

## Comparative Study of Multiple Causation in the Iranian and Malaysian Tort Law

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### Abstract

This paper examines the concept of multiple causation. Causation is one of the important elements of tortious liability. Under this concept, the plaintiff must prove a causal link between the defendant's harmful act and the damage suffered by him. If the plaintiff cannot prove this connection, he cannot succeed and his claim will fail. Sometimes, the alleged damage may be the result of a single cause. In this kind of situation, the "but for" test is applied. In some other cases, the damage may result from more than one cause, and all the causes together contribute to the final result (damage). This is referred to as multiple causation. In this latter situation, the causes may occur concurrently (at same time) or successively (one after the other), but all of them combine to create a single injury. So the main question that arises in such a situation is, which one of the causes can be held responsible for the injury. In answering this question, various legal systems have different solutions. The Malaysian tort law, for example, places emphasis on the "substantial factor" as the basic solution in multiple causation cases. In Iranian tort law, on the other hand, the emphasis is on what a reasonable person would in the ordinary course of things consider to be the cause of the injury (the "reasonable factor" test). The determination of this reasonable factor is usually done by the judge. Once this reasonable factor is determined, all the other causes will not be considered to be substantial factors. But in concurrent causation cases, all the causes will each be fully liable for the resulting damage. In the case of causes occurring successively, each cause will be liable for the damage caused by it. Based on the existing literature, this kind of research has never been undertaken and, is therefore, novel. The article is divided into five parts namely:

(i) Introduction; (ii) Multiple causation under the Iranian tort law; (iii) Multiple causation under the Malaysian tort law; (iv) Comparative analysis of both legal systems; and (v) Conclusion.

**Keywords:** Causation; Substantial factor; Multiple causation in the Iranian and Malaysian law

### Introduction

#### Background

Multiple causation is one of the most complex legal issues in the tort law of both Iran and Malaysia. Consequently, lawyers and judges have devoted special attention to the subject. Different theories and solutions in both tortious legal systems show the importance and complexity of the subject. Various articles, as well as textbooks on tort law have been dedicated to the issue. In Iranian law, some sections of the Islamic Penalties Act (IPA) 1992 and the Civil Liability Act (CLA) 1961, as well as the Civil Act (CA) 1929, focus specifically on this issue. In their discourse, legal practitioners and writers have also included causation as one of the elements of tortious liability. For instance, Iranian legal writers, such as Katouzian [1], Darabpour [2], as well as Malaysian legal writers, such as Talib [3], Kidner [4], Murphy [5], Howarth [6], and Prosser [7] amongst others, dwell extensively on this issue. However, writers on Iranian tort law all concentrate on the old theories that have been derived from Islamic law. By contrast, Malaysian law is based, in part, on the common law, and is, to that extent, influenced by that system. As a result of this, the Malaysian legal system contains more contemporary solutions for addressing the multiple causation dilemma. However, as said, no comparative study between both systems on this issue has yet been undertaken. In that sense, this research is novel.

#### The objectives

The research has two important objectives: practical and theoretical. On the theoretical level, we try to find new solutions in tort law on multiple causation, in order to foster better understanding on the part of lawyers and legislators on the subject, as well as to correct the defects in the domestic law. On the practical level, the research can help judges

and professionals in diverse fields, such as engineers, doctors, and lawyers, in applying the doctrine of causation more correctly, thereby advancing the cause of justice, while also removing the ambiguities inherent in some of the older theories.

#### Methodology

This is pure legal research, and it is qualitative, descriptive, and comparative. We begin by describing the legal concepts and theories. We then critique them, and finally proceed to compare them under systems, highlighting similarities and differences. In the concluding section, we consider, as much as possible, what new solutions can be adopted from either system for the purposes of resolving the problem of multiple causation in the other.

#### The problem statement

Causation is one of the elements of civil liability (tort). It must be proved in all tort actions. If the plaintiff is not able to prove causation, his action will fail. Causation is the chain between an alleged injuries, damage, or loss, and the wrongdoer's (the defendant) act. Sometimes, there is a single cause of injury in an action, such as when a person destroys another party's house with an explosive device. Here, finding the cause of damage is simple. But in some other cases, more than one

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factor may cause an injury, and the judge must try to find which one of them is the cause of the injury. Finding the factual cause among various factors is very difficult and complex. Suppose pedestrian hurries to walk past a street, a reckless driver whose car has a technical defect, with a malfunctioning brake system then hits the him. The ambulance arrives late at the scene because the street has been blocked due to another accident. Then the injured person is brought to the hospital quite late. The doctors and nurses fail to act properly, and the hospital, in any case, is inadequately equipped. As a result, the injured person dies. The crucial question is, who is liable? This is just one example of the numerous possible cases of multiple causation. Multiple causation has various dimensions, as explained below, and this varied nature illustrates the complexity and difficulty associated with the concept: (1) The factors act together concurrently to cause a damage, for instance, three strong men push the defendant's car, which then falls into the river. Which one of the men will be liable, particularly in a case where the power of two persons would be enough for that result? (2) Two or more factors combine together to cause the damage, but each cause can independently create the same result. An example would be an innocent fire, which before reaching the plaintiff's house, combines with another fire set up by the wrongdoer to destroy that house. In this situation, it is clear that each of the fires acting alone can destroy the house. Who then would be liable for the destruction of the plaintiff's house? (3) Sometimes, different factors, not necessarily acting concurrently, may cause a damage and none of them acting alone can create that result, as in the example given above involving a medical case. (4) Sometimes, the causes act successively, that is, at different times (5) Sometimes, two or more factors may cause damage, but it is not clear which one of those factors has caused the damage. As an illustration, two hunters concurrently fire some shots and a person is injured. Or ten manufacturers produce the same drug, and the plaintiff suffers cancer as a result of the use of that drug. Which of the manufacturers will be liable? In Iranian tort law, multiple causation is basically understood as relating to cases where there are more than one factor, and a single injury or damage. On the other hand, in Malaysian tort law, multiple causation may relate to situations involving more than one factor with a single injury, or two different injuries in two accidents. Not surprisingly, multiple causation represents one of the most complex issues under that system, and it is important to find the cause of the injury. Therefore, where there are several causes in an accident, for example, in a vehicular accident, those causes may act concurrently (at same time), non-concurrently (not necessarily at same time), or successively. These three forms of causation are examined in this discourse.

But first, it is necessary to explain some of the key words in this article: "causation", "cause", and "multiple". According to the Cambridge dictionary, the word "multiple" means several, numerous, different, more than one, or double. And according to the Oxford dictionary, "cause" means that which produces an effect. In essence, causation refers to the connection or relation between two things.

Contemporary causation Issues in the courts are: Multiple causation, ambiguous causation and evidence of causation with two sub categories including; Use of scientific experts to prove causation and proof by preponderance that the evidence [8].

**Cause:** In contract law, causation is the causal nexus between breach of contract and damages

- Causal question will determine extent of liability
- Limited by foreseeability
- Purpose: efficient use of resources

The Iranian tort law is based on the philosophical conception of cause, and this approach creates some difficulties. Cause is a factor as a result of whose occurrence a damage arises. Absent its occurrence, the damage will not arise. In other words, the occurrence of the damage depends on the occurrence of the cause; the former cannot arise without the occurrence of the latter. Condition is a factor in the absence of which, the damage will certainly not arise, but if it exists, the damage may arise [9]. For example, to light a fire one needs a match, dry wood, and gasoline. Here, the cause is the match, whereas the dry wood and the gasoline are merely conditions for the fire to occur. This is because without the match, the dry wood and the gasoline alone cannot cause the fire; they are only conditions for it to occur. There is thus a need to distinguish between both concepts, because in such situations, the cause, rather than the condition is liable. The term: "cause" has not been defined at common law. Instead, the common law relies on the "but for" test, and the "substantial factor" test. However, the difference between cause and condition has been noted in legal commentary by some common law trained lawyers. They explain that the factors underlying an injury may all not be the same; some may be cause, while others may be merely conditions. The latter are only circumstances facilitating the occurrence of the damage. As Howarth [6] observes, it is necessary to distinguish between conditions and cause. He points out that where there is a causal link between the harmful act and the damage, the wrongdoer (cause) is liable. Prosser and Keeton [7] relying on *Gilman v Central Vermont Railway Co*, also argue that if the defendant has created a passive static condition which caused the damage he is not liable. Distinguishing between the two concepts is difficult, but necessary, in order to avoid the miscarriage of justice. In attempting to make this distinction, some writers utilize terms such as "proximate" "direct" and so on, to describe the causative relation. According to Markesinis and Deakin [10], if the "but-for" test does not pass one of these tests, namely the "proximate", "direct" (etc.) tests, it is a mere condition.

## Multiple Causation under Iranian Tort Law

Causation is one of the important elements of civil liability in Iranian tort law. A chain of causation is required in all cases, and without it, the plaintiff's action will fail. He ought to prove that there is a causal link between the harmful act of the defendant and his loss, damage, or injury. S1 CLA in referring to the elements of civil liability provides that, "Every one ....causes moral or material loss of another person."

Sometimes, there is only a single cause for an alleged damage. For instance, where a person damages another party's car, that person is the cause of the damage. In other cases, there are various causes. Those causes may act concurrently or successively. However, successive and concurrent causes have a common feature, which is that they are all effective in causing the loss. Sometimes, each factor acting alone is enough to cause the damage, but may combine with another factor to cause such damage. An example is where one defendant pours poison, and another pours arsenic into a cup of tea, which the plaintiff drinks, and then dies. Or two fires are started by two defendants, and both fires combine with each other to destroy the plaintiff's house. In these examples, each factor is able to trigger the loss. In some cases, no one of the causes is enough to independently cause the damage, but rather must combine with other factors to cause that damage. This latter situation is known as "latitudinal multiple." On some other occasions, the various losses occur consequentially in the sense that the occurrence of one loss leads to the occurrence of another loss, and so on and so forth. This can be illustrated by referring to a situation where a person

injures another, and then the injured person, as a result of that injury, suffers a serious infection, which in turn necessitates the amputation of his hand, leading consequently to the loss of his job. This situation is referred to as longitudinal multiple.

As mentioned above, the philosophical meaning of cause has preeminence in Iranian tort law. In every case, the judge must find the cause, and this is one of the problems faced under the Iranian legal system. Where there are various causes in an accident, who is liable? Against whom can the plaintiff bring an action? There are various solutions, both theoretical and statutory, to this question in Iranian tort law. We must first distinguish between two situations, concurrent (longitudinal) and multiple (latitudinal) because both have different solutions.

### Concurrent cause

Concurrent cause means that the damage is caused at same time by several persons, and the act of each of them is sufficient to cause that damage. For example, one person pours poison into the drink of another, then a second person pours arsenic into it, and the victim takes the drink and dies. In this case, the action of each defendant caused the death of the deceased, but their conduct in concurrence caused the same result. On the basis of the IPA, all causes are liable jointly and severally. S 365 IPA provides that, "Where several persons cause a damage or injury, they are liable in equal measure." This is because the result can be attributed to all of them, and there is a causal link between their conduct and the result. According to S14 CLA 1961, "Where several persons cause damage to another party, they are liable jointly and severally." It is to be noted that in Iranian law, joint and several liability is not applied as a general rule, but only as exceptional solution in those cases provided for in statutes.

There are other situations involving concurrent cause, as where several persons take an action concurrently, which results in a single accident, but with the action of only one of them causing damage. Here we do not know which one of them caused that damage. We can consider an instance where several soldiers concurrently shot a person who dies from a bullet shot by one of them. The difference between this case and the case involving a concurrent cause is that here, all the factors act in concurrence, but only the action of one of them causes the damage. But in the concurrent cause situation, all the factors act at same time, and are all effective in causing the damage. We refer to the situation involving several soldiers above as brevity cause (Sabab Mojmal). It is probable that the damage is attributable to each of them. In the example above, we know that a bullet from one of the soldiers killed the deceased, but we do not know whose particular soldier it is. It is clear that compensation must be paid to the relatives of the deceased. The problem, however, is which of the soldiers will be responsible for the payment of that compensation.

In this respect, no clear solutions are provided in the statutes, and those that are mentioned are not able to address this question, because unlike here, those solutions relate to situations where all the factors contribute to the damage leading to the possibility of joint and several liability. Legal and religious jurists have advanced various ideas for resolving this problem as outlined here. (1) All hunters, for example, are liable jointly and severally [1]. This solution is unjust and inconsistent with the exceptionality of the rule, which provides for joint and several liability (2) casting of lot – where there is no clear evidence to show which party is liable for the damage, we may resolve the problem through the casting of lot [11]. This solution is somewhat crude, and not legally compelling. Unsurprisingly, it has not been applied in

addressing multiple causation cases [12]. (3) Payment by treasury, meaning that the compensation will have to be paid by the state (Beyt ol Mal), since it is not possible to determine the party that is liable. This solution has been sharply criticized on the grounds that payments from the treasury are restricted to specifically identified cases, and not in situations such as this. (4) Common liability of all the causes - here, each and every party pays a portion of the compensation, the relevant portion being determined by the judge (Safari, 2000) [12]. It seems that, among these different suggested solutions, payment by the treasury is the fairest, because on the one hand, compensation is duly paid, and on the other, an innocent person is not charged simply on the basis of probability, without any concrete evidence. In the following case the concurrent causation has been discussed. *Fairchild v Glenhaven 3 WLR 89 House of Lords*.

This was a conjoined appeal involving three claimants who contracted mesothelioma, a form of lung cancer contracted by exposure to asbestos. Mesothelioma can be caused by a single fiber of asbestos. The condition does not get worse the greater the exposure. Once the fiber has embedded into the lung it can lay dormant for 30-40 years before giving rise to a tumor which can then take 10 years to kill. It will be only the last 1-2 years where a person may experience symptoms. By this time it is too late to treat. Each of the claimants had been exposed to asbestos by a number of different employers. They were unable to demonstrate, and medical science was unable to detect, which employer exposed each of them to the one fatal fiber.

**Held:** If the claimants could demonstrate that one employer had materially increased the risk of contracting mesothelioma they were entitled to claim full compensation from that one employer [13].

### Multiple causes (non-concurrent)

Multiple causation refers to cases involving more than one factor, which occur in such a manner that no single one factor can be said to be the cause of the damage. Instead, each factor combines with the others to cause that damage. We describe this as multiple causation in order to distinguish it from concurrent and successive causes. In this respect, various solutions have been advanced both in statutes, and in legal commentary.

**Proximate (Close) cause:** According to this theory, the cause of an injury is that which has direct and close relation to the injury, among all the intervening factors. So, the closest cause to the injury is the basic cause of that injury, and is, therefore, liable. This theory enjoys customary acceptance because usually when an accident occurs, the average bystander considers the closest factor to the accident to be liable. Some statutes refer to direct cause as the cause of the damage. In this regard, S332 CA provides that, "where one person indirectly destroys a property and another party directly destroys that same property, the direct cause (Mobasher) of the destruction is liable." This is because the direct cause is closer to the damage than the indirect cause. So it is liable [14]. S363 IPA contains an identical provision. The theory may be justified on the basis that the indirect factors before the occurrence of the direct factor, are in a static natural state, and the accident, as well as the resulting damage, would not occur in the absence of the direct factor. Thus, it is the activity of the direct factor that changes the situation and causes the damage. Hence, it must be liable [2].

**Predominated (precedent) cause:** This theory implies that where there are many factors in an accident, the factor that has the earliest effect in causing the injury is liable. S364 IPA provides that, "if two persons interfere in the occurrence of a crime forcibly and indirectly, a

person is liable whose action took effect before the actions of the others. For instance, one of them digs a well, and then another person put a stone beside the well, over which a pedestrian stumbles and falls into a well. The person who placed the stone near the well is liable, and there is no liability on the part of the person who dug the well". Here the stone had an earlier effect than the well.

**Equality of causes:** This theory implies that each factor has played a role in causing the loss, and all of them are therefore, liable equally. There is no difference between the factors or their features. All the factors interfere in the loss, and as such, they are liable. None of the factors can cause the damage alone. According to S 335 CA, "if two parties (train or vessel) are at fault, both are liable". S 336 IPA also provides that "where two vehicles collide and are damaged, if the collision is attributable to both vehicles whether both are at fault or not, each one of them is liable for half the damage caused to the vehicle of the other party." Moreover, S 365 IPA provides that "where several persons together cause a damage or injury, they must all pay compensation equally. S 14 CLA contemplates joint and several liability for all factors by providing that "where several persons cause a damage collectively, they are liable jointly and severally to compensate for the damage." The section is an example of the equality of cause theory, although the method of compensation is different. It should be noted that this solution is an exceptional one, rather than a general rule. It can only be applied where there is a clear statutory provision that provides for it.

**Measure of interference:** This theory is deduced from some sections of the CLA. S14 CLA, as mentioned already, contemplates the joint and several liabilities of all the factors, and provides that, "in the case the court (judge) determines the extent of liability of each of them according to their degree of interference." This solution seems just and fair because where the measure of interference is different; the measure of liability ought to be different.

**Theory of traditional cause:** This theory distinguishes cause from condition, and is more widely advocated. It does not treat all factors as equal. The cause of damage is taken to be that, which on according to the ordinary course of things, and based on the degree (balance) of probabilities, is the effective factor causing the damage. The remote cause is not to be considered. The judge has to evaluate all the factors and determine among them, the factor that has caused the damage, based on the ordinary course of things. The theory relies on custom in determining the cause of damage. The CA and the CLA do not contain clear solutions in this respect. However, S 355 IPA provides that, "whenever a person lights a fire in his estate, either of a scale, or in excess of a scale he requires, and which fire, against the natural course of things, suddenly spreads to, and damages a neighbor's estate, he is not liable.

## Multiple Causes under Malaysian Law

Causation is one of the elements of tortious liability at common law and in Malaysian law. A chain of causation between loss, injury, or damage, and the relevant factor is required. If the plaintiff is unable to prove the causal link, the action fails. Where there is a single cause in an event or accident, the "but -for" test is applied. This means that but for the defendant's negligence, the plaintiff would not have been injured [15]. In *Barnet v Chelsea Kensington Hospital*, the wife of the deceased person could not prove that the defendant's act caused the death of her husband, so her action failed [4]. It seems that the test has two meanings. The first is that,; but for the defendant's act, the plaintiff would not have been injured. In *DevonCounty Council v Clark*, the Court of Appeal found that there was a causal link between a psychologist's negligence,

the lack of remedial teaching provided to the claimant, and the long-term effects of his dyslexia [16]. The second meaning of the test is that, if there were not the defendant's breach of duty, the accident would not have occurred [4]. Both meanings of the "but-for" test are substantially consistent with the meaning of cause in Iranian law.

In spite of its importance, the "but-for" test cannot apply in all cases. The following are some of its limitations: (1) where an accident is caused by concurrent factors, each of which is capable of creating the same result, for example, where two persons carry candles in a place where there is gas leakage, leading to an explosion, the act of each defendant is sufficient to independently cause the explosion. The "but for" test cancels both causes. (2) Where two hunters concurrently fire shots and injure the plaintiff, if the "but-for" test is applied, both hunters would be absolved of any blame. However, the High Court of Canada held that both hunters were liable [6]. (3) Where a wrongdoer, and an innocent defendant concurrently cause a loss, such that each factor acting alone is capable of causing that loss, as where two fires, one from a wrongdoer, and the other from an innocent party, which before arriving at the plaintiff's house, combine together to destroy it, the High Court of Vyskansy held that none of them was liable. This is because the result occurred without the defendant's act [17]. (4) Where there are multiple factors in a case (for example a road accident), the "but-for" test is not useful [16]. This is so in that it cannot establish but for which factor, the plaintiff would not have been injured. Put briefly, in situations involving multiple causes, the "but-for" test is not suitable [18]. There is, therefore, a need to look for other solutions for the purposes of resolving the problem. Lawyers and judges have attempted to suggest various solutions as outlined below.

## Different forms of multiple causation

An examination of legal texts and the case law would show that the following situations are treated as multiple causation at common law and in Malaysian tort law: (1) Concurrent causes act at the same time, and each one acting alone, is capable of causing the damage. (2) Several causes contribute in causing the same damage, but no one of them is sufficient to cause that damage, such as in medical cases, where a patient dies from the fault of several persons. (3) Successive causes lead to damage in succession, as where in a vehicular accident, a car is damaged in two successive accidents. Here, the cause of the first accident will be liable for repairing and spraying the damaged car. However, the cause of the second accident will only be liable for repairs. (4) Various causes lead to an injury at different times, but it is not certain which one injured the plaintiff. A useful example here is where a person worked at five different factories in succession and then contracted a skin disease. (5) Various sources produce the same disease, such as environmental pollution caused by several factories, or injury caused by pills made by twenty manufactures. (6) Two hunters case - *Summer v Tice*.

**Concurrent causes:** In this situation, several causes contribute to the occurrence of an event. Although each one of them alone is capable of causing the damage, they all combined to cause it. In such a case, all the causes are liable jointly and severally, although the plaintiff cannot recover more than once (*Hodgson and Wait* 2001). The causes may all act concurrently, or independently, but all the actions combined together to cause the damage [15].

**Multiple causes:** A situation involving multiple causes arises where there are different factors causing the damage, but which are not necessarily occurring/acting at the same time. Each one alone cannot cause the damage. A good example of situations involving multiple causes is the medical case earlier mentioned. The main question here is:



which factor is liable? There are various solutions in this respect both at common law and in Malaysian tort law.

### Substantial factor

Where there are many factors causing damage in a case, some legal analysts have advocated the substantial factor as the basic factor, in order to distinguish the cause from other factors (conditions). This means that the other factors are not liable, and the defendant's conduct must be the substantial factor causing the damage. Analysts employ different terminologies to convey their understanding of "substantial factor." Thus, in addition to "substantial factor" [4,19], some analyst also use the phrase "material cause" [6,20], or "sufficient causal link" [10]. Sometimes, "proximate cause" is also used. It is difficult to describe the nature of the substantial factor without applying some common sense. According to the substantial factor theory, where there are multiple causes leading to the damage, and it is not known which one is the cause, the plaintiff must prove that the defendant's act, at least, had material interference in causing the damage. In that case, the defendant must pay full compensation [20]. Of course, as Hodgson and Wait [19] emphasize, the solution is a pragmatic rather than a theoretical one. In both *Hoston v East Berkshire Health Authority*, and *Wilsher v Essex*, the courts relied on the substantial factor test. Also, in *Barnet v Chelsea and Kensington Hospital, Neil J*, relying on the theory, declared that "I find that the plaintiff has failed to establish on the balance of probabilities, that the defendant's negligence caused the death of the deceased" [4]. This case seems to suggest that the substantial factor is the factor, which on the balance of probabilities degree (more than 50%) has been effective in causing the damage. As some writers maintain, the plaintiff must prove that at least 51% of the defendant's failure caused the damage [16]. The suggestion is based on the balance of probabilities degree. So where a factor has an effect of more than 51% in causing the damage, it is the more effective cause. In *Devon County Council v Clark*, the Court of Appeal found that there was a causative link between a psychologist's negligence, the lack of remedial teaching provided to the claimant, and the long-term effects of his dyslexia [16]. The substantial factor is sometimes a test for the proximate cause [7]. The substantial factor must bear responsibility for complete loss [21]. In summary, the legislature or the judge employs terms such as direct, proximate, foreseeable, remote, sufficient, or similar words to describe the important features of the causal link between a wrongful act (omission, negligence), and its result. And a factor, which does not have one of those features, is deemed to be a mere condition, not a cause. If the damage is caused by two factors, and it is indivisible, both factors are treated as the substantial cause. In *Corvey v Havener*, two motorists were involved in a race, and one of them collided with and injured the coachman. Both motorists were considered to be the substantial cause of the injury. Substantial factor has been explained through two subsidiary theories by some legal scholars [5]. These are "increasing risk" and "increasing harm".

**Increasing harm:** According to this theory, the substantial factor implies that it is not necessary for the plaintiff to prove that the defendant's behavior was the sole cause of his damage. What is important is for the plaintiff to show that the defendant's conduct was the substantial factor causing the damage suffered by him. In *Bonnington Casting Ltd v Wardlaw*, the plaintiff contracted pneumoconiosis after inhaling dust from two sources—swing grinder and pneumatic hammers—at his place of work. One of these sources, the hammer, was innocent, and the other, the grinder, was negligent, as it accounted for a greater percentage of the dust inhaled by the plaintiff. But the plaintiff could not satisfy the "but for" test. The House of Lords held that the defendant was liable

because the dust from the grinding machine was one of the causes that contributed to the disease. The plaintiff only needed to prove that the dust inhaled from that machine was an important cause of the injury [5]. In other words, based on the balance of probabilities, the dust from the grinding machine was an important factor that caused the disease.

**Material increasing risk:** In *McGhee v National Coal Board*, the plaintiff worked for the defendant, and contracted dermatitis because of his exposure to brick dust. The defendant was held to be at fault as he did not prepare a washing room for the plaintiff to wash himself after work. The plaintiff only washed himself after he arrived at home, and as a result, he contracted dermatitis. However, it was not clear whether his disease arose from the defendant's failure to provide a washing room. The plaintiff could not prove that the employer's breach of duty had materially contributed to the injury. He also could not satisfy the "but-for" test. However, it was proved that his disease was associated with brick dust, and that the dust covered his body after he started to work. The House of Lords held that: it was sufficient for him to prove that the defendant's breach materially increased the risk of injury to him. Accordingly, the plaintiff was allowed to recover compensation in full. This is because, by not providing a shower room, the defendant had materially increased the risk of the plaintiff contracting dermatitis [6,22]. The burden of proof shifted to defendant to show that his failure was not the cause of dermatitis. This solution applies where there is no conclusive evidence to show that the defendant's fault is the cause of the damage, and also where there is no certainty as to the actual and specific cause of the damage [3]. Hence, it seems that the solution is a subsidiary, and not a principal rule. The *McGhee* was distinguished in *Hoston v East Berkshire Area Health Authority* where the defendant was found not liable. It was held that the plaintiff must prove, on the balance of probabilities degree, that one cause materially played a role in causing the loss. In *Kayv Ayrshire and Arran Health Board*, the plaintiff could not prove causation. It seems that in this case, the court leaned toward the material cause theory. Also in *Wilsher v Essex Area Health Authority*, the court tended to rely on the material cause or material contribution theory. Thus, the defendant was obliged to pay full compensation [16]. Some lawyers have suggested that under Malaysian law, material contribution in increasing the risk of damage is applicable. For example, in *Wu Siew Ying v Gunung Tunggal Quarry and Construction Sdn Bhd Ors*, the *McGhee* principle was adopted. However, in another Malaysian case, *Dr K.S. Sivanathan v The Government of Malaysia & Anor*, the court distinguished *McGhee* from *Wilsher*. In *Wilsher*, it was held that the doctor could not conclusively be deemed to be the causative factor behind the plaintiff's final injury [3]. The material contribution theory was accepted.

The material contribution solution is not as inclusive after all, as it does not apply to all cases. It applies only to cases in which the relevant risk breaches the duty of care. The burden, in such cases, is on the defendant to avoid causative relation. In essence, the burden is shifted to the defendant, who must avoid the risk. However, a different approach was adopted in *Hoston v Berkshire*, where the House of Lords held that the plaintiff was not entitled to compensation because he could not prove that, on the balance of probabilities, the defendant's failure was the cause of his damage. In order for him to succeed on causation, the plaintiff needed to prove that there was at least 51% chance that the defendant's failure caused the damage [16]. This thus is an exceptional solution. In *Fairchild v Glenhaven Funeral Service Ltd* [13], the House of Lords noted that policy issues must also be considered. Hence, in exceptional cases, the "but for test" must be set aside, and every employer ought to be treated as materially contributing to a risk according to the length of term the plaintiff had been working

for him. Therefore, in *Wilsher v Essex*, the House of Lords applied the material cause test [20]. Also, in *X Y Z v Sheering Health Care*, the judge held that there was not a considerable risk, and the plaintiffs accordingly failed in their action.

**Predominant cause (front in influence theory):** As a way to address the problems observed above, some legal writers, such as Clerk and Lindsell [22] have proposed the predominant cause theory. They suggest that where there are several causes in an action, and their combination have caused the particular damage, the predominant cause is liable. In *Rouse v Squires*, it was held that, "the prior negligence of a lorry driver who skidded and obstructed the motorway continued to be an operative cause and contributed to a subsequent accident when another driver failed to see the obstruction in dark frosty conditions and skidded killing the claimant" [22]. The theory is, to some extent, based on fault, and Carin L.J. justifies it in the following manner, "Not those who deliberately or recklessly drive into the obstruction. Then the first driver's negligence may be held to have contributed to the causation of accident of which the immediate cause was the negligent driving of the vehicle."

**Proximate cause:** This theory is based on the close connection between cause and damage. If in an accident there is so close a connection between the defendant's act and the plaintiff's injury, the defendant is liable [15]. It means that the defendant's conduct is a substantial factor in bringing about the plaintiff's injury. Sometimes, the proximate cause is termed the last human wrongdoer [7]. The last human wrongdoer is liable for the damage, while others, who are antecedent in time, are exempt. The proximate cause relates to liability based on fault (negligence). But in intentional torts, or in cases where the defendant has intended the consequences of his action, the test will not apply, and intent disposes of any question of remoteness. This view was expressed by the court in *Quinn v Leatham*. The defendant must incur all the consequences of his action, whether remote or close. In *Smit New Court Securities Ltd v City Bank NA*, it was held that the consequences of the defendant's action (in cases involving intent) will never be too remote [22]. He is liable for every damage attributable to him, whether or not such damage was reasonably foreseeable. This theory has advocates in the English law on multiple causation, who believe that the latest cause or the closest cause is liable. Francis Bacon criticizes the equality of causes and asserts that, it is difficult that the law evaluates all causes and their effects on each other because it is an endless duty, so it (law) is satisfied with the direct and proximate cause [1].

**Degree of blameworthiness:** This solution has been proposed in relation to cases involving vehicular accident, and it is said that the driver must bear a greater share of the blame, while the passenger who could have reduced the damage by wearing seat belt must also bear some share of the blame. In *Davis v Swan Motor Co Ltd*, the court pointed out that consideration not only should be given to the causative potency of a particular factor, but also its blameworthiness. The question is what damage should be payable. The question is not to be prolonged by an inquiry into the degree of blameworthiness on either side. It suffices to assess a share of responsibility, which will be just and equitable. If there is failure it makes a difference, which means that the failing party is liable [19].

**Equality of causes:** This theory holds that if there are more than one factor that may be deemed to have caused the damage, the court should not dismiss the possibility that all the factors are liable. So, as stated in *Baker v Market Harborough Industrial Cooperative Society Ltd* [22], if the judge can find which factor is solely blamable, he holds

that factor to be the cause. But if he cannot find which one is the sole or substantial factor, responsibility will normally be assigned equally among all the different factors. In *Fitzgerald v Lane*, all three parties were found to have acted negligently, but it could not be established the act of which party caused the crucial injury. The Court of Appeal found both the 1<sup>st</sup> and the 2<sup>nd</sup> defendants liable. If the damage is indivisible, the causes incur joint and several liability for the entire harm caused [23]. In *Bierczynski v Roger*, where two motorists were involved in a race, and one of them was compelled by the other to hit a horse, it was held that both drivers were liable for the full loss [15]. This is contrary to Iranian law. According to Howarth [6], if both sides are balanced, and it is impossible to identify the portion of each side, the damage is suffered by both equally.

### Brevity cause

**Two hunters:** This case is of a complex and puzzling nature, because it is certain that the relevant damage was caused by one of the wrongdoers, but it is not known which one. This is illustrated by the two hunter cases namely, the U.S. case of *Summers v Tice*, and the Canadian case of *Cook v Lewis*. In these cases, two hunters fired shots, and the plaintiff was immediately injured by one bullet, but it was unknown the gun from which the bullet that hit plaintiff was fired. The "but for test" could not be applied. Each hunter argued that he was not liable because there was no evidence to show that he caused the injury. It was clear that the bullet, which injured the plaintiff, came from only one of the guns so both defendants could not be liable. The courts held that both defendants were liable [6]. These cases are examples of situations involving a single cause, but due to lack of evidence to establish who is inevitably liable, the court decided that all the defendants were liable.

**Share of contribution in market:** This relates to mass torts, where the plaintiff, for example, is not able to prove which manufacturers or pills injured him because of the generic nature of the production. In some cases, the plaintiff may suffer injury due to the consumption of a drug that he bought from a drug store, for example, aspirin, which was produced by many manufactures. Every one of those manufacturers may claim that the others are liable. The plaintiff cannot prove which manufacturer produced the drug that he consumed where it is not specified to which manufacturer the drug belongs. Similar situations may arise in environmental pollution cases. For instance, the plaintiff may suffer a disease caused by a dangerous pollutant that may have emanated from more than 30 firms. In such cases, the plaintiff cannot prove causation. The risk contribution theory has been advanced as a way of relieving the plaintiff of the burden of proving causation in these cases. In some cases, the courts have held that each factory is liable in accordance with its share of the relevant market. For example, if a manufacturer commands 20% of market supply, it will be liable for an equivalent percentage of the damage. In *Sidle v Abbott Labs* (1980), the court allocated liability among DES manufactures according to their respective market shares [21]. All the manufacturers contributed to the creation of the risk that the deceased person had incurred. In *Mass v Mallet*, the court also decided on the basis of the market share of the defendants [15]. Lord Hoffmann, in the *Fairchild* case, observed that the attribution of liability according to the relative degree of contribution to the chances of disease being contracted would smoothen the roughness of the justice which a rule of joint and several liability creates [4]. In mass torts (toxin), the plaintiff is not able to identify the specific product, brand, retailer, or manufacturer, because of the generic nature of the product. The risk- contribution theory has, therefore, been used to lighten the plaintiff's burden of proof. When a boy ingested lead paint resulting in brain damage, the plaintiff could not prove and identify

the manufacturer of the paint that he ingested. On the basis of the risk contribution theory, the court found that many of the individual defendants knew of the harm caused by white lead carbonate pigments, and yet continued production. Thus, in *Thomas v Mallet* [15], it held that each industrial defendant contributed to the creation of the risk of harm to the public generally, and the plaintiff specifically. The market share liability theory implies the abandonment of causation [6]. It should be added that if one of the defendants is innocent, and the other is the wrongdoer, then according to the alternative theory, the onus is on the defendant to prove his innocence.

### Successive causes

In this situation, the causes occur successively so that the second or third factor may create the same damage as the first, or even more, as in a situation where the plaintiff's car was damaged in an accident, and then damaged a second time in another accident, with the latter damage being of the same, or greater magnitude than the earlier one. In *Performance Cars v Abrahams*, the plaintiff's car was damaged in two collisions successively. It was held that the second defendant was not liable for the respray of the car, because the damage was caused in the first accident. A similar decision was reached in *Carslogie Steamship Co Ltd v Royal Norwegian Govt*. In *Baker v Willoughby*, the plaintiff was injured twice in two different accidents. In the first accident, he was injured in his leg as a result of which he could not perform heavy tasks. In the second involving a robbery, the same leg was shot and it had to be amputated. The House of Lords held that the first defendant was liable for the first injury, and his liability remained for the amputation of the leg. But in *Jobling v Associated Dairies*, the plaintiff was injured in his back in the first accident. As a result, his ability to work was reduced and his earning capacity reduced to 50%. Then between that accident and trial of the case, he contracted a bad condition not related to the first accident in such a manner that he could not work at all. The House of Lords held that the defendant was liable for the loss of earning only up to the cutoff point date he was not able to work at all. The decision was based on the premise that from that point on, there was no earning even without the accident [24]. This contrasts with the decision in *Baker v Willoughby* where the first defendant was held liable for the loss of earning even after amputation [20]. Some lawyers contend that if the second accident was created by the negligent, or deliberate act of the defendant, Baker would apply, but if the second accident arose from a natural event, then *Jobling* would apply [16]. But, save for policy considerations, it is not clear what difference exists between the two situations. The reasoning in *Baker* was followed by the appeal court in *Murrell v Healy* and in *Heil v Ranking* [20].

### Critiquing of the Theories

In this section of the article, we subject the theories already discussed above to further scrutiny.

**Proximate cause:** The theory propounds an easy solution and facilitates the task of the judges. The judge simply looks for the direct cause among all the factors, and then holds it liable. The theory is realistic, but only to some extent. It cannot be treated as a basic theory, which can be applied in all tort cases. To that extent, it tends to create undesirable results. For example, if a person injures another, and the later goes to the hospital, where the doctor was negligent, and he subsequently dies, in accordance with this theory, the doctor will be liable. Or, if a passenger runs across a street into a car which is recklessly driven by the driver, the passenger is liable. SS 332 CA and 363 IPA validate this critique in providing that, "...unless the indirect cause is stronger..." Therefore, it is suitable and more relevant to pay attention to

the degree of the interference, effect, force, fault, weakness, or strength, and so on, of the factors, instead of their proximity or remoteness. Hence, the solution offered by this theory is not inclusive, and is not capable of being applied to all cases.

**Precedent cause:** This theory is partially realistic since it may be that the preceding cause is the effective cause, and custom usually attributes the damage to it. But it cannot be treated as a principal theory that can be applied in all cases. Otherwise, it will lead to awkward results. For example, if a person feeds fatal poison to another, who is killed by a third person with a gun, the third person is liable, and this would be an unjust result. The provision of S364 IPA shows that the legislature has not treated this as a basic rule. This is because that section further provides that "if one of them does a forcible action and the other does not, the former is liable." This theory cannot apply in concurrent causation cases because in such situations, there are no predominate or later causes for the damage. Instead, all the causes act at the same time, and the resulting damage is attributable to all of them. The important question here is that where both persons intended to destroy the property of a third person, how we can say that only one of them is liable? There are differences among religious jurist in the respect. Some lawyers suggest that the provision of this section is restricted to cases involving indivisible damage [1] (in Malaysian law). It seems that the predominant cause theory is an exceptional rule, and applies to situations involving vehicular accidents, in particular, circumstances, such as those indicated in the case law, and apparent from Carin L.J.'s remark noted above. It may be added that the same critique previously made in this respect under Iranian law can also be made here.

**Equality of causes:** This theory, like the others, is only partially realistic. Each factor alone cannot cause the loss, but must combine with the others to do so. Thus, they all must be liable. However, it is faced with several objections. For example, it does not justify correctly why the features of the factors must not be considered. Moreover, it is not clear why the fault factors and the innocent factors are to be considered equal in effect. Also, all factors are not "cause"; some of them are mere "conditions", and conditions alone cannot cause damage. Therefore, the factors are not equal. For example, where a passenger in a vessel leans over to the extent that he falls into the sea, and the vessel, unfortunately, has not rescue boat, are the two factors equal? Additionally, according to the solution put forward by this theory, the judge has to consider all the factors, which is quite an arduous task. Furthermore, in cases involving indivisible damage, such as physical injury to a person, or a moral loss, the theory cannot apply because it cannot determine the portion of the damage that is attributable to each factor. In relation to these critiques, some lawyers, for example [1], suggest that the "content of S365 IPA is on the contribution of compensation between factors". This suggestion has, however, also attracted some criticism. Other lawyers criticize the theory on the grounds that all factors are not equal; some of them are only conditions, and not the real cause of the damage, while others are causal factors. For example, the failure to have a life boat ready is not the cause of the death of a person who sinks immediately, without any trace upon falling into the ocean [7]. That failure is a condition, which only facilitates the sinking. So there is no causal link between the failure and the death. Rather, the deceased's act of leaning over the ship is the cause

**Measure of interference:** the theory is fair and just. However, applying the theory in practice presents some problems. For example, how can we determine the measure of interference of the different factors? Is there a scientific criterion to be used for the determination of the degree of interference? How can the court determine the degree of interference in indivisible injury cases? Nonetheless, beyond these problems, it is a just solution in theory.



Traditional cause theory: The theory is based on the ordinary course of things and the degree of probabilities. Weakened, accidental, and very remote factors are not considered to be the cause of damage. All factors are not equal. Thus, it seems fair and just. The solution is not based on the philosophical meaning of cause, but rather on its traditional meaning, which is what, in the view of reasonable persons, and based on custom, is considered to be the cause of the damage. In spite of all its appeal, it is not an all inclusive theory. This means that it is not to be applied in all cases. For example, is the foreseeability of loss required or not? Moreover, custom involves specific judgments in all cases. In complex situations, such as those having an environmental or industrial dimension, how might one determine the cause based on custom? This being so, is there any other solution for resolving the problem? What is the role of fault? These and many more questions may be asked. In some cases, a minor fault may be blamable even though it is not the cause, based on the ordinary course of things. For instance, a driver, who at a gas station, throws a snip and burns the gas station, is blamable [25,26].

### Multiple Causation: The New Theory Judge (Authority) Theory

In both the Iranian and the Malaysian legal systems, there has been a tendency toward the goal of justice. The different theories show that much effort has been made by the legislatures and the judges to reach the ends of justice. In any tort action, the cause is liable. Hence, it is always necessary to determine the cause of damage. The various theories represent different ways of searching for that cause. No theory alone is capable of showing causative connection in all cases, neither is that necessary. The appropriate solution would vary with individual cases. Sometimes, the complexity of the relation is such that we cannot even rely on a single solution. Finding the cause in such circumstances is usually very difficult. Also the measure of the contribution made by the different factors in causing the damage is not the same. The legislature cannot enact a single and general solution for all cases. The person who hears and determines the case is the judge, and he must have sufficient authority to evaluate all the interfering factors in a case. Sometimes, the remote factor may have a substantial effect, and at some other time, the proximate factor may have a greater effect, and so on. The judge may seek assistance from various experts, in order to find the relevant cause. He has to consider fault and failure, especially the protection of the injured party, public policy, and a plethora of other factors. So there is no single, all inclusive theory on this issue. The judge may turn to various theories as a guide, but he is not bound to stress on any one of them. Instead, he must elect the most proper one in every case. The cause(s) is a factor that is required to effectively trigger the occurrence of the particular damage. In other words it is the substantial factor. The suggested solutions are descriptions of the features of "cause". The main duty of the judge is the dispensation of justice. The solutions must not obstruct the cause of justice. Each theory explains only a part of the fact, not the whole. Everything put together, the judge's authority as an inclusive theory is to be suggested.

### Comparative Analysis

In order to analyze both the Iranian and the Malaysian legal systems, we considered the similarities and the differences between both systems. On the basis of that consideration, the following can be regarded as the similarities between the two systems. In situations involving accidents, cause is that factor the occurrence of which leads to the particular accident. The "but-for" test covers both meanings. So it is said that but for the defendant's act, the plaintiff would not have

been injured. In other words, due to the defendant's act the plaintiff has incurred the injury at issue. Both senses of the "but-for test", as explained above, conform to the classic appreciation of cause in Iranian law.

Both systems distinguish condition from cause, and the latter is held liable for the damage in question. The substantial (ordinary) factor is the basic rule in the issue of causation. The other theories are exceptional. In indivisible damage, each factor is liable for full compensation. Intentional injury looks for remote results. The substantial factor is liable for foreseeable damage. A causal link between the alleged loss and the defendant's conduct is required. In injuries occurring successively, the defendant is liable for the injury that he has caused. If there is a breach of duty by the defendant, (in increasing risk cases) but the plaintiff fails to prove a causal link, the burden of proof is shifted to the defendant to establish the absence of fault. Apart from the substantial factor test, there are other theories, which can apply in particular cases, and may also be treated like the substantial factor test, as the case may be, by the judge. Where a situation involves an innocent factor, and the wrongdoer factor, the latter is liable. In injuries occurring concurrently all factor are liable jointly and severally.

As already discussed, however, there are some differences between the Iranian and the Malaysian legal systems on the subject of causation. While under the Malaysian legal system, cause is conceived in a legal sense, under the Iranian legal system, cause (reasonable/ordinary) is understood in a philosophical sense. Thus, in Malaysian law, if a factor contributes more than 51% to the relevant injury, it is deemed to be the substantial factor. However, presently in Iran, there has been a move away from the philosophical understanding of cause. Joint and several liabilities is an exceptional rule in Iranian tort law, but in Malaysian law, it is the basic rule in concurrent causation cases. In Malaysian law, if there are several causes acting concurrently, but one of them harms the plaintiff, all the causes are liable. By contrast in Iranian tort law, the direct cause (Mobasher) is liable. Moreover, in trespass cases, liability is absolute under Iranian law. In brevity cause situations, there are several solutions in Iranian jurisprudence as an indirect source of law. For example, based on the payment by treasury theory, all causes are relieved of liability. Therefore, the solution is nearer to the ends of justice, and the plaintiff is compensated. But in Malaysian law, all causes are liable.

As noted, there is a delicate difference between the appreciation of cause under both Iranian and Malaysian law. In Iranian law, cause is a factor, which includes two features. The first is that it is a required condition for the occurrence of the injury. The second is that the factor played an effective role in causing the damage. So both features are considered in testing for the cause and the result it had. This like saying that if a particular accident had not occurred; the plaintiff's injury would not have resulted and if the cause existed, the injury would occur. On the other hand, the "but-for" test does include both of these meanings. Hence, in situations involving multiple causes, the "but-for" test is not useful, as it absolves all factors from liability. By contrast, the philosophical meaning of cause in Iranian law considers all factors to be liable.

The philosophical approach is the overriding rule in Iranian law, whereas the practical approach is more prevalent in Malaysian law. Nevertheless, under the present law of both systems, there is a convergence of both approaches. There is also an observable difference between both systems in their appreciation of the notion, "multiple." In Iranian tort law, multiple includes those cases that involve several causes and single damage. It also relates to situations where a wrongful act



causes damage, which damage, in turn, causes damage, and so on. On the other hand, in Malaysian law, the notion is understood in a wider sense. It does not only include cases, which involve various factors and a single result, but also those with various factors and several results as in successive and brevity causes.

Furthermore, while the theories of increasing risk and increasing harm exist in Malaysian law, there are no such theories in Iranian law, unless those theories can be seen to lead to the substantial factor theory, which exists in Iranian law.

## Conclusion

One of the implications of this article is that it is necessary to distinguish cause from condition. This is because the cause and not the condition is liable for any alleged damage. In all cases, the onus of proving causation lies on the plaintiff. Moreover, it should be noted that the substantial factor (cause) is the basic rule and theory on causation. In fact, this rule is closer to the ordinary cause rule in Iranian law, as well as the philosophical definition of cause. Therefore, it is applicable in Iranian tort law. The duty of determining the substantial factor rests with the judge, and that factor may differ in every case. Both the increasing risk theory and the increasing harm theory are variants of the substantial factor rule. Cause is a factor, which is required to effectuate the occurrence of an alleged damage, and it seems that this rule is an elevated form of the ordinary cause test. The measure of interference of factors theory is more capable of ensuring justice than the other theories, which are exceptional theories, and therefore, applicable only in particular cases. Under the Iranian system, the solution offered by the brevity cause is more justifiable, as an innocent cause is not penalized, although the damage in question is compensated. The judge must have authority to employ all these theories, and as guidelines for determining the cause of damage. Ultimately thus, the judge's authority is an inclusive theory in multiple causation cases.

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