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ترجمه کتاب

پژوهشکده بیمه، به منظور کمک به گسترش دانش بیمه‌ای، ترجمه کتاب

Causation in Insurance Contract Law

را در دستور کار خود قرار داده است. لذا از کلیه اساتید، پژوهشگران و دانش‌آموختگان رشته حقوق دعوت می‌شود که در صورت تمایل به ترجمه کتاب مذکور، کاربرگ درخواست ترجمه پیوست را به همراه سوابق علمی و اجرایی خود و ترجمه صفحات ذکر شده با ذکر عنوان کتاب، حداکثر تا تاریخ ۱۴۰۳/۰۶/۱۶ به آدرس ایمیل nashr@irc.ac.ir ارسال فرمایند.

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CHAPTER 2

Causation and interpretation

Introduction

In the field of philosophy, the most influential causation theory can be found in Hume. Hume defines a cause as

> [a]n object precedent and contiguous to another, and where all the objects resembling the former are plac'd in like relations of priority and contiguity to those objects, that resemble the latter.[1]

This definition identifies three conditions for a cause to be present.[2] First, a cause temporally precedes its effect. Second, a cause is contiguous to its effect. Third, all objects similar to the cause are in a "like relation" to objects similar to the effect. This third resemblance condition says that cause and effect instantiate a regularity – the core idea of Hume's Regularity Theory.[3] Causation is thus analysed in terms of temporal precedence, spatiotemporal contiguity and regular connection.[4] Attempts to analyse causation in terms of invariable patterns of succession are referred to as "regularity theories" of causation.

Hume's Regularity Theory deals with the nature of causation as that relation is referred to in science and in everyday life. A few key corollaries[5] are noteworthy: first, the spatiotemporal contiguity of cause and effect excludes causation at a distance: a cause is proximate to its effect, either directly or via a chain of contiguous events. Second, the temporal precedence of the cause and the direction of time imply that causation is asymmetric: if *a* causes *b*, then it is not the case that *b* causes *a*. It rules out the possibilities of simultaneous and backwards-in-time causation. The third condition means the causal relation between some actual particulars holds a certain regularity. Whether a regularity is true is thus determined by which specific matters of

1 Hume, *A Treatise of Human Nature* (London, 1739) in L. A. Selby-Bigge and P. H. Nidditch (eds.) (2nd edn, Oxford: Clarendon Press, 1978), p. 169.
2 https://plato.stanford.edu/entries/causation-regularity/.
3 Ibid.
4 Ibid
5 Ibid.

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peril. In this case, although perils of the sea led to the physical loss of the vessel, the assured's loss accrued at the time of the seizure, and the chain of efficiency ended. In this insurance claim, the incident of heavy weather had no consequence or legal effect. Therefore, the ensuing event could not be considered as the proximate cause or even a contributing factor.

In summary, as proximity in time is no longer the test in law, the expression of "chain of causation" in insurance claims should not refer to a "chain of events in time order" but a "chain of efficiency." The cause of a loss should be that circumstances existed which created the opportunity for the loss to occur. The efficient cause should be the peril which profoundly inserts the incidence of the loss at the starting point of the chain. On the other end, the chain of efficiency will be ended either by the consequence of loss or by an intervening cause. Under the latter circumstance, if the intervening event contributes to the ultimate loss or a new loss, a new chain of efficiency should be recognised and it should be the proximate cause in the claim. Contrary to the test of proximity in time, the cause happens at the last point, and seems more unlikely to be the efficient cause, unless it exercises an intervening causal effect on the occurrence of the loss or damage.

3.3 Causal terminology: shades of semantic difference

In insurance policy wordings, a wide range of different formulations may be found of the required connection between the occurrence of an insured peril and the loss against which the insurer agrees to indemnify the policyholder. For example, "disease clauses" in business interruption cover will use connecting language to describe the required connection between the occurrence of a notifiable disease and the interruption of the business, such as "following," "as a result of," "arising from" and "in consequence of." It is often contentious whether the use of causal expressions shows a clear intention to derogate from the proximate causal connection. A question will then arise: are there a variety of degrees, scalars and tests of causes, especially in insurance causation?

3.3.1 Scalarity of causation

Considering the philosophical accounts, Moore suggests that besides the bifurcated tests (cause-in-fact and cause-in-law) as discussed in Chapter 2, there is also a search for a unitary notion of causation that is much more discriminating (in what it allows as a cause) than the hopelessly promiscuous counterfactual cause-in-fact test of the conventional analysis.[62] The uni-

62 See Michael Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009), Chapter 4.

In terms of the test of causation, Per Lord Mance in *The Cendor MOPU*:

> When the Act was passed, the language "loss attributable to unseaworthiness" catered for the Victorian reluctance to look behind the last cause in time to any previous cause. How far the word "attributable" now allows regard to be had to causes which would, under modern conceptions, not be regarded as proximate appears undecided, and may in turn depend upon how far modern conceptions of proximity can, in cases of unseaworthiness, lead the eye back beyond the immediate cause to initial unseaworthiness as the real, dominant or effective cause.[75]

The important "how far" question, regretfully, still remains open in this case, as the focus of the decision was diverted to defining inherent vice and the efficient cause test. The legal connection between unseaworthiness and losses has been analysed in a carriage case, *Smith, Hogg v Black Sea & Baltic*.[76] The shipowner claimed a general average contribution from the charterer under a charterparty concluded for carrying an amount of timber. The charterparty stated that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage arising from (among other things) act, neglect or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. The vessel had been overloaded and commenced the voyage. She put into a port on the way to replenish her bunkers and she fell on her beam end subsequently. Before the appeal to the House of Lords, both courts below decided the vessel was not seaworthy and the shipowner had not exercised due diligence. However, the first instance decision found that unseaworthiness did not cause the loss, having considered that the unseaworthy condition had been remedied after the bunkering (which actually was not the case); whereas the Court of Appeal held the cause of loss was unseaworthiness due to a failure to exercise due diligence.

Lord Wright in the House of Lords looked into the pure causation of the divergent conclusions of the two courts below. Lord Wright supported that "a shipowner is responsible for loss or damage to goods, however, caused, if his ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen *but for* that unseaworthiness."[77] Therefore, unseaworthiness in the law of carriage by sea applies the but-for test in terms of causation. Moreover, as to the possibility of an intervening cause, Lord Wright doubted "whether there could be any event which could supersede or

75 *The Cendor Mopu*, para. 57.
76 (1940) 67 LlL Rep 253; [1940] AC 997.
77 Ibid., p. 259, cited from *Carver's Carriage of Goods by Sea*, 4th edn, p. 1005.

CHAPTER 8

Burden and standard of proof

As a general principle, the onus of showing that a loss has occurred which was proximately caused by an insured peril rests on the assured. Taking a fire policy as an example, once an insured who has established a loss by fire is *prima facie* entitled to recover. It is then for the insurer to establish that the fire was started with the insured's connivance in order to reject the insurance liability.[1] The evidence may show that the loss is *prima facie* covered by the policy, but if the matter is litigated, the burden of proof still rests upon the assured.[2] Where the cause of a past event is in issue and two or more competing causes are advanced, the burden of proof on causation remains on the claimant throughout, and though the defendant can advance a competing cause, there is no obligation on the defendant to prove its case.[3] The insurer may elect to put the claimant to proof rather than advance a case.

As explained by the Court of Appeal of Singapore in *Britestone Pte Ltd v Smith & Associates Far East, Ltd*:

> The term "burden of proof" is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This obligation never shifts in respect of any fact, and only "shifts" in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the

1 Christopher Butcher, "Loss, causation and burden of proof" in Rob Merkin, Iain Goldrein, Lord Mance (eds) *Insurance Disputes* (3rd ed., London: LLP, 2012) p. 196. *Slattery v Mance* (1962) 1 QB 676; *Kastor Navigation Co Ltd and Another v AGF M A T and others ("Kastor Too")* [2002] EWHC 2601 (Comm), [2003] 1 Lloyd's Rep 296.

2 John Birds, *Birds' Modern Insurance Law* (3rd edn, London: Sweet and Maxwell, 2019), p. 260.

3 *Rhesa Shipping Company SA v Edmunds* (*The Popi M)* [1985] 1 WLR 948, p. 951C.

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