Book Review

S Green, *Causation in Negligence* (Bloomsbury 2015). 185 pp. ISBN 978-1-78225-521–5. £ 50.00 (hardback).

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I Introduction

The volume under review is testimony to the depth and sharpness of the scholarly debate on causation under English tort law.[1] In the words of the author,[2] the book has a twofold aim. First, it provides 'an accessible means of navigating the infamously baffling case law in this area by disentangling the different "types" of causal problems which arise, and classifying decided cases accordingly'.[3] Second, it 'offers a simple analytical formulation which is capable of dealing with all aspects of the causal inquiry in negligence, even those hitherto regarded as difficult. This formulation, referred to as the Necessary Breach Analysis (NBA), eschews detailed philosophical and theoretical handwringing in favour of pragmatic reasoning'.[4] As these statements make clear, the intended addressees of the volume are first and foremost English judges and students. Yet, the amount, complexity, and originality of the author's intellectual research give a lot of food for thought to scholars too.

In the following pages, after a sketch of the contents of the volume (section II) and of the NBA test (section III), I will express a few considerations on the book's proposal for a new tool for assessing causation (section IV), and on its possible value-added on the other side of the Channel (section V).

1 Suffice it to note that, in England alone, two other books were published in the same years on the subject: cf *G Turton*, Evidential Uncertainty in Causation in Negligence (2016), and *S Steel*, Proof of Causation in Tort Law (2015).

2 The author should not be confused with the two other eminent Greens in the causation field: the great American legal realist Leon Green, and his fellow citizen Michael D Green, who was one of the two Reporters for the 'Restatement (Third) of Torts: Liability for Physical and Emotional Harm'.

3 *S Green*, Causation in Negligence (2015) 1.

4 Ibid.

II The book's outline and contents

Underlying the book is a substantial dissatisfaction with the state-of-the-art of the scholarly debate over causation in negligence, whereby 'causation' means what many continental legal systems would dub 'factual' or 'natural' causation.[5]

The point is, as Green notes, that 'causation in negligence has become complicated, convoluted and confused', and 'has suffered from over-analysis or, at the very least, excessive micro-analysis, at the expense of attention paid to the whole'.[6] According to the author, the wealth of literature, hypotheses, and discussions, as well as the proliferation of theories, tests, and approaches, are not 'beneficial in constructing a causal model which meets the objectives of the tort of negligence.'[7] To Green, the major flaw of current intellectual constructions of the notion of causation is that they deal with problems that might be fascinating for scientists and philosophers, but are largely detached from the real life of law in courtrooms. Scholars tend to study a 'very specific and relatively unusual set of facts',[8] and to develop their models accordingly. In Green's view, 'hard cases make bad law for the very reason that they favour exceptions over rules'.[9] Further, claims arising from 'freakish accidents', to use Prosser's expression,[10] are quite rare in the real world.[11] Even when such claims are heard by English

5 See *M Infantino*/*E Zervogianni*, Summary and Survey of the Results, in: M Infantino/E Zervogianni (eds), Causation in European Tort Law (2017) 587, 597–601; *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann*, Questionnaire, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law I, Essential Cases on Natural Causation (2007) 1. The author acknowledges that problems of factual causation are often intertwined and hardly distinguishable by issues of (what under English law is called) remoteness of damage: *Green* (fn 3) 43–45. The same observation – that is, that the theoretically bright line between causation in fact and the second-stage of the causal inquiry becomes easily blurred in practice – is shared by many legal systems. In other common law jurisdictions, cf respectively *D Hamer*, "Factual Causation" and "Scope of Liability": What's the Difference? (2014) 77 Modern Law Review (Mod L Rev) 155–188 (Australia); *DA Fischer*, Insufficient Causes (2005–2006) 94 Kentucky Law Journal (Ky L J) 276, 290 (United States); as to continental Europe, cf *Infantino*/*Zervogianni* (supra in this fn) 597–601; *C von Bar* (ed), Principles of European Law – Non-Contractual Liability Arising out of Damage Caused to Another (2009) 751; *H Koziol*, Natural and Legal Causation, in: L Tichý (ed), Causation in Law (2007) 56, 66f; *B Markesinis*/*H Unberath*, The German Law of Torts (4th edn 2002) 103.

6 *Green* (fn 3) 1.

7 *Green* (fn 3) 2.

8 *Green* (fn 3) 10.

9 Ibid.

10 *WL* Prosser, Palsgraf Revisited (1953) 52 Michigan Law Review (Mich L Rev) 1, 12.

11 *Green* (fn 3) 9.

courts, judges handle them with much less effort than that exerted by theoreticians.[12]

It is therefore with the idea of developing more pragmatic tools for dealing with every day causation that Green analyses the most daunting problems of causation, engaging in a thorough dialogue with the major past and living authorities on causation in the English, US, Canadian, and Australian jurisdictions. The final result provides readers with a neat classification of substantive causal questions (made reader-friendly by the reminder, at the beginning of each chapter, of the most important cases on the issue), and with a brand-new refinement to the traditional 'but-for' test, which promises to better explain existing case law and better guide judges in future cases.

This is carried out in six chapters, preceded by the author's introduction (Chapter 1) and followed by some concluding thoughts (Chapter 8).[13] Chapter 2 presents the features of the proposed refinement to the but-for test, that is, what the author calls the 'Necessary Breach Analysis' (NBA),[14] while Chapter 3 identifies some basic 'causal principles' which should work in combination with the NBA to streamline the causal inquiry.[15] The other chapters classify and explore issues that have posed the most fundamental challenges to the but-for test under English law, such as cases of overdetermined and pre-empted causation,[16] cases of causal uncertainty with multiple contributions to an injury (such as those which prompted the development by English courts of the 'material contribution

12 Ibid. The observation about the judicial ease in managing causal problems seems to be transsystemic: see *C Quézel-Ambrunaz*, Essai sur la causalité en droit de la responsabilité civile (2010) 19–20 (France); *RW Wright*, Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts (1988) 73 Iowa Law Review (Io L Rev) 1001, 1002; *L Green*, Are There Dependable Rules of Causation? (1929) 77 University of Pennsylvania Law Review (U Pa L Rev) 601, 620 (United States).

13 See respectively *Green* (fn 3) 1–7 and 173–175.

14 *Green* (fn 3) 8–31.

15 *Green* (fn 3) 32–57.

16 According to *Green* (fn 3) 58, cases of overdetermined causation are cases involving events with 'multiple causal factors, all of which: are severally sufficient; are independent of one another; lead to indivisible injury; lead to the same type of damage; affect the claimant simultaneously'. By contrast, pre-empted causation involves events with 'multiple causal factors, all of which: have a non-duplicative effect on the claimant (ie the risks generated by at least one factor must never eventuate in damage to the claimant); are independent of one another)'. See *Green* (fn 3) 58–93.

to the injury' and 'material increase in risk' doctrines),[17] as well as cases of lost chances.[18]

In reviewing English case-law through the lens of the newly proposed NBA, Green engages in a tireless analysis of judicial decisions' details, and in a brave confrontation with the masters of causation in the common law world (such as, to mention a few, Jane Stapleton and Richard W Wright), often disagreeing with their conclusions and taking non-mainstream and non-conformist positions.[19] But the most original part of Green's thesis lies in her proposal of the NBA.

III A new test: necessary breach analysis at work

As said, Green elaborates a refinement of the traditional but-for test. The effort is intended to 'provide a framework for analyzing any given factual situation, so that the legally relevant causal issues therein can be identified and resolved in a straightforward and effective manner'.[20]

The proposed two stages of the NBA are articulated in the following questions:[21]

> Stage 1: Is it more likely than not that *a* defendant's breach of duty changed the normal course of events so that damage (including constituent parts of larger damage) occurred which would not otherwise have done so when it did? Stage 2, applied to each defendant

17 According to *Green* (fn 3) 94, the former are cases where 'there are multiple factors (not all of which need to be tortious); the case is not one of over-determination or pre-emption; it has been established that the tortious factor/s have had an actual effect on the claimant's position at trial; and either the injury is divisible in principle, but it is not possible to attribute constituent parts to particular factors on the facts of a given case …; or the injury is indivisible'. The latter are cases where 'there are multiple potential sources of the risk which has eventuated in the claimant's damage; there is a single agent responsible for that risk; there exists a "rock of uncertainty" such that causation is impossible to prove in principle' (*Green* (fn 3) 123). See, respectively, *Green* (fn 3) 94–122 and 123–152.

18 Defined by *Green* (fn 3) 152 as cases 'where a chance exists independently of the breach of duty, so that the defendant's breach affects the claimant's ability to avail herself of that chance, but does not affect the substance of the chance itself'. See *Green* (fn 3) 152–172.

19 One of the best illustrations of the originality of Green's analysis comes from her rejection of the idea that problems of causation and remoteness should be always detached from one another (*Green* (fn 3) 43–45). This is an idea, by contrast, defended by both Stapleton and Wright: see *J Stapleton*, Cause-in-Fact and Scope of Liability for Consequences (2003) 119 Law Quarterly Review (LQR) 388; *I Puppe*/*RW Wright*, Causation in the Law: Philosophy, Doctrine and Practice, in: M Infantino/E Zervogianni (eds), Causation in European Tort Law (2017) 17 f.

20 *Green* (fn 3) 4.

21 Ibid.

> individually: Was the effect of this defendant's breach operative when the damage occurred?

The test should work in combination with three basic causal principles:[22]

> [A] defendant will only be liable where she has, on the balance of probabilities, made a difference to the claimant's normal course of events; a defendant will only be liable for that difference which, on the balance of probabilities, she can be determined to have made to the claimant's course of events; a defendant is entitled to take her victim as she finds her at the time of her breach of duty (and this can work to both the advantage and disadvantage of the defendant).

What makes the proposed NBA different from the but-for test and from the other refinements of the but-for test developed over time developed (such as the well-known NESS[23] and INUS[24] tests) is that its first stage asks 'a counterfactual question of all breaches of duty taken together', while the second stage 'asks of each defendant whether her breach was operative at the time the claimant's damage occurred'.[25]

The book provides abundant illustrations of the superiority of the NBA vis-à-vis the but-for and other tests under many scenarios and under many variations. Two examples regarding pre-empted causation will suffice here.

The first one arises from the following circumstances: the claimant is run down and killed by a careless motorcyclist. Had he not been killed by the motorcyclist, he would have drunk the coffee he was carrying. Unknown to the claimant, the coffee contained a lethal dose of cleaning fluid, accidently put in the beverage by the trainee barista who prepared it, meaning that, even if the

22 *Green* (fn 3) 32 (further adding that '[t]hese principles, adhered to in combination with an NBA, will enable the causal inquiry to reach answers which are both consistent and predictable, regardless of the fact patterns to which they are applied').

23 NESS stands for 'Necessary Element of a Sufficient Set', according to which 'an actual condition *c* was a cause of an actual condition *e* if and only if *c* was a part of…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' (*RW Wright*, The NESS Account: Response to Criticisms, in: R Goldberg (ed), Perspectives on Causation (2011) 285, 291).

24 INUS stands for 'Insufficient but Non-Redundant Necessary Part of an Unnecessary but Sufficient Condition', as elaborated by *JL Mackie*, The Cement of the Universe: A Study of Causation (1980).

25 *Green* (fn 3) 17.

road accident had not killed the claimant, the coffee would have. As Green puts it,[26]

> on these facts, the first stage of the NBA is easily passed, since the hapless sleepy pedestrian would still have been alive but for at least one of the breaches of duty. Rather than being effectively absolved by the presence of the other breach, as would happen under an individualized But For analysis, both defendants are subjected to the second stage of the NBA…At this stage, all hypothetical worlds are ignored…This allows us clearly to see that, in the example given above, the fact that the motorcyclist's breach was operative on the claimant when he died means that the barista's breach was not operative, and never could be.

The second example is tailored to the facts of *Saunders System Birmingham Co v Adams*.[27] In that case, a car rental company had allowed one of its vehicles to be leased with faulty brakes. The car was then involved in a collision which injured the claimant, but the accident occurred because of the driver's failure to use the brakes in a timely fashion (without any knowledge that they were faulty). As observed by Green,[28] this is 'another situation in which the NBA is an obvious improvement on the But For test. In Saunders-type situations, the But For test is unable to distinguish between pre-empting and pre-empted factors because, again, asked of each factor in turn, the answer will be an affirmative one, which will deny all factors causal relevance'. By contrast, under the NBA it would be clear that '[t]he claimant was at no point affected by the faultiness of the brakes because, although they created a risk of injury to pedestrians, that risk never came to fruition. Instead, it was the wholly separate and independent risk created by the driver's breach of duty which actually culminated in the injury'.[29]

According to Green, the NBA would prevent judges from losing time on causal investigations about hypothetical worlds which turn out ultimately to have no legal relevance,[30] and provide them with an easy-to-use tool to assess causation and reach 'the correct result'[31] under any possible circumstance.

26 *Green* (fn 3) 18.
27 117 Southern Reporter (So) 72 (Ala 1928), where the court concluded that the only cause of the accident was the driver's failure to brake. On this case, see also below, under section IV.
28 *Green* (fn 3) 78.
29 Ibid.
30 *Green* (fn 3) 16.
31 *Green* (fn 3) 14.

IV The endless quest of the causation Grail

This is the place to discuss neither the possible strengths and weaknesses of the NBA, nor its alleged superiority vis-à-vis other tests.

What is rather interesting to note here is that Green walks the fine line between her professed pragmatism and the fascination for intellectual debates over causation, as well as that between her distrust for one-size-fits-all theories and the temptation of accommodating all causal problems under the umbrella of a single test. Throughout the entire volume runs the tension between the perceived need of discarding mental exercises of no practical significance, and the intellectual pleasure in engaging in multiple variations of hypothetical scenarios and in finding a would-be all-inclusive rule for getting to the 'correct result'.

It is difficult to resolve this tension. As the book itself shows, there are many grounds for being skeptical about the utility of academic digressions on causal problems, and about the search for an all-inclusive magic formula to do the trick. It is sufficient to take the two illustrations mentioned in the preceding section to realise that scholars disagree both as to tests to employ, and as to what their 'correct' results are.

One can, for instance, take the classic account of pre-empted causation – that of the 'desert traveler' scenario, after which the barista-careless driver example cited above, under section III, is modeled. In this hypothetical, first proposed by McLaughlin,[32] A puts poison in a traveler's water flask, whilst B later empties that flask with the result that the traveler dies of thirst while traversing a desert. These facts have notoriously fueled almost a century of scholarly disagreements. To mention a few participants in the debate, Hart and Honoré concluded that A and B are both factual causes of the traveler's death,[33] while Moore ended up proposing that nobody should be liable.[34] By contrast, Green's NBA would reach the

32 *JA McLaughlin*, Proximate Cause (1925) 39 Harvard Law Review (Harv L Rev) 149, 155, fn 25 ('Suppose A is entering a desert. B secretly empties A's water keg and weights it with salt. A takes the keg into the desert where C steals it, both A and C thinking it contains water. A dies of thirst. Who killed him?').

33 *HLA Hart/AM Honoré*, Causation in the Law (2nd edn 1985) 239–241; along the same lines, see *J Stapleton*, Perspectives on Causation, in: J Holder (ed), Oxford Essays in Jurisprudence. Fourth Series (2000) 61, 82–83; but see also *AM Honoré*, Necessary and Sufficient Conditions in Tort Law, in: DG Owen (ed), Philosophical Foundations of Tort Law (1995) 363, 378 (who, ten years later the 2nd edn of the volume with Hart, stands for the conclusion that, under the circumstance, only B is the cause of the injury).

34 *SM Moore*, Causation and Responsibility (2009) 248, 466f.

same conclusion mandated by Wright's NESS test,[35] that is, that only B is a cause of the final injury.[36]

No more academic uniformity is to be found on the facts of Saunders, where the Alabama Supreme Court ruled that only the driver was a cause of the pedestrian's injuries.[37] Under the facts of the case, both Wright (under his NESS test) and Green (under NBA) reach the same conclusion of the Alabama court,[38] while those who rely on the traditional but-for test would either make only the negligent car rental company liable,[39] or would opt for liability of both the car rental company and the driver.[40]

To put it simply, disputes are never-ending. Although one might raise doubts as to the pragmatism and the 'in-touchness' with the real world of these quests for the Grail of causation, it is reassuring to see that such disagreements have not yet restrained scholars' enthusiasm for delving into the search for new or better paradigms.

V A glance from the continent

Are there any lessons from all the above that can be drawn from the comparative and continental European perspective?

Although enriched with multitude references to works stemming from the common law world (especially from American and Australian legal literature),[41] the book under review is about English law. Its distinctive English flavour arises

35 *RW Wright*, Causation in Tort Law (1985) 73 California Law Review (Cal L Rev) 1737, 1802–1803. See also *Honoré* (fn 33) 239–241.

36 Green (fn 3) 64 f.

37 *Saunders System Birmingham Co* v *Adams*, 117 So 72, at 74 (Ala 1928).

38 Cf *RW Wright*, Acts and Omissions as Positive and Negative Causes, in: JW Neyers/E Chamberlain/SGA Pitel (eds), Emerging Issues in Tort Law (2007) 287, 304; *RW Wright*, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility (2001) 54 Vanderbilt Law Review (Vand L Rev) 1071, 1125, 1130; *Wright* (1985) 73 Cal L Rev 1737 1801, and *Green* (fn 3) 78. It should however be noted that other scholars understand the NESS as leading to the exoneration of the driver (*A Beever*, Rediscovering Negligence (2009) 425) or as inculpating both the driver and the car rental company (*Green* (fn 3) 8).

39 *DA Fisher*, Causation in Fact in Omission Cases (1992) Utah Law Review (Utah L Rev) 1335, 1373–1375; *L Green*, The Causal Relation Issue in Negligence Law (1962) 60 Michigan Law Review (Mich L Rev) 552, 569, fn 77.

40 *DW Robertson*, The Common Sense of the Cause in Fact (1997) 75 Texas Law Review (Tex L Rev) 1765, 1787 f; *WL Prosser*, Handbook of the Law of Torts (4th edn 1971) 239 f.

41 See, for instance, the quotations of Stapleton' and Wright's works cited above (see fns 19, 23, 38).

not only from Green's thorough survey of English leading cases about causation, nor from her attention to case-law details (where, as is well known, the devil of causation lies), but also from her focus on causation in negligence only, and the reliance that her proposed NBA makes on the breach of duty analysis. In many continental European countries neither the emphasis placed on fault liability, nor that on the notion of duty would make great sense. Many European tort law systems provide for multiple forms of strict liability, with the result that causation is usually discussed under tort law in general, rather than under a particular cause of action.[42] Further, since the requirement of a 'duty of care' relationship is unknown to the large majority of continental countries' tort laws, a test based on such a requirement would hardly be transplantable on the continent.[43]

What I think is more interesting from the civil law perspective is the very quest for a general refinement of the but-for test which animates the book. Both in common law and in civil law jurisdictions, courts and scholars have discussed for decades hard cases concerning factual causation, in which the traditional tools for handling causal problems – the but-for test in common law, the *condicio sine qua non* in civil law – are held to be unfit for adjudicating claims. Yet, in spite of the shared dissatisfaction for these tools, the intensity of common law scholars' theoretical struggles for providing a replacement to the but-for test in the last century has remained almost unknown on the continent.

This is not because continental Europeans are not aware of the limits of the *condicio sine qua non* test. They are. Actually, the limits of the *condicio sine qua non* were thoroughly discussed and reviewed at the turn of the 20th century especially by German criminal legal scholars,[44] whose teachings, fueled by the admiration for pandectism, have inspired the theory and practice of causation in tort throughout the whole European continent.[45] But in the last decades continental European courts and scholars have generally worked to overcome the limits of the *condicio sine qua non* in tort law on grounds other than the development of a new general test for factual causation. They have done so by proposing particular

42 See *BA Koch/H Koziol*, Comparative Conclusions, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 395, 425 f.

43 There is a wealth of comparative legal literature on this point. As far as causation is concerned, see for all *M Infantino/E Zervogianni*, The European Ways to Causation, in: M Infantino/E Zervogianni (eds), Causation in European Tort Law (2017) 85, 87–128.

44 See, among the many, the cases discussed by *F von Liszt*, Lehrbuch des Deutschen Strafrechts (14/15th edn 1905) 127.

45 On the German influence on the understanding of causation on the European continent, see *AM Honoré*, Causation and Remoteness, in: International Encyclopedia of Comparative Law, XI.7 (1971) 31 f ; *P Catala/JA Weir*, Delict and Torts: A Study in Parallel – Part IV (1965) 39 Tulane Law Review (Tul L Rev) 701 at 703, 708, 718 f.

ad-hoc variations of *condicio sine qua non*, elaborating new liability theories, resorting to procedural devices, and adapting the law of evidence and proof.[46] Whilst continental Europeans have used all these instruments to remedy the 'defectiveness' of the *condicio sine qua non* under specific circumstances, it seems to me that they have been comparatively much less interested than their common law counterparts in the search of a general substitute for the traditional test.

This is another reason to admire Green's brave diving into the depths of the theoretical ocean of causation problems. The quest for the Grail of causation might well be a perpetual process, but Sarah Green's attempt is worthy of attention and admiration.

46 Examples would be countless. Among the many possible illustrations, suffice it to point out how French and Dutch Supreme Courts ruled on collective liability of pharmaceutical companies selling a dangerous drug. Notwithstanding the uncertainty about the company which actually sold the drug to the plaintiff, the courts established the defendants' liability either by creating a presumption of causation (France), or by relying on an ad-hoc collective liability theory (the Netherlands). Cf Cass Civ 1, 24 September 2009, Bulletin no 187, no 08–16305, and Hoge Haad (HR) 9 October 1992, Nederlandse Jurisprudentie 1994, 535, comment by *CJH Brunner*. Scholarly proposals and judicial decisions getting round the problems posed by the limits of the *condicio sine qua non test* under specific circumstances have often inspired legislators. For instance, the 1992 Dutch Burgerlijk Wetboek (BW) contains, among others, express provisions on several and joint liability in cases of 'indeterminate' causation (ie, cases where an unknown member of a group or people causes a harm which could have been prevented by other members of the same group: art 6:166 BW), and of 'concurrent' causes (ie, cases where the harm appears to be the result of different factors, for each of which a different person might be responsible, but it remains unclear who actually did it: art 6:99 BW). Both the just-mentioned scenarios were considered by subsequent legislators. Art 186(4) of the Slovenian Law of Obligations of 2002, for instance, provides a similar answer to the indeterminate causation problem, whereas several and joint liability for the concurrent causation case is imposed by art 138(1) of the Estonian Law of Obligations of 2002, and by art 1.370 of the Romanian Civil Code of 2009. On the way continental legislatures follow theoretical and practical developments, as far as causation is concerned, see *M Infantino*, Causation Theories and Causation Rules, in: M Bussani/AJ Sebok (eds), Comparative Tort Law. Global Perspectives (2015) 279, 286–288.