

**Emmanuel Voyiakis**

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## Causation and opportunity in tort

Emmanuel Voyiakis<sup>#</sup>

Some cases of causation in tort are hard because we do not know enough about what happened, i.e. we lack epistemic access to facts that would establish whether a defendant's conduct meets the applicable standard of causation. *Fairchild v Glenhaven Funeral Services*<sup>1</sup> is a hard case of that kind. The normal standard of proof of causation in tort requires claimants to show that the defendant's conduct caused the claimant's harm on the balance of probabilities. However, given that medical science did not have sufficient understanding of the aetiology of the disease that the claimant employees suffered in *Fairchild*, requiring them to satisfy the balance of probabilities standard would have meant that their action against any of the defendant employers should fail, and that conclusion has a counterintuitive ring. Other cases are hard because applying to them the normal standard of causation would yield counterintuitive results even when all the relevant facts are in hand. The familiar *Two Fires* example is a hard case of this kind.<sup>2</sup> Each of two persons, acting independently, sets a fire. The two fires eventually merge and consume the claimant's home. Each fire would have been sufficient to cause the damage, and neither was a necessary cause of it. Applying the normal 'but for' standard of causation, which requires that the defendant's conduct be a necessary cause of the claimant's harm, would entail that neither person caused the damage, even though the intuitively right answer seems to be that they both did.

Sandy Steel and David Ibbetson have called the first kind of problem 'epistemic', and the second 'conceptual'.<sup>3</sup> My aim here is to show that we can approach both kinds of problems with the aid of a moral idea sketched out by H.L.A. Hart and developed into a more general account by T.M. Scanlon. Applied to causation, that idea says that a standard of causation and/or proof of causation can be justified to a person as long as it affords that person the opportunity to affect how things will go through their choices, and that opportunity is something that person has reason to value. I will develop that idea in the context of epistemic questions, and then extend it to conceptual ones. And I will try to show that the idea explains both why we may apply

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<sup>#</sup> Associate Professor, LSE Law Department. I am grateful to Tatiana Cutts, Nick Sage, Sandy Steel, Andy Summers, Gemma Turton, and the Journal's referees, for their comments. This paper is dedicated to the memory of my colleague and friend Helen Reece.

<sup>1</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

<sup>2</sup> R Wright, 'Causation in Tort Law' 73 *California LR* (1985) 1735 at 1775-6.

<sup>3</sup> S Steel – D Ibbetson, 'More Grief on Uncertain Causation in Tort' (2011) 70 *CLJ* 451 at 452.

certain familiar standards of causation in easy cases, and why and how far we ought to relax or modify those standards in hard cases. Elsewhere I have claimed that the idea in question can form the basis of a general account of private law<sup>4</sup>, but my discussion here will not assume the truth of that claim.

Saying that we may defend or criticise principles of causation on the basis of the opportunities that they provide one with implies that the justification of those standards will be specific to the purpose and practical stakes of tort law, chief amongst which is the allocation of the burden of repair. If you already believe that questions of causation in tort are moral questions about what is ‘fair’ between the parties, or about when one is sufficiently ‘involved’ in what happened to be required to make repair<sup>5</sup>, the paper will invite you to organise your intuitions about fairness or involvement by reference to the opportunities one has to affect the outcome of the causal enquiry. If you believe that the concept of causation has a minimum content that is necessary and constant across different domains of enquiry (e.g. that, no matter which question you are addressing, causation will always be distinct from correlation)<sup>6</sup>, you could treat the paper as addressing not questions about the ‘concept’ of causation, but questions about certain moral conditions of responsibility for repair -with or without causation, depending on your preferred conceptual account. To put it differently, if we come to agree that, say, defendants in *Two Fires* may not be required to make repair as long as they lacked the opportunity to affect how their separate activities would mesh, I have no stakes in convincing you that, if that responsibility should not be imposed on them, they also cannot be said to have caused the relevant harm. For similar reasons, although I will be drawing on Hart’s insights about the justificatory significance of a person’s having the opportunity to choose what will happen in a situation, I have no stakes in defending Hart’s quite different account of causation in tort law, as laid out in his seminal work with Tony Honoré.<sup>7</sup> My aim, instead, is to explain how the Hartian insight I have in mind could

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<sup>4</sup> E Voyiakis, *Private Law and the Value of Choice* (2017).

<sup>5</sup> HLA Hart – A Honoré, *Causation in the Law* (2nd ed., 1985) 185; J Stapleton, ‘Choosing What We Mean by ‘Causation’ in the Law’ 73 *Missouri LR* (2008) 432; S Green, *Causation in Negligence* (2015); Lucy W., *Philosophy of Private Law* (2007) at 183ff; L Hoffmann, ‘Causation’ 121 *LQR* (2005) 592. See also Lord Hoffmann’s opinions in *Empress Car Company (Abertillery) Ltd v. National Rivers Authority* [1998] UKHL 5; [1999] 2 AC 22 at [15]: “one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule”; *Fairchild*, above n.1 at [54]; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353 at [128].

<sup>6</sup> R Wright, above n.2; S Steel, *Proof of Causation in Tort Law* (2015); M Moore, *Causation and Responsibility* (2010) 146-7; R Epstein, ‘A Theory of Strict Liability’ 2 *Journal of Legal Studies* (1973) 151.

<sup>7</sup> Above n.5.

be developed into a plausible account of causation in tort law, whether or not that account matches Hart's own.<sup>8</sup>

The paper has three sections. Section 1 lays out Hart's and Scanlon's account of the significance of opportunities in the justification of principles that impose burdens on a person. Section 2 applies that account to easy cases of causation and then extends it to epistemic and conceptual problems. Section 3 compares that account to a similarly motivated alternative recently proposed by Sandy Steel.

## 1. Opportunities and the justification of burdens

When a principle imposes a burden on a person, that person is entitled to some justification as to why they ought to bear that burden. Legal standards of causation impose burdens on people, so they too need to be justified in such terms. For example, the balance of probabilities standard requires claimants to prove that it is more likely than not that the defendant's conduct caused the harm. If claimants are unable to discharge this burden, they cannot require a defendant to make repair. Assuming that they cannot turn against anyone else for that purpose, it follows that claimants will have to bear the cost of repair themselves. Suppose that claimants ask why they ought to bear that burden. What could we say in response?

In his essay 'Legal Responsibility and Excuses', H.L.A. Hart laid out a general strategy for addressing that question. Writing about the justification of criminal punishment, Hart noted that the case for making certain kinds of conduct punishable is related to the fact that the relevant criminal laws give people the opportunity to bring about certain outcomes by choosing appropriately. For reasons I will come to, Hart found it helpful to develop his point by drawing what he called, drily, a 'mercantile analogy' with private law contexts. He pointed out that legal rules that create certain familiar institutions, e.g. those of a will or a contract, can be seen as setting up a "choosing system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways". Such institutions, Hart argued

provide individuals with two inestimable advantages in relation to the areas of conduct they cover. These are (1) the advantage to the individual of

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<sup>8</sup> For the record, it does not. While my account focuses on the opportunities that a principle of causation affords a person to affect how things go, Hart and Honoré, *ibid* at 81-2, attribute significance to opportunities mostly in situations where one's conduct presents a *third party* with the opportunity to cause harm, e.g. when the defendant leaves the house unlocked, giving a thief the opportunity to enter and steal the claimant's property, as in *Stansbie v Troman* [1948] 2 KB 48.

determining by his choice what the future shall be and (2) the advantage of being able to predict what the future will be. For these institutions enable the individual (1) to bring into operation the coercive forces of the law so that those legal arrangements he has chosen shall be carried into effect and (2) to plan the rest of his life with certainty or at least the confidence (in a legal system that is working normally) that the arrangements he has made will in fact be carried out. By these devices the individual's choice is brought into the legal system and allowed to determine its future operations in various areas thereby giving him a type of indirect coercive control over, and a power to foresee the development of, official life.<sup>9</sup>

Hart's point was that the justification of contract principles that impose certain practical burdens on the parties is related to the fact that those principles do not simply give those parties the opportunity to *know* how things will go. They also give them the opportunity to *affect* how things will go.

At first blush, Hart's idea seems to justify too much, and too easily. Consider the opportunities people have to affect what happens to them in the criminal context. For those of us who do not see a life of crime as a plausible career path, the opportunity Hart speaks of amounts to nothing more than the opportunity to avoid criminal sanctions by steering clear of the kinds of conduct that criminal laws describe. But the fact that a person has that opportunity could not possibly suffice to justify the laws in question. If it could, then any law of whatever content would be justified as long as it allowed people the opportunity to avoid incurring the burdens it describes. Imagine a law that made it an offence for a speaker in a public rally to continue speaking when the authorities ask them to stop, on the ground that the speaker could have avoided any punishment by ending their speech. For Hart's idea to be able to bear any substantial justificatory weight, we must understand 'opportunity to affect' as something more than 'opportunity to avoid'.

That, I believe, is the point of Hart's 'mercantile analogy' with contract law. Hart appealed to contract settings to draw attention to the *enabling* aspect of his idea. The justificatory significance of the fact that legal principles provide people with certain opportunities turns on how those principles make it possible for people to pursue their ends through their choices, rather than on merely how they allow

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<sup>9</sup> HLA Hart, 'Legal Responsibility and Excuses' in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edn (Oxford, Oxford University Press, 2008) at 44 (emphasis in original). Hart's essay first appeared in S Hook (ed.), *Determinism and Freedom in the Age of Modern Science* (New York, Collier Books, 1958) 95.

people to avoid the burdens those principles involve.<sup>10</sup> A contract is precisely the type of arrangement in which people undertake burdens and obligations in order to bring about a state of affairs that they judge favourably, rather than simply an arrangement for avoiding sanctions or other burdens. Of course, the opportunity to avoid burdens is important in contract contexts too. People sometimes enter into contracts in order to avoid liability altogether or to limit liabilities they already have. Even in those contexts, though, the purpose of a contract is never the mere avoidance of liability. People conclude agreements *in order* to incur liabilities in exchange for more or better opportunities to pursue their ends, e.g. they undertake to pay a premium in return for insurance coverage against certain types of harm. Hart's claim is that contract law may justifiably hold people to the burdens that such agreements involve precisely because it puts people in charge in those ways.

I will turn in a moment to how Hart's idea could be put to use in tort contexts, and questions of causation in particular. It is clear, however, that the idea itself needs some further elaboration. As the public speech example suggests, the fact that a person had the opportunity to affect how things will go in a situation does not always justify the imposition of burdens on that person. In fact, giving a person a choice about how things will go can sometimes make that person's position worse. The Nazi officer who presents Sophie with her eponymous choice in William Styron's novel inflicts *further* indignity on her by having her choose which of her children will die and which will survive. The same can be true in less dramatic contexts. Suppose that the city can protect everyone against a health hazard by sealing off the building or area where that hazard is located, and that doing so is not too costly.<sup>11</sup> Instead, the city officials decide to inform everyone about the hazard, thinking that this will enable citizens to protect themselves by staying away from that building or area. Other things being equal, this would be a terrible decision, because 'giving people the choice' in this situation would expose them to far more danger than necessary. People sometimes forget, mishear, misunderstand, underestimate dangers, or overestimate their capacity to self-protect. 'Giving them the choice' in this situation

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<sup>10</sup> Cf HLA Hart, 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (1983) at 60-1: "The criminal law consists largely of rules [that]... are simply 'obeyed' or 'disobeyed'. But other legal rules are presented to society in quite different ways and have quite different functions. They provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. Such are the rules enabling individuals to make contracts, wills, and trusts, and generally to mould their legal relations with others. Such rules, unlike the criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices".

<sup>11</sup> The example is TM Scanlon's, see TM Scanlon, *What We Owe To Each Other* (Cambridge, Mass, Belknap Press of Harvard University Press, 1998) at 256-7

will make none of them safer and at least some of them *less* safe. This suggests something more needs to be said to explain how a person's having a choice matters in the justification of principles that impose burdens on that person.

We owe such an explanation to T.M. Scanlon. Scanlon argues that Hart's basic idea is correct insofar as a principle that imposes burdens on a person makes that imposition contingent on whether that person has *reason to value* the opportunities to choose that the principle affords them. As he puts it:

Once we understand the positive reasons that people have for wanting opportunities to make choices that will affect what happens to them, what they owe to others, and what others owe to them, we can see also how their having had such opportunities can play a crucial role in determining what they can reasonably object to.<sup>12</sup>

According to this 'value-of-choice' account, a principle that requires people to bear certain burdens is justified as long as it allows those persons the opportunity to affect how things will go through their choices, and that opportunity is something that those persons have reason to value.<sup>13</sup> This last condition explains why Sophie's choice cannot be taken as a basis for holding her responsible for the fate of her children, and why the fact that informing everyone about the health hazard would enable every citizen to self-protect does not suffice to make this the right policy. In both cases, the explanation is that the persons involved have no reason to value having the choice in question. Sophie would have been better off if the fate of her children had been decided by someone else, citizens would have been better off if the city had quietly sealed off the building that contained the health hazard, and so on.<sup>14</sup> Note that, as in the example of odious laws against public speaking, having the opportunity to choose does not become valuable for a person simply because that person can avoid a bad outcome if they *make* a particular choice (e.g. if they fall

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<sup>12</sup> Ibid at 251.

<sup>13</sup> Scanlon calls the sense of responsibility concerned with the practical burdens people are required to bear 'substantive', and he contrasts it with the 'attributive' sense, which is concerned with the moral assessment of persons and their conduct, *ibid* at 248-9.

<sup>14</sup> Is the opportunity to have the criminal sanctions we are liable to depend on our choices something we have reason to value? Hart thought so, above n.9 at 47: "by attaching excusing conditions to criminal responsibility, we provide each individual with benefits he would not have if we made the system of criminal law operate on a basis of total 'strict liability'. First, we maximize the individual's power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual's choice as one of the operative factors determining whether or not these sanctions shall be applied to him... Thirdly, by adopting this system of attaching excusing conditions we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law".

silent so as to avoid the sanctions of the law against public speaking). It becomes valuable if that person has reason to want to *have* a choice in the situation. If a thug puts you at gunpoint and says 'your money or your life', the thug gives you an opportunity to save your life by making a particular choice, namely to hand over your wallet. The value-of-choice account explains why that does not diminish your objections to the thug's conduct. The morally significant feature of the situation is not that you have a choice at your disposal, but that you do not have reason to value being presented with a choice between your money and your life.<sup>15</sup>

The value-of-choice account also explains why we would reach different conclusions in variations of the above examples. Suppose that sealing off the health hazard would take too long, and that informing everyone is the policy that has the best chance of containing the danger. In this variation, having the opportunity to self-protect is something that citizens have reason to value, precisely because, given the alternatives available, things are more likely to go well for them if they are provided with information that puts their safety in their own hands. Or suppose that Sophie is asked to choose which of her children will get vaccinated against a disease, as there is a shortage of the vaccine in the concentration camp. Here the value for Sophie of the opportunity to choose may depend on considerations like how well she knows the health and disposition of each of her children and dangers that the disease involves, and what choosing one over the other child for vaccination would represent, towards herself and others, about her as a mother. Under certain assumptions, it is possible that having that choice would be valuable for Sophie, and therefore that she would not have an objection against a principle that required her to decide which child will get the benefit of the vaccine. As Scanlon notes, and *Sophie's Choice* illustrates, the value for a person of having a choice may be other than instrumental. Sometimes a person will value the opportunity to choose how things will go not because this will enable that person to achieve a favourable outcome (e.g. it will keep that person or someone dear to them safe), but because of what that choice represents about that person and their relationship to others, or because of the symbolism attached to a person having or not having a choice in a situation.<sup>16</sup> For simplicity, I will be referring only to the instrumental value of choice, referring to its representative and symbolic value for a person only where necessary.

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<sup>15</sup> That is also why, if someone picks your pocket without you noticing, you would not complain that they should have used threats rather than stealth in order to give you a 'say' in the situation.

<sup>16</sup> The independent significance of the last parameter becomes clear in a variation in which Sophie is asked to choose which of her children will be executed, and Sophie already knows that one of them is terminally ill. While Sophie having the terrible choice makes it more likely that her healthy child will survive, it still puts its life in her hands in a way that demeans her status as a mother. It would



Finally, the value-of-choice account helps draw our attention to a problem that Hart's own account does not touch upon, namely the level at which we should 'pitch' questions about the value of a choice for a person. Questions of pitch are important both because some persons are better choosers and some are worse, and because the same person can be a better chooser in certain situations and a worse chooser in others. We therefore need to ask how this variety in the value of a given choice affects the moral significance of having that choice. To give practical bite to the question, suppose that, in the health hazard example, a forgetful person complains: "A warning might suffice for most people, but it does not do me much good because it is likely to slip my mind, so the fact that the warning puts my protection in my own hands cannot be taken as a basis for imposing burdens on me, in the way that it can for the less forgetful". How should we respond?

It is, I think, a plausible starting point that principles about the allocation of practical burdens cannot be sensitive to, or make allowance for, every feature of every person's disposition or situation. The more allowance we make for each person's particular sensitivities, the greater the burdens that *others* will have to bear in consequence.<sup>17</sup> If it is not the forgetful person's responsibility to ensure that the danger does not slip their mind, it will be someone else's responsibility to remind them of it, or to design and implement an alternative policy for protecting everyone against the health hazard. That will involve costs, and sometimes those costs will be so high that others may reasonably refuse to bear them. For example, the urgency of the public health hazard places a limit to how much the city ought to do to ensure that people not only get the word but also that they keep it at the forefront of their attention, if doing more makes it harder for the city to deal with the hazard itself.

We can incorporate this thought into the value-of-choice account. We can say that finding the right level of generality for assessing the value of a choice for a person requires a degree of triangulation.<sup>18</sup> That is, it requires us to ask whether others

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therefore have been better for Sophie if the choice in this variation were made by a medical expert rather than by herself. I am grateful to Tatiana Cutts for discussion on this point.

<sup>17</sup> Here the difference between judgements of attributive and substantive responsibility is at its clearest. While it can be the case that no one is to blame for an accident, it cannot be the case that no one is to bear its cost (or the burden of making repair for it).

<sup>18</sup> This seems to me the right way to respond to an objection raised by Zofia Stemplowska, Alex Voorhoeve, and Andrew Williams, respectively, see A Voorhoeve, 'Scanlon on Substantive Responsibility' 16 *Journal of Political Philosophy* (2008) 184; Z Stemplowska, 'Harmful Choices: Scanlon and Voorhoeve on Substantive Responsibility' 10 *Journal of Moral Philosophy* (2013) 488; A Williams, 'Liberty, Liability and Contractualism' in N Holtug – K Lippert-Rasmussen, *Egalitarianism: New Essays on the Nature and Value of Equality* (2007) 241. The three authors argue that the value-of-choice account lacks the resources to explain why, in the health hazard case, the complaints of a person who under one policy would not be warned is stronger than the complaint of a person whose

would have reason to value the opportunities given to *them* by a principle that took more of that person's particular features and sensitivities into account in allocating practical burdens to everyone involved.<sup>19</sup> I return to this point and its practical implications for choosing standards of causation in the next section.

## 2. Causation

Here I turn to how the value-of-choice account helps us address questions of causation in tort. I divide the discussion in four parts. The first discusses easy cases, the second and third discuss hard 'epistemic' cases, and the fourth discusses hard 'conceptual' cases.

### (a) Easy cases

The value-of-choice account explains why easy cases of causation are easy. They are easy because the opportunity to affect the allocation of the burden of repair by adducing evidence of what happened is something that people have general reason to value, at least in systems that make that allocation a matter of private litigation. For a start, those parties are more closely involved than others (e.g. state officials or third parties) in the events that led to the harm to be repaired, and are therefore generally better placed to take charge of the effort to establish what happened. Secondly, the practical stakes of the litigation are higher for those parties than for anyone else, so it is particularly important to them to be able to take such charge. The same reasons help us trace the boundary between an easy and a hard case. A case is easy when the parties have reason to value the opportunity to establish what happened. It becomes hard when that opportunity is not valuable for the party that

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disposition (e.g. their forgetfulness, or innate curiosity about the danger) makes it less likely that the warning they receive will have the intended effect on them. The difference, I think, is that the person who was not warned had no opportunity to protect themselves against the danger, whereas the forgetful person at least had the opportunity to take measures to ensure that their forgetfulness did not get the better of them in the situation.

<sup>19</sup> Consider a variation in which many people in the city are by disposition forgetful, and the city's mobile networks can, at minimal cost, send regular alerts and updates to everyone until the hazard has been eliminated. Given that, in this variation, forgetfulness is not a peculiarity of a random person but a known condition of a considerable section of the population, and that the cost for others of ameliorating the effects of that condition on the efficacy of the warnings is very small, forgetful persons could perhaps object to a principle that allowed the city to adopt a plan that did not give people the benefit of such reminders.

bears the burden of establishing what happened, either as a general matter or in relation to certain particular activities or situations. Of course, the value for parties of the opportunity to take charge of the effort to establish what happened will also depend on the costs of initiating a tort action or defending themselves against one, but as that consideration bears on the general justification of dealing with such disputes through private litigation, I propose to leave it aside except when the costs in question are special to the collection and presentation of evidence of causation.

We could use the same account to address two more specific issues. One is whether the burden of proof in easy cases ought to lie with claimants or with defendants. Another is what the appropriate standard of proof ought to be in such cases. I take each in turn, and propose to address a third question about the appropriate general standard of causation -necessity, sufficiency, or some alternative- in my discussion of conceptually hard cases.

Claimants in a tort action seek to effect a change in how things are. They have suffered some harm or other setback to their interests, and they believe that the law requires someone else, namely the defendants, to bear the burden of making repair or of limiting their future activities (for simplicity I will henceforth refer to repair only). Claimants therefore have reason to value the opportunity to change things by enlisting the coercive powers of our institutions -the opportunity to have what John Goldberg and Ben Zipursky elegantly call 'civil recourse'.<sup>20</sup> A standard that required claimants to prove that the defendants' conduct caused the relevant harm could be justified to claimants precisely because it makes the imposition of that burden contingent on claimants' having the opportunity of civil recourse. The same does not hold for defendants. Defendants are, as a general matter, content with the way things are. Having no reason to seek recourse to our institutions, they could plausibly object to a standard that required them to prove that they did not cause the harm the claimants suffered. However, defendants would have no objection to a standard that required them to contest the evidence that claimants put forward. They have reason to value that opportunity because, once litigation has started, the process is more likely to have a favourable outcome for them if they, rather than a third party or a state official, are put in charge of this defensive task.

Finally, the value-of-choice account can explain why we may generally require claimants to prove that the defendant's conduct was the cause of the harm 'on the balance of probabilities'. Tort actions give people the opportunity not to obtain repair *simpliciter*, but to obtain it from particular individuals. The opportunity to

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<sup>20</sup> See, e.g. B Zipursky – J Goldberg, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' 75 *Fordham LR* (2006) 1563.

individuate responsibility in this way is something that people have reason to value, as our communities provide people with the option of socialising the costs of repair only in certain situations. It follows that, in the first instance, a person who has suffered harm and claims that someone else ought to make repair could not object to a standard that required them to establish a causal link between the harm and the conduct of that person. We can then arrive at the reason why the claimants must establish that link on the balance of probabilities by the process of ‘triangulation’ I outlined in the previous section, i.e. by considering the parties’ respective objections to standards that required claimants to satisfy a different standard. On the one hand, requiring claimants to establish a causal link ‘beyond reasonable doubt’ would be asking too much of them. Producing that degree of proof can be very hard even in the commonest of situations, so the opportunity to satisfy a general standard that can only rarely be satisfied is bound to be of limited value to those persons, especially when the risks of harm that those persons are exposed to are common. On the other hand, a standard that required claimants to establish only that the defendants’ conduct ‘materially increased the risk’ of harm would demand too much of *defendants*, because it would deprive them of an opportunity that they have reason to want, namely to show that while their conduct may have endangered the claimant’s interests, there were other and more likely causes of the harm that the claimant suffered. As a similar question featured centrally in *Fairchild*, where the court endorsed a ‘material increase in risk’ standard of proof, I return to the substance of this complaint in the next section.

(b) Epistemic problems: *Fairchild*

Now I turn to how the value-of-choice account would deal with some familiar hard cases of the epistemic kind, using *Fairchild v Glenhaven Funeral Services* as my main illustration. The claimants had developed mesothelioma as a result of having inhaled asbestos fibres. Over the course of their career, they had worked for each of the defendant employers for periods of varying length. It was accepted that all defendants had been negligent in exposing the claimants to the risk of inhaling asbestos fibres. However, while the causal link between asbestos and mesothelioma had been sufficiently established by science, the precise mechanism by which asbestos fibres caused the disease was not well understood.<sup>21</sup> It was therefore not

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<sup>21</sup> For a summary of the scientific knowledge on mesothelioma, see *Sienkiewicz v Greif* [2011] UKSC 10 at [19] per Lord Phillips: “i) Mesothelioma is always, or almost always, caused by the inhalation of

possible to say that the claimants' disease was more likely than not to have been caused by the exposure to asbestos during employment with one defendant employer rather than another.<sup>22</sup> The House of Lords decided that requiring the claimants to meet the balance of probabilities standard would be unjust to them. It applied a different standard, according to which defendants who materially increase the risk of the claimants suffering a certain harm are taken to have caused that harm, and, since the other requirements of the claim were made out, it held defendants jointly and severally liable to make repair.<sup>23</sup> This has been referred to in subsequent case-law and academic discussion as the 'material increase in risk' standard. In *Sienkiewicz v Greif*, the Supreme Court held that, for the purposes of that standard, an increase in risk counts as 'material' if it is not minimal.<sup>24</sup>

The value-of-choice account explains why claimants could object to being required to meet the balance of probabilities standard. The mere fact that claimants cannot satisfy the requirements of a certain standard does not, of course, entail that the standard in question cannot be justified to them. Say that a claimant had ample access to all the evidence required to satisfy the balance of probabilities standard, but lost or mishandled it. That claimant cannot object to the application of the relevant standard, insofar as they had the opportunity to meet its requirements,

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asbestos fibres; ii) A significant proportion of those who contract mesothelioma have no record of occupational exposure to asbestos...; iii) The more fibres that are inhaled, the greater the risk of contracting mesothelioma; iv) There is usually a very long period between the exposure to asbestos and the development of the first malignant cell. Typically this can be at least 30 years; v) There will be a lengthy period between the development of the first malignant cell and the point at which the disease can be diagnosed. At the time of *Fairchild* this was thought to be 10 years, but is now thought to be at least 5 years. During this period, further exposure to asbestos fibres will have no causative effect; vi) The mechanism by which asbestos fibres cause mesothelioma is still not fully understood. It is believed that a cell has to go through 6 or 7 genetic mutations before it becomes malignant, and asbestos fibres may have causative effect on each of these; vii) It is also possible that asbestos fibres have a causative effect by inhibiting the activity of natural killer cells that would otherwise destroy a mutating cell before it reaches the stage of becoming malignant”.

<sup>22</sup> Not everyone agrees with that assessment. Beever A, *Rediscovering the Law of Negligence* (2007) at 477-481, argues that, on the accepted facts, it was equally probable that that mesothelioma might be caused by a single fibre, a few fibres, or many fibres, and therefore the probability that any one of the defendants contributed causal fibre was well over 50%.

<sup>23</sup> *Fairchild*, above n.1 at [33] per Lord Bingham: “I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim”; at [63] per Lord Hoffmann: “as between the employer in breach of duty and the employee who has lost his life in consequence of a period of exposure to risk to which that employer has contributed, I think it would be both inconsistent with the policy of the law imposing the duty and morally wrong for your Lordships to impose causal requirements which exclude liability”.

<sup>24</sup> Above n.21 at [108] per Lord Phillips. The Court rejected the competing view that an exposure is material if it doubles the risk the claimant is naturally exposed to.

and reason to value having that opportunity, which put the outcome of the causal enquiry in their own hands. *Fairchild* is different precisely because, due to the lack of scientific knowledge about the aetiology of the mesothelioma, the claimants never had such an opportunity. A principle that required *Fairchild* claimants to prove causation on the balance of probabilities would not have put the outcome of the causal enquiry in the claimants' hands in any way.

The same line of thought helps make the case for the 'material increase in risk' standard that the court applied in *Fairchild*. The fact that uncertainty about the aetiology of the claimant's disease is scientific entails that the parties cannot hope to affect the outcome of the causal enquiry by resolving it, i.e. by individuating the cause of the claimant's harm. However, this is not the only opportunity parties have to affect the outcome of the causal enquiry through their choices. As long as the scientific uncertainty is itself a known fact, parties will have the opportunity to choose whether or not to bring about a situation in which the causal enquiry is known to end in that *cul-de-sac*. If parties have reason to value that opportunity, they cannot object to a standard that makes the outcome of the causal enquiry turn on how they exercise that choice. To put it differently, if the core problem in cases like *Fairchild* is the scientific uncertainty about the aetiology of the claimant's harm, we may justifiably determine whose problem this will be by asking whether a party had the opportunity to decide whether to bring it about, and reason to value being able to make that decision.

In cases like *Fairchild*, both defendant employers and claimant employees have the opportunity to decide whether or not to bring about a situation in which science is known to be unable to individuate the cause of the claimant's harm. The defendants can choose whether or not to engage in an enterprise, or design a system of work, that involves a risk of exposing claimants to asbestos fibres. The claimants can choose whether or not to work in posts that involve risk of contact with asbestos, and whether or not to withhold their labour whenever the defendants' system of work becomes unsafe in that regard. However, the value of their respective choices varies significantly from one party to another.

The defendant employers have clear reason to want to be generally able to make and act on their own assessment of the risks that their enterprise involves, including the risk of their employees inhaling asbestos fibres, rather than have each of those decisions made by or requiring the advance approval of others, e.g. their employees or a state agency. That is particularly true when employers have sufficient knowledge about the relevant risks and the means of reducing or eliminating them in the workplace. Suppose now that the employers expose their employees to a

known risk of uncertain aetiology, and that the employees suffer the harm that the risk relates to. Employers could not object to a standard that makes the uncertain aetiology their problem, insofar as whether they incur that burden turns on how they exercise their entrepreneurial prerogative in setting the system and conditions of employees' work. And that remains the case even if employers (along with the claimants and everyone else) lack the further opportunity to prove whether or not the harm suffered by their employees was not caused by the particular way they have exercised that prerogative.<sup>25</sup>

Note that this makes the scientific uncertainty the employers' problem not because employers are in breach of their duties of care, but because they have the opportunity to decide whether or not to expose their employees to the risk of a disease the precise aetiology of which science is known not to understand. The difference matters because the sole fact that an employer chooses to expose employees to a risk of that sort does not necessarily put the former in breach, e.g. suppose that the subject-matter of the business is the removal of asbestos from industrial premises, and that the employer does everything by the book.<sup>26</sup> That is so because standards of proof of causation and standards of care attend to different opportunities employers have in such situations. Standards of proof of causation attend to the opportunity employers have to choose whether to expose employees to a known risk of unknown aetiology. Standards of care attend to their opportunity to choose how to protect employees against that risk. That is why, as the court pointed out in *Sienkiewicz*, the precise magnitude of the risk employers exposed employees to matters in respect of the latter kind of standard only.

Consider now whether claimant employees have reason to value the opportunity to decide whether or not to be exposed to the risk of harm of unclear aetiology of which is known to be unclear. Things look very different from their perspective, precisely because it is hard to see any advantage to them of having such a choice. Employees may sometimes have reason to want a measure of control over their

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<sup>25</sup> This also explains how the value-of-choice account avoids the result that "an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma... claims by employing only those who had previously been exposed to excessive quantities of asbestos dust", *Fairchild*, above n.1 at [33] *per* Lord Bingham. If the ground of employers' liability in cases like *Fairchild* is their opportunity to exercise their entrepreneurial prerogative in making decisions about who to employ and how to design their system of work, that liability will be even clearer when employers have made hiring decisions on the basis that Lord Bingham describes.

<sup>26</sup> To put it differently, the fact that we cannot tell which employer caused the employees to suffer mesothelioma does not, by itself, increase the risk of harm to the employees.

own workplace safety<sup>27</sup>, but they have no reason to want to be able to bring about a situation in which the causal enquiry ends up in a *cul-de-sac*. Having that option offers them nothing but to undermine their prospects of being able to hold defendant employers liable in case the relevant risk materialises. That remains the case even when an employee has reason to want to undertake an employment that carries the risk in question, e.g. because they have occupational expertise in dealing with asbestos. That person may reasonably want to be able to work in that field, but they will not want to do so *because* science will be unable to individuate the cause of the harm in case they inhale asbestos fibres and suffer mesothelioma.<sup>28</sup>

By the same token, though, we can imagine situations where employees may, in fact, have reason to value the opportunity to choose whether or not to bring about a situation of causal uncertainty. Suppose that there is a cheap, wearable, and easy-to-operate device that detects the risk of presence of asbestos fibres in a work environment. All but one of the defendant employers failed to supply the claimant employees with that device. One defendant employer did supply it, but the claimants failed to wear it. Say that it would have been too demanding to require that employer to be monitoring compliance constantly, that a spot-check policy would be reasonable enough, and that the employee was never caught without the device. Finally, suppose that the particular employer turned out to be as careless as any others in exposing the claimant employees to asbestos, e.g. by failing to ensure proper workplace ventilation. It seems to me that the particular employer could still object to a principle that bundled them together with employers who did not supply the asbestos-detection device. The reason is that, in supplying them with the device, the particular employer made it possible for employees to obtain reliable assurance that they are free from a very serious health risk in that particular workplace. It follows that, as long as the device put the health and safety of employees in their hands in a way that they have reason to value, employees could not object to a standard that required them to use the device on pain of not being able to count

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<sup>27</sup> Elsewhere I have argued that this opportunity will usually be valuable to employees as a *failsafe* against the failure of employers to protect them, rather than as a first strategy, Voyiakis, above n.4 at 118-9. See also G Gray, 'The Responsibilization Strategy of Health and Safety: Neoliberalism and the Re-configuration of Individual Responsibility for Risk' 49 *British Journal of Criminology* (2009) 326.

<sup>28</sup> The same goes for employees' reason to want a degree of independence or freedom from having their work micromanaged by the employer. It seems to me that employees will generally want freedom from micromanagement because they estimate that this will allow them to perform better without compromising their safety against workplace risks. They are not likely to want that freedom *because* the aetiology of the disease they will suffer if those risks materialise is unclear. I am grateful to the journal's reviewers for discussion on the point.



the employer who supplied it as one among those causally responsible, in case the relevant risk materialises.

(c) Standards of proof, burdens of proof, and community insurance schemes

With this account of *Fairchild* in hand, we can now address some other epistemically hard cases. These cases are hard because the opportunity to take charge of the effort to establish what happened may lack value for a person even in situations where our scientific understanding of the causal mechanism by which the harm came about is perfectly adequate. For example, the relevant evidence may not be easily obtainable or accessible to claimants, e.g. because it is in the possession of another party or because the harm occurred long after the defendant's conduct and the evidence has been lost. The resulting uncertainty may be evidential rather than scientific, but the opportunity to establish what happened may be no more valuable to defendants than it was to either party in *Fairchild*.

Again, the value-of-choice account can help us describe the problem in a way that also suggests its solution. In cases of evidential rather than scientific uncertainty, claimants would have nothing to complain about if the law eased their access to the relevant evidence, or required someone else to provide it. So rather than treat those cases as raising issues about the standard of proof of causation, we should treat them as raising issues about the proper allocation of the burden of proof between the parties. Principles like *res ipsa loquitur* and rules of evidence regarding discovery and disclosure have precisely that function in the law. We apply them when the claimant is poorly placed to prove what can be proven, and on the condition that we may justifiably require defendants (and, occasionally, third parties, but I will leave this to one side) to bear part of the burden of producing such proof. Under the value-of-choice account, that condition will be met as long as defendants have reason to value the opportunity to collect and maintain that evidence. In that regard, consider the contrast between two situations. In one, the claimant cannot prove who knocked them on the head in a dark alley, and they sue you because you happened to be around at the time. In the other, a consumer cannot prove whether a product was defective. The difference between the two situations, it seems to me, lies not so much in the position of the claimants, as in that of the respective defendants. You do not have any special control over the alley, nor do you have a monopoly on evidence about your whereabouts and behaviour in public spaces. Asking you to monitor your own movements and maintain records in case you are involved in accidents or other harm-causing events

would impose a high logistical burden on you, and perhaps even expose you to risk of your information being used by others (e.g. the corporation that supplies the software for your smartphone) for illegitimate purposes. By contrast, a business tends to have exclusive control over events occurring in its own production line, which will typically be located in premises it is the sole occupier of. Moreover, the business has clear reason to value the opportunity to exclude third parties from supervising the production process and gathering their own evidence pre-emptively, in case something goes wrong.<sup>29</sup> For that reason, and to that extent, we may justifiably require the business to make its evidence available or suffer the risk of having adverse inferences drawn, while we may not require you to prove that you were not the one who struck the claimant on the head.

Some other cases may lie somewhere in-between. Consider the familiar example in which an unidentified taxi hits a pedestrian, there are only two taxi companies in town, and there is no evidence as to which company the 'guilty' taxi belongs to.<sup>30</sup> Could we justify requiring the defendant companies to prove that the taxi was not theirs, on pain of having to share the burden of repair? It seems to me that the answer turns on whether taxi companies have reason to value being able to collect and maintain real-time information on the whereabouts of their taxis. That value may depend on the functionality, cost and reliability of such tracking, as well as on the risks of that information being accessed and used by third parties. On certain assumptions, it is plausible that tracking can be something that taxi companies have reason to value, and therefore that we may require those companies to bear at least part of the burden of proof.

This leads us to harder cases. Consider *Summers v Tice*, where two defendants who were part of a hunting party were careless in shooting, only one bullet hit the claimant and caused their injury, but the claimant could not establish which

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<sup>29</sup> For an application in a medical setting, see *Ybarra v Spangard* 25 Cal.2d 486 (1944) is a case of the latter kind. The Court said at [2a]: "it is difficult to see how the doctrine [of *res ipsa loquitur*] can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment". See also *Barclay v Dunlop Ltd* [1999] ECC 73 at 81 *per* Judge LJ.

<sup>30</sup> The example appears in *Herskovits v Group Health Cooperative of Puget Sound* (1983) 664 P 2d 474 *per* Brachtenbach J. dissenting, and is noted in *Sienkiewicz v Grief*, above n.21 at [95-6] *per* Lord Phillips. The question that the two judges address, and answer in the negative, is whether we could take the percentage of taxi ownership of each company as an indication of the likelihood that the 'guilty' taxi was its own. Here I am concerned with the different question of whether we could justify to defendants reversing the burden of proof.

defendant had fired it.<sup>31</sup> Or *Fitzgerald v Lane*, where the claimant suffered tetraplegia as a result of successive collisions with two vehicles but the claimant could not establish whether the second collision had contributed to the injury.<sup>32</sup> What makes *Summers* and *Fitzgerald* harder is that the defendant hunters and drivers were no better placed than the claimants to establish what happened. The fact that one drives a car or carries a gun may put one in control of how the car or the gun is used, but it does not necessarily put one in a favourable position to establish whether the use of one's car or gun had a particular causal effect.

The resulting impasse is analogous to that of *Fairchild*, so we could follow the same route out of it, by focusing on the opportunities the defendants had to choose whether to bring about a situation in which the causal uncertainty would be likely to arise. This allows us to note an important difference between *Summers* and *Fitzgerald*. Members of a hunting party have the opportunity to set the terms of their group activity. They can decide whether to hunt alone or in concert, and arrange their shooting practice so as to make it easier to distinguish between their shots and those of others (from using guns of different calibre, to observing certain rules about who fires when, and so on). Moreover, those hunters have general reason to value a modicum of freedom in setting the terms of their shooting practice, instead of having every aspect of it regulated by the state or third parties. As long as members of a hunting party have that opportunity, others may require them to bear the burden of having adverse evidential inferences drawn against them when their shooting practice made it impossible to establish whose shot caused the claimant's harm.<sup>33</sup> The position of drivers is different, because drivers are not able to ensure that they are alone on the road, nor are they normally able to drive 'in concert' with others.<sup>34</sup> They therefore lack the opportunity either to set up or to avoid situations of causal uncertainty in the way that members of a hunting party can.<sup>35</sup>

This leads to what might strike one as a counter-intuitive conclusion, namely *Fitzgerald v Lane* was wrong to impose the burden of proof of causation on the two defendants. The conclusion looks odd because it seems unjust for the claimant not to be able to obtain repair from either of the careless defendants when we know *for*

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<sup>31</sup> *Summers v Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (California Supreme Court). A similar case is *Cook v Lewis* [1951] SCR 830 (Supreme Court of Canada).

<sup>32</sup> *Fitzgerald v Lane* [1989] 1 AC 328.

<sup>33</sup> Cf. also *Oliver v. Miles*, 144 Miss. 852 (1927).

<sup>34</sup> Things are different when defendants engage in a racing contest, *Saisa v. Lilja*, 76 F.2d 380 (1935).

<sup>35</sup> It follows that we should distinguish between situations in which the hunters can be reasonably expected to be conscious of each other's presence in the vicinity, and situations where that is not the case. I return to this aspect in my discussion of *Two Fires* in (d) below.

*sure* that one of them was the cause of the harm. I believe that this impression should be resisted, because it relies on two intuitions that do not suffice to justify it, either individually or cumulatively. The first intuition is that a justifiable principle should ensure that the claimant obtains repair. The second is that the fact that the defendants were in breach of their duties to the claimant is a legitimate tie-breaker in deciding that they, rather than anyone else, ought to bear the burden of providing such repair. The problem with the second intuition is that it cannot be justified to either defendant: the presence of the other driver in the situation was an occasion neither of them had the opportunity to look out or control for.<sup>36</sup> Furthermore, the first intuition can be adequately met without imposing the burden of repair on defendants. For example, we could treat the accident in *Fitzgerald* as the work of an ‘untraced driver’, and have the claim processed by the Motor Insurers’ Bureau<sup>37</sup> or, if the relevant conditions are met, by the Criminal Injuries Compensation Scheme.

#### (d) Conceptual problems

I now turn to problems about the *standard of causation* that tort law may require the parties to meet. The main question is whether the defendant’s conduct must be shown to be a necessary condition of the claimant’s harm, or whether it must only be shown to be a sufficient condition of it. The significance of the question becomes clear in cases like *Two Fires*, which are hard even though we have full epistemic access to the relevant facts. Each defendant’s conduct is sufficient to cause the harm, but neither cause is necessary, as that harm would have occurred anyway as a result of the other defendant’s conduct. Applying the typical ‘but for’ test, which posits necessity as the correct standard of causation, leads to the uneasy conclusion that neither defendant caused the harm. Drawing on that unease, some authors have argued that the necessity standard should be abandoned, and that a sufficiency standard is a better fit for our intuitions, both in hard cases like *Two Fires*

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<sup>36</sup> It seems to me that Sarah Green’s ‘Necessary Breach Analysis’, above n.5 at 73ff, misses this aspect, insofar as it bundles defendants together regardless of whether those defendants had the opportunity to co-ordinate their activities.

<sup>37</sup> Note that resort to the MIB scheme does not involve a legal fiction. The MIB Untraced Drivers Agreement 2017 (England, Scotland and Wales) applies in respect of accidents caused by an unidentified person, defined in s. 1(5) as ‘a person who is, or appears to be, wholly or partly liable in respect of the claim and who cannot be identified’. This does not exclude claims in which the ‘guilty’ defendant lies within a determinate group, but there is no way of identifying which one they are.

and in easy cases.<sup>38</sup> The choice of standard is a ‘conceptual’ matter because it turns on our understanding of when an action or event is properly described as the cause of some effect or outcome, rather than the amount of evidence required to satisfy us that the cause-effect relation obtains in a particular case.

Requiring a claimant to establish that a defendant’s conduct was a sufficient cause of the harm is generally less demanding than requiring them to show that the defendant’s conduct was a necessary cause. Under the necessity standard, the claimant must establish an additional counterfactual, namely that, were the defendant’s conduct removed from the chain of events (or ‘but for’ that conduct), the harm would not have occurred. *Two Fires* illustrates the significance of that difference. In that situation, satisfying the sufficiency standard is easy, while satisfying the necessity standard is impossible, precisely because there is no way for the claimant to establish the ‘but for’ counterfactual in respect of either defendant.

The value-of-choice account says that the claimant may be required to establish the ‘but for’ counterfactual if the imposition of that burden is contingent on the claimant having an opportunity they have reason to value. In easy cases that condition will be met because it will generally be possible for the claimant to bring that task to fruition, and things are more likely to go well for them if they take such charge, rather than rely on the state or third parties to gather the required proof. We can then extend that idea to account for conceptually hard cases like *Two Fires* just as we extended it to account for epistemically hard cases like *Fairchild*. We can ask whether the parties had the opportunity to choose whether to bring about a situation in which it would be impossible to establish the counterfactual, and that opportunity was valuable to them. This may require us to treat some conceptually hard cases differently from others. Consider two variations of *Two Fires*. In the first, the defendants coordinate their activities so that their respective fires reach the claimant’s home at the same time. In the second, the defendants are unaware of and could not have known about each other’s activity. Under the value-of-choice account, the defendants of the first variation could not object to a principle that made the impossibility of establishing the ‘but for’ counterfactual their problem, because they had the opportunity to coordinate their activities so as bring about

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<sup>38</sup> See e.g. R Wright, above n.2 at 1790, proposing that “c contributed [causally] to e if and only if c was a member of a set of conditions which actually existed prior to e, which were sufficient for e, and which would not have been sufficient for e without c” and S Steel, above n.6 at 33, proposing a revised version of Wright’s test, according to which “c counts as a cause of e if it is necessary for the sufficiency of a concretely specified set sufficient for e, where sufficiency may be determined both by physical laws of nature and by the requirement of a rule or set of rules”. For a defence of Wright’s test, see G Turton, *Evidential Uncertainty in Causation in Negligence* (2016), Chapter 2(III).

that impossibility or prevent it from arising, just as the hunters had the opportunity to make their own shooting plan in *Summers v Tice*. By contrast, the defendants of the second variation never had the opportunity in question, and in that respect are in the same position as the two drivers in *Fitzgerald v Lane*. This means that the case for making it their problem that their activities meshed will turn on whether we can plausibly tie the imposition of the burden of causal uncertainty on the defendants to some opportunity that they had to affect the relationship between their respective activities. The bare fact that each defendant could have avoided engaging in their *own* activity will not be enough for that purpose, as that opportunity relates to the burden of taking care not to harm others, not to the burden of being regarded as the cause of a harm when the circumstances make it impossible to establish the 'but for' counterfactual.

### 3. Hard cases and the duty of assistance

Here I try to sharpen the value-of-choice account by contrasting it with an alternative proposed by Sandy Steel.<sup>39</sup> Steel's account is similar in character, but it purports to address hard cases by appealing to certain special normative corollaries of the duties of wrongdoers towards their victims, rather than an argument about the opportunities that each party has in the situation.

Steel begins from the idea that persons who breach their duties towards others owe their victims more than a secondary duty to make repair. They also owe them a duty not to make it more difficult for victims to obtain repair in situations where causation may be difficult or impossible to establish. In turn, this secondary duty can sometimes take the form of a positive obligation "to participate in schemes whereby one can ensure or substantially increase the probability that one will compensate one's victim, even if one's victim cannot be identified".<sup>40</sup> Steel argues that we can appeal to this duty of assistance to explain why we may sometimes require defendants to contribute to a fund that will compensate the claimant they have wronged. One of the particular rules he proposes in that regard provides:

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<sup>39</sup> S Steel, 'Justifying Exceptions to Proof of Causation in Tort Law' (2015) 78 *MLR* 729. Sandy's generous comments on an earlier draft have been immensely helpful in clarifying my thoughts about the relationship between our accounts.

<sup>40</sup> The underlying idea here is that a person who cannot fulfil their duty to another ought to enlist other people's help, so far as possible, in order to do so. As Victor Tadros, whom Steel quotes at 732, puts it: "If I promise to you to *v* and I cannot myself *v* I typically have a duty to get someone else to *v*", Tadros *V.*, *The Ends of Harm* (Oxford, Oxford University Press, 2012) 193.

*Causative defendant indeterminacy rule (CDIR)*. If D1, D2... Dn, each acting independently of the others, have each wrongfully injured one of C1, C2...Cn, but it cannot be determined in any case on the balance of probability which D has wrongfully injured which C, though it is true of each D that it may have caused each C's injury, then, each D is liable to contribute to a fund in the amount of the injury that it has, on the balance of probability, caused.<sup>41</sup>

This rule explains why two defendants whose separate conduct causes injury to one of two claimants, when it cannot be determined which defendant injured which claimant, may be held jointly liable to compensate those claimants. The rule can be justified to the defendants, Steel says, because

each D... has either caused a C's injury *or* prevented the C being able to enforce its secondary rights in respect of that injury. It may have prevented this enforcement because its wrongful conduct makes it impossible to attribute causality to a particular defendant. The prevention deprives C of the compensatory damages it would have obtained from the defendant who actually caused the damage... Hence, *each* D should be liable to *each* C...<sup>42</sup>

Steel proposes two broadly similar principles to deal with problems of causally indeterminate claimants and indeterminate defendants.

Steel's account seems to me to rely on three particular claims. One is that wrongdoers owe a duty to assist the persons they have wronged in obtaining repair. Another is that, in situations of causal uncertainty, this assistance ought to take the form of a contribution to a scheme that makes it more likely for the wronged persons to obtain repair. A third, and implicit, claim is that participation in such schemes can be justifiably limited to persons who have wronged the particular victims. I believe that the first claim is correct but that the second and third require qualification in ways that the value-of-choice account can explain.

Since people incur the duty of assistance in virtue of having committed a wrong, that duty will be present in all cases of where questions of causation arise, whether easy or hard. Under Steel's account, what changes from one group of cases to the other is the practical burden that the duty entails: full compensation or no compensation in easy cases (depending on whether or not the relevant standards of causation and proof are satisfied), appropriate contribution to a fund for the benefit of the claimant or no contribution at all in hard ones (depending on whether the requirements of Steel's particular principles are met). At the same time, an account

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<sup>41</sup> Above n.39, at 733.

<sup>42</sup> *Ibid* (original emphasis).

of the duty of assistance should be able to explain why the content of that duty differs depending on whether the case at hand is easy or hard, i.e. why that duty will generally require defendants to give a truthful account of what happened and perhaps to allow the victim easy access to certain pieces of evidence, and occasionally require them to make a contribution to a fund for the victim's benefit. We cannot require wrongdoers to do more by way of assistance simply because requiring them to do the usual amount would increase the chance that the victim's action would fail. Steel appreciates the point, and argues that wrongdoers are required to do more in hard cases because in those cases they have committed an *additional* wrong by acting in a way that prevented the victim from being able to enforce their secondary rights towards other wrongdoers. In his view, the victim's complaint against the defendants is: "if you hadn't wronged me at the moment or in the circumstances that you did, the causal question would have had an easy answer and I would have had a straightforward claim against you or the other wrongdoers".

The difficulty with that complaint is that the timing or the circumstance of a particular defendant's wrongdoing can constitute a wrong only if that defendant had an additional duty not to expose the victim to a situation of causal uncertainty. As we have seen, sometimes it makes good sense to require this of defendants. The members of the hunting party in *Summers v Tice* could be reasonably required not only to be careful when shooting, but also to adopt a hunting plan that would not have more than one persons in the hunting party shoot in the same direction at the same time. That, however, is not true of the defendant drivers in *Fitzgerald*. That group of defendants had no opportunity to coordinate the timing or sequence of their activities, and therefore could object to any principle that put them under a duty to choose a plan that minimised the incidence of situations of causal uncertainty. Steel's account misses the relevance of this because it treats the fact that the wrongs took place at the same time as enough to make the creation of causal uncertainty wrongful in itself.

The point reveals what looks to me a more general limitation of Steel's account, namely that his principles do not attribute significance to the opportunities that the parties had respectively to prevent the causal uncertainty from arising. Consider again the fictional variation of *Fairchild* in which a claimant employee has been provided by one of the defendant employers with a wearable asbestos detection device, but failed to wear it. Had the employee worn the device, there would have been no uncertainty as to that defendant's causal involvement in the harm. Steel's principles cannot account for the force of that employer's complaint against being lumped together with the other defendants because they do not attach weight to



the opportunities the parties may have had to avoid becoming embroiled, or embroiling others, in the causal uncertainty.

Similar concerns should lead us to be sceptical about Steel's implicit claim that participation in the scheme of assistance for the victim's benefit may be justifiably limited to wrongdoers only. This seems unduly restrictive, especially in situations where exposing the victim to the risk of causal uncertainty is not an additional wrong. The fact that in some of those situations we ought to protect the victim from the burden of repair need not entail that we may justifiably increase the burden of assistance on wrongdoers. Like the group of defendants in *Fitzgerald*, sometimes wrongdoers may reasonably disclaim responsibility for the fact that the victim cannot establish causation on the balance of probabilities. In some of those cases, the duty of assistance should perhaps fall on the community, in the form of a requirement for the establishment of an insurance fund for the benefit of certain victims. Steel's account does not make sufficient space for this option, but it does not show why it ought to be foreclosed either.

#### 4. Conclusion

A case of causation does not become hard simply because we do not know what happened or how it happened. It becomes hard when we find it difficult to tell whose problem it ought to be that what happened cannot be established to the satisfaction of normal standards of causation and proof. I have drawn on Hart and Scanlon's work to put forward an idea for resolving difficulties of both the conceptual and the epistemic sort: a legal standard that makes those difficulties a person's problem is justified when that standard affords that person the opportunity to affect how things go through their choices, and that opportunity is something that that person has reason to value. This idea is a good fit for our intuitions about both hard and easy cases. We find it fair to apply the 'necessity' standard of causation and the 'balance of probabilities' standard of proof in easy cases because people have the opportunity to meet their respective demands, and obvious reason to value being in charge of that task. We find it unfair to apply the 'balance of probabilities' standard in *Fairchild* precisely because claimants lacked that opportunity. My claim has been that our intuitions in both easy and hard cases, and in hard cases of both the conceptual and the epistemic sort, are underpinned by the same set of questions. Did the parties have the opportunity to prove what happened, or to satisfy a certain standard of causation? Would we be asking too

much of them if we required them to do so? If what happened cannot be proven to the satisfaction of the normal standard, or if some normally important counterfactual is impossible to establish, did the parties have the opportunity to choose whether or not to lead the causal enquiry down that *cul-de-sac*? And if so, would we be asking too much of them if we made the causal uncertainty their problem?