. This is not to deny that responsibility of this sort is possible or even important. It's just that we misunderstand the causal structure when we fail to draw this distinction. Once we see this, we also understand the law's duty requirement, as

well as why omissions must be linked to some sort of counterfactual dependence.<sup>70</sup>

## VI THE NON-CAUSAL GROUNDS FOR LIABILITY IN OMISSIVE OVERDETERMINATION

With this in mind we can make more sense of the confusion in omissive overdetermination. Who caused the accident, the rental agency that failed to repair the brakes or the driver who never stepped on them? Is this a case of overdetermination or preemption? The answer is “neither”, as *failures* are not causal. The interesting question is making sense of how counterfactual, quasi-causal liability works in these cases.

In a case of a defendant who breaches a duty to a plaintiff, and, but-for the breach, the plaintiff would have been better off, the answer is clear. But in these cases, there are two defendants, each of which breach, but, taken individually, but-for each breach, the plaintiff would be injured just the same. The question as to whether a defendant should be liable is a normative one as follows: is the relevant duty upon me (and Plaintiff's right) to restore Plaintiff to the possible world she would be in but for *my* breach (in which case there is no liability) or is the duty/right one in which Plaintiff is entitled to be in the world she would be in if *all* parties comported with their duties. A case can be made for either

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<sup>70</sup> There is a complication here, that I cannot do full justice to in this article, in that many causal processes involve gaps and absences and actually exemplify the structure of Double Preventions, rather than direct continuous causal processes. This objection is pressed famously and forcefully by Jonathan Schaffer, see e.g. Jonathan Schaffer, "Causes Need not be Physically Connected to their Effects: The Case for Negative Causation" in C. Hitchcock (ed), *Contemporary Debates in Philosophy of Science* (Blackwell, 2004) 211. For example, pulling the trigger on a gun involves disconnecting the sear, which allows the spring to uncoil, propelling the striker onto the powder, compression of which produces an explosion which propels the bullet. The link between the trigger pull and the release of the bullet, therefore, involves gaps and absences. The resolution of this issue involves the correct analysis of Double Preventions as well as the correct understanding of mechanisms and black-box type causation in productive causal theory (see Glennan (n 55) 198-199). Regardless, at most it shows that mechanisms with gaps don't lose their causal status (a potential problem for a theory like Dowe's). It does not, and cannot, show that omissions themselves have causal efficacy. Even Schaffer cases don't weaken this claim. I am responsible for pulling the trigger on the gun, because by pulling that trigger I cause X, and causing X is something I have a duty not to cause, because it acts as a double preventor of Y, which is a bad consequence, etc. The point is that we can describe the structure using only positive causes, and, by so doing, we've left nothing out. The omissions will follow from that structure. The reverse is not true. Nothing in Schaffer suggests that non-events can trigger events or vice versa (except using this structure). The entire process can be described positively. The omissions and preventions will supervene on this process alone.

position. The plaintiff has a right to be in that perfect world, but against whom does she have that right? As we saw, this is the question that animates Stapleton.

Fischer and Stapleton are correct that we need policy and normative judgments to sort these cases out. But that we need to do so is precisely because these cases are grounded on non-causal liability in the first place. We don't have this problem at all when the grounds for liability are truly causal. While resolving the normative issue is beyond the scope of this article, my point is that resolving this matter is no longer an issue of cause in fact, or of the metaphysics of causation. Nor is it one in which the courts should engage in guess work as to whether the other party was likely to omit. That question, what the second, independent party was likely to do, might affect the counterfactual, but it won't affect the right or the duty owed.

From a purely causal point of view, at the most basic level, we are not confused in these cases about what has happened. The puzzle doesn't concern the physics or the causal structure of the scenario. Rather, the puzzle is in how to satisfactorily reconstruct that information in a manner that makes sense of *responsibility*. That we don't know whom to blame in *Saunders* or in *Elayoubi* is not because we are amazed or confused at how the plaintiff got injured. It's not that we look at the injury as an uncaused miracle.<sup>71</sup> Our confusion pertains to legal responsibility.

So, the first lesson is, that omissive overdetermination is not about causation at all. The mistake that most courts and commentators have made is in judging the efficacy of each omission, but there is not, and cannot be, efficacy for an omission. The right way to treat omissive overdetermination runs through the correct way to treat omissions more generally, which means it is a story about quasi-causation that entirely supervenes on the causal structure. That latter story is normative, though, because the relevant counterfactuals are selected by honing in on the duty. The choice whether to hold each ommitter to his own omission, or whether to hold him to the outcome of perfect performance by all actors with a duty towards that plaintiff, is indeed a normative one. It would be a mistake, therefore, to treat this issue as generalizing beyond omissions to causation in general. Proper, that is, active causation, doesn't suffer from this concern.

## VII LOOKING BEYOND OMISSIVE OVERDETERMINATION TO THE CAUSAL STRUCTURE

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<sup>71</sup> Cf Wright (n 2), 294, 298-9, 305.



Is there nothing more to say, causally, about these cases? Go back to *Saunders*. Neither *omission* caused the accident, and avoidance of neither omissive breach would have made a difference to this result. Does this mean that nothing caused the crash? Not at all.

There is a simple analysis easily missed by focusing on the omission: the driver hit the plaintiff with the car; *that* is actually a cause of injury, in the simple sense of factual causation. This is the first clue at breaking the symmetry between Driver and the rental agency. But perhaps the lesson is deeper.

In a seminal article, Richard Epstein argues that, fundamentally, liability is for harm caused, which begins with movement and action.<sup>72</sup> Epstein argues for strict liability (rather than negligence) as the basic paradigm that should define the relationship between injurer and injured. The basic presumption is “as *between* the person who did nothing and the person who acted, the only way to correct the injustice is to have the second compensate the first.”<sup>73</sup> Epstein's argument is frequently misinterpreted as a plug for strict liability in all torts. Rather, what Epstein argues for is a conceptualization of the tort that begins with liability for causation, and develops outwardly from there through a sequence of pleas and counterpleas.

The prima facie case in torts is that A applies force against B, injuring him. Epstein's account, therefore, assumes a difference between “active” and “passive” parties. Suppose that P's vehicle is standing at an intersection when the light turns green, and D, coming from behind, crashes into P's rear. Who caused the accident? If we look simply to counterfactuals, both P and D did: had D stopped, the crash could have been avoided. But so too for P: had P not stood still (or had P gotten out of the way), the collision could have been avoided just the same. This symmetry gets broken, of course, once we focus on duties: if P had a duty to move (because the light was green), and D acted faultlessly, then it is P's conduct, and not D's, that would be blameworthy. Similarly, had the light been red and P

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<sup>72</sup> Epstein (n 54).

<sup>73</sup> Richard A. Epstein, "Toward a General Theory of Tort Law: Strict Liability in Context", (2010) 3 *Journal of Tort Law* (online) 1932-9148, citing *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (Lord Cransworth): "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer" and Oliver Wendell Holmes *The Common Law* (Little, Brown, and Co, 1881) 84: "[T]he defendant...has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than the one who has had no share in producing it".

was supposed to stand still, P's standing still would be a background condition, and D's action would be seen as "causal" and grounding liability.

Epstein's point, however, is that, regardless of how duty gets apportioned, causation comes first. Causally, there is an asymmetry in this case (as opposed to a case in which the two, in motion, collide). D clearly *crashed* into P, thereby causing the collision. D is the active party, in motion, transmitting force. P is passive. The causal analysis is available without recourse to duty. From this it doesn't follow that D is *liable*: normative considerations still matter for the determination of liability, but the basic structure of the case begins with the causal analysis (and where fault is not at issue, because the matter is governed by strict liability, it ends there).<sup>74</sup> Since it is D who crashed into P, D will be liable unless he has justification or excuse for so doing.

Torts can be analyzed in either of two directions. We can begin with duty, proceed to breach, and then trace out the consequences of that breach; or we can begin with causation of harm and then ask whether the causation of harm was in breach of duty. Normally, these analyses end up in the same place. If D negligently injures P, on the first (duty) analysis, we look at D's negligence and ask whether it caused P's injury; on the second (causation) analysis, we look to D's causing and ask whether D should be absolved (because he met the standard of care). The difference will be, not in which standard (strict liability or negligence) is applied, but in the role that meeting the standard of care has. In duty-based accounts, the breach becomes the causal relatum to analyze causation (only tortious conduct serves as an element in a tort). In cause-based accounts, the relevance of the standard of care is in determining whether the conduct that did cause the harm was tortious.<sup>75</sup> If it was not (if the standard of care was met), defendant is excused from liability, even though his conduct caused harm.

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<sup>74</sup> With the caveat that strict liability will not attach if the "act" is entirely not voluntary, cf. *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616): the harm "may be judged utterly without his fault...As if a man by force take my hand and strike you or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances..."

<sup>75</sup> This differs from Leon Green's position that limits the factual causal analysis to the question whether any aspect of the defendant's conduct caused the harm. That step is indeed the first step suggested here, but, unlike what Green suggests, this is not sufficient to satisfy the factual elements of a tort. What I am suggesting is that an action that did cause harm might be tortious, if done with insufficient care. The care element is still present, and if due care was exercised, the action is not even tortious in the first place, and scope of liability considerations do not kick in. See Leon Green, "The Causal Relation Issue in Negligence Law", (1962) 60 *Michigan Law Review* 543, 547-8, 550-2. My distinction is consistent with the ruling in *The Empire Jamaica* [1955] 1 AER 452, interpreted by Hart and Honoré, 1985 (n 33) lviii as requiring "aspect causation". See also Wright (n 33). The tortious aspect of the conduct is important in determining whether the conduct that caused was indeed tortious.

In *Saunders*, if the relevant standard of care for auto accidents were strict liability, that would be all we need: Defendant hit Plaintiff with his car. It doesn't matter whether Defendant was driving carefully. But suppose D is held to a negligence standard (and would be absolved had he driven more carefully, i.e. tried to stop the car): D hit P, this makes D *prima facie* liable to P. D could either: (1) deflect that liability by claiming that he drove carefully (which he did not, since he didn't apply the brakes) or (2) join the rental agency as a co-defendant claiming that they are liable to him for failing to fix the brakes. C (the rental agency) could be on the hook for breach of duty to inspect. The claim against C is quasi-causal, for failing to prevent a harm. In a normal case, one where D had attempted to apply the brakes, but C still failed to inspect, this would matter.

(1) is not available to D since he never even applied the brakes. D's driving, which did cause P's harm, therefore, was not, in fact, careful.<sup>76</sup> (2) is arguably defeated in this case, because, now, when we ask what would have happened had C comported with their duty, we get the same result: C's omission made no difference. So only D is liable. D (negligently) caused the harm, whereas C didn't even quasi-cause the harm. On the other hand, in the case where D actually does apply the brakes, but they don't work, D can deflect causal liability (because his action is no longer tortious). In this case, claim (2) would be good, and C would be liable.

In other words, if this suggestion is right, we need to take a fresh look at the omissive overdetermination cases and divide them between cases in which D *caused* harm, and his omission is simply the failure of a defense of due-care, and cases in which D's connection to the harm truly is quasi-causal, in which case the conundrum from above about omissive overdetermination applies.

For example, alter the scenario in *Saunders* so that, instead of a failure to inspect the brakes, the rental agency's wrongdoing is active and causal. Suppose the agency's negligence was to place and leave a sharp object on the front bumper of the car, such that when the driver negligently entered the intersection, he struck plaintiff with that object and killed him instantly. The crash of the car alone would have been sufficient to kill the plaintiff instantly as well. If this is a

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<sup>76</sup> The account as stated is neutral as to whether it respects aspect causation here. Suppose driver was driving negligently, but the negligence made no difference in this case (e.g. because the pedestrian came out of nowhere), does this account still remove the defense of due care? You can still keep aspect causation intact by adopting the directionality of duty standard from *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

case of omissive overdetermination, not removing the object made no difference. But if instead, we look to the active causes, the combination of active forces looks like a standard case of overdetermination, rendering both liable.<sup>77</sup>

Suppose, instead, that Driver doesn't press the brakes, because Pedestrian truly came out of nowhere: Driver drove with perfect care. In such a case, Driver would have caused the crash, just the same. But this time the driving would not be tortious. Since Pedestrian came out of nowhere, the failure to inspect the brakes seems irrelevant as well.

Now let's make the case a pure omission case: Suppose a father is riding on a runaway trolley and sees his child stuck on the track. The father notices an emergency brake on the car. Unbeknownst to the father, the brake has been negligently inspected and doesn't work. The father, who is duty bound to rescue his child, fails to pull the brakes. In this case, the father's omission made no difference, just as the driver's omission made none in *Saunders*. And because the father failed to pull the brake, the inspector's negligent omission made no difference either. On this analysis, the father is not responsible for the child's harm.<sup>78</sup> Unlike in *Saunders*, he was neither a cause nor a difference maker.

Patterns like this, if correct, would also absolve the inattentive captain on the ship without life-preservers, since he is not the cause of passenger's falling overboard. The same would go for the shipping company (ignoring vicarious liability, for the moment). Neither caused, and neither, alone, could have prevented.

In the warning cases, the details will depend on how the harm was caused. If manufacturer's actions, or the device itself, caused harm, the theory of recovery should be to trace back to the action itself, with the failure to warn seen as relevant to rendering that action tortious. The same goes for failure to read. Was the harm caused by the actions of the installer (who failed to read), or did the installer simply fail to prevent harm that he would have, had the warning been given and heeded? For example, if a lifeboat fails to inflate properly, due to inflation instructions that were neither sufficiently clear nor properly read, this would be on the omissive side; if a device explodes, it's on the causal side. If a physician performs a procedure that harms the patient, that is on the causal side; if she fails to prevent an independently harmful condition, that is on the omissive side.

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<sup>77</sup> Compare to *People v. Lewis* (n. 10).

<sup>78</sup> Unless we adopt the duplicate necessity solution (see Stapleton above).

In *Elayoubi*, tentatively, the question would be the same: was the birth defect actually caused by the second doctor's surgical actions (in which case, failure to request the records renders that *action* tortious), or by the remaining damage from the first procedure (in which case, failure to file the records properly with the first delivery renders that action – the first delivery – tortious), or was it a harm that occurred naturally, but could have been prevented had the procedure been conducted properly (in which case, the case truly is one of the passive omissive overdetermination discussed in the previous section).

## VIII CONCLUSION

In sum, causation matters. Omissions are not causal. True cases of omissive overdetermination require a non-causal, quasi-causal solution.<sup>79</sup> This is not a pure-policy solution, in the instrumental sense. It is still an operation of corrective justice. But in quasi-causal cases the grounds for liability are not for harm caused, but for harm one had a duty to prevent. This slight modification explains why omissive overdetermination cases are tricky. With the right understanding of omissions, they are tricky exactly in the manner we expect them to be.

Secondly, while omissions themselves cannot cause, some cases of omissive overdetermination may be better understood when we pay attention to the underlying causal structure. Again, causation matters. When the defendant harms the plaintiff with her action, that is causation. The importance of the omission is not in reference to causation. It is in reference to whether the causing

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<sup>79</sup> If you don't buy the argument that omissions are not truly causal you can still get some of this to work for you. For example, if, like Steel and Stapleton (see n 25 above), you accept a disjunctive definition of causation as either counterfactual dependence or production (either but-for or contributing to the positive productive process) you'll get the result that omissive overdetermination gets defeated on both counts. You can then, presumably run my second analysis (focusing on the underlying causal structure) to resolve some of these. The problem with this view is that it lacks motivation, eschewing as it does, a view of causation that explains this disjunction or the anomalous features of omissions discussed.

Suppose you agree that omissions are not truly causal (or are of secondary causal status) can you reject my duty-based account of quasi-causal liability? Perhaps. When the gardener omits to water the plant (which was his duty), process P kills the plant. Since gardener had a duty to prevent P from killing the plant, he is seen, normatively, as if he killed the plant himself. This would be a form of vicarious liability for the process that did kill the plant, inherited via the omission. Presumably, such liability is limited by the same counterfactual restrictions (e.g. he must have had the power to prevent the killing had he done his duty). This will work in some cases. What it loses is the intuition of difference between acting and omitting, doing and allowing. If you think that these can (sometimes) make a difference morally, it is better to think of quasi-causal liability along the lines proposed here.

action itself is tortious, or whether defendant is faultless and should be absolved. Driving into a pedestrian without braking, is (unless the pedestrian is totally unseen) below the standard of care, and thus appropriate grounds for liability. But, when it comes to factual causation, it is a mistake to ask whether the negligence itself made a difference. The causal element is met, regardless of whether the driving was negligent. The importance of the negligence is in marking the causing action as tortious and thus potential grounds for liability.