

But-for Causation with Multiple Injurers

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Under the but-for requirement of causation, an injurer in tort cannot be held liable for more than the difference between the loss the victim would have suffered if the injurer had not been negligent, and the loss actually suffered by the victim. We demonstrate that, contrary to a widely accepted view, incentives may be insufficient under this requirement when two or more injurers cause harm to a victim.

The basic reason is that one injurer's negligence may lower the impact of another injurer's negligence, in which case there may be not only an efficient but also an inefficient Nash-equilibrium in the "game" played by the injurers. For instance, the negligence of either injurer may be sufficient for part or all of the loss, in which case neither injurer's negligence is necessary for it (duplicately caused injury). An inefficient equilibrium may then arise in which neither injurer takes due care, expecting the other not to do so. Courts and the Third Restatement of Tort Law actually loosen the requirement of causation in various ways, and we find that, with some reservations, these eliminate the inefficiency. These ways include considering duplicately caused injury as caused by the injurers, and, counterintuitively, when measuring damages, not subtracting benefits which an injurer's negligence bestows on the victim, when these benefits involve goods not actually harmed. In the case of more than two injurers, it may be warranted to expand the concept of causation further, as the Third Restatement does by employing the so-called NESS-test. We find that this test eliminates the potential inefficiency, but that so does the Shapley value in a less inclusive manner, when the injurers act simultaneously or without knowing each others' acts.