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Causation in Commercial Law

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Introduction

Causation cannot be discussed in connection with commercial law without addressing considerations of general application and importance. There are, of course, a number of issues of particular interest to commercial law, but understanding their significance is assisted by first directing oneself to general questions that have relevance to other legal topics and law generally.

Legal notions of cause grow from sometimes competing conceptions in science, philosophy, everyday life, morality and law. Causation is an element in all legal and human questions that involve understanding, and attribution of responsibility for, some aspect of the past. Its central importance makes it no less elusive. As Dean Pound said in 1957,¹ any systematic exposition of causation could be described as “unscrewing the inscrutable”.

Causation takes its place along with other considerations such as remoteness, foreseeability and, increasingly, scope of duty in the attribution of legal responsibility and awarding of compensation for acts and omissions. The

^{*} President, New South Wales Court of Appeal. I wish to thank, and acknowledge the assistance of, my researcher, Ms Anna Garsia, for her work and insights that have been invaluable in developing the paper.

¹ Roscoe Pound, “First Harry Schulman Lecture on Torts at Yale Law School” (1957–1958) 67 *Yale Law Journal* 1.

courts have used these mechanisms both to control and to expand responsibility. When one mechanism is used (for example scope of duty) it often has a direct effect on the operation of other mechanisms (including causation). Further, some approaches to causation² combine causation, foreseeability and remoteness in one stage of an enquiry as to liability, which is better described as scope of liability, after the satisfaction of a minimum requirement of “but for” factual causation or factual involvement.

Discussion and debate about causation in the 20th century have reflected broader patterns of thinking about the law generally: legal realism, legal positivism, corrective justice, law and economics and modern realism.³ The developments in approach to the causal analysis by scholars, the judiciary and Parliament within the last 20 years have encouraged a more explicit illumination of the place of corrective justice in torts, which has not been restricted to personal injury, affecting responsibility in commercial contexts.⁴

Academic and extra-curial writing

I do not propose to undertake an exhaustive review of the work of scholars and judges writing extra-curially, but rather to sketch, by way of introductory framework, the contribution of some of the most influential writers for our common law legal tradition, in particular, Professors Hart and Honoré,⁵ Wright⁶ and Stapleton.⁷ I apologise to others to the extent that this choice

² In particular that of Professor Stapleton, below n 7, and of the various Australian State and Territory Parliaments in the *Civil Liability Acts*, below n 94.

³ For a summary of the main theoretical accounts see Jane Stapleton, “Choosing what we mean by ‘Causation’ in the Law” (2008) 73 *Modern Law Review* 433.

⁴ See in particular in relation to the operation of the *Trade Practices Act 1974* (Cth).

⁵ HLA Hart and AM Honoré, *Causation in the Law* (1st Ed, 1959; 2nd Ed, 1985, Oxford, Clarendon).

⁶ Richard W Wright, “Causation in Tort Law” (1985) 73 *California Law Review* 1735; Richard W Wright, “Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis” (1985) 14 *Journal of Legal Studies* 435; Richard W Wright, “The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics” (1987) 63 *Chicago-Kent Law Review* 553; Richard W Wright, “Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying Concepts” (1987–1988) 73 *Iowa Law Review* 1001; Richard W Wright “Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility” (2001) 53 *Vanderbilt Law Review* 1071. For critical review of Wright’s causation analysis, in particular the necessary element in a sufficient set of conditions (“NESS”) test see Richard Fumerton and Ken Kress, “Causation and the Law: Preemption, Lawful Sufficiency, and Casual Sufficiency” (2001) 64 *Law and Contemporary Problems* 83.

might be taken to contain within it a value judgment on their work. That is not intended. Limits of space and time for present purposes and my personal debt of gratitude for the illumination their work has given me persuade me to focus on their work at the outset. I will include in this introductory section some discussion of the extra-curial writing of Lord Hoffmann.⁸ If I may say so, the clarity and illumination of his influential articles and his judicial opinions reflect an enormous contribution to the law in this area of discourse.

One advantage in even a brief discussion of these writings is the uncovering and discussion of key concepts and organisational theories which inhere in both judicial and statutory expressions of rules of causation. Indeed, one of the key insights of Professor Stapleton that assists in the avoidance of confusion is the use of the notion of “involvement” of the relevant act or omission with the relevant result, rather than expressions such as cause-in-fact. This helps to illuminate the legal reality that Lord Hoffmann has made clear that there is no such thing as causation as an existing essential concept in law to which additions or subtractions must be made depending on the legal context.⁹ Rather, by reference to proved involvement of the act or omission with the result, or the relationship between them, the relevant legal rules of responsibility (in particular the content of any relevant duty) and of compensation and consequential conforming rules of scope will be applied to assess responsibility. Basal to that function and that analysis will be the

⁷ Jane Stapleton, “Law, Causation and Common Sense” 8 *Oxford Journal of Legal Studies* 111; Jane Stapleton, “Duty of care and Economic Loss: A Wider Agenda” (1991) 107 *Law Quarterly Review* 249; Jane Stapleton, “Negligent Valuers and Falls in the Property Market” (1997) 113 *Law Quarterly Review* 1; Jane Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997) 113 *Law Quarterly Review* 257; Jane Stapleton, “Risk Taking by Commercial Lenders” (1999) 115 *Law Quarterly Review* 527; Jane Stapleton, “Perspectives on Causation” in Jeremy Horder (Ed), *Oxford Essays in Jurisprudence* (4th series, 2000), 61; Jane Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences” (2001) 54 *Vanderbilt Law Review* 941; Jane Stapleton, “Unpacking Causation” in Peter Cane and John Gardner (Eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (2001), 145; Jane Stapleton, “Cause in Fact and the Scope of Liability for Consequences” (2003) 119 *Law Quarterly Review* 388; Jane Stapleton, “Loss of the Chance of Cure from Cancer” (2005) 68 *Modern Law Review* 996; Stapleton, above n 3; Jane Stapleton, “The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims” (2008–2009) 74 *Brooklyn Law Review* 1011; Jane Stapleton, “Factual Causation and Asbestos Cancers” (2010) 126 *Law Quarterly Review* 351.

⁸ Lord Hoffmann, “Common Sense and Causing Loss” (Lecture to the Chancery Bar Association, 15 June 1999); Lord Hoffmann, “Causation” (2005) 121 *Law Quarterly Review* 592 (the text of the article was delivered as the Blackstone Lecture at Pembroke College, Oxford, 14 May 2005).

⁹ See for example, *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883, 1105–1106 [127]–[130] (“*Kuwait Airways*”).

infusion of the common sense of the milieu in which the question is being asked. This is perhaps to say nothing more (except in more words) than that causation cannot be divorced from the legal framework that gives rise to the cause of action;¹⁰ or to say nothing more (but with less grace) than did Mahoney JA in *Barnes v Hay*¹¹ or Sopinka J in *Farrell v Snell*¹² or Hope and Priestley JJA in *Barnes v Hay*.¹³

Hart and Honoré

Hart and Honoré's great work, *Causation in the Law*, can be seen to embody at least two principal aims: first, to analyse the use of causal language in everyday and judicial life to ascertain whether a conceptual framework could be constructed or extracted from such usage, in order to identify the sources of the uncertainties and confusion which they saw as surrounding the use of causal language; and, secondly, to deal with the legal realist theories that sought to reduce causation to a minimal "but for" enquiry, after which all was policy.¹⁴ The first aim underpinned the anchoring of causation for legal purposes in "common sense" in the attribution of responsibility. They sought a principled basis upon which to use causal language to attribute responsibility. As Lord Hoffmann has said,¹⁵ a great achievement of Hart and Honoré was to

¹⁰ McHugh J in *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 491 [98] citing Lord Hoffmann in *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1998] UKHL 5; [1999] 2 AC 22, 29 ("*Empress Car Co*"); and Gummow J in *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232, 255 [62].

¹¹ *Barnes v Hay* (1988) 12 NSWLR 337, 353:

"[T]he determination of a causal question involves ... a normative decision as to whether, for the purposes of the case, the precedent act for which the defendant is responsible should be seen as causal to the plaintiff's loss. And, in my opinion, that evaluation is made, not by a 'test' or 'guide' such as the 'but for' test, but by a functional evaluation of the relationship and the purposes and policy of the relevant part of the law."

¹² *Farrell v Snell* [1990] 2 SCR 311, 326:

"Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

¹³ *Barnes v Hay* (1988) 12 NSWLR 337, 339:

"Few judges have the time to plumb these philosophical depths by giving a full consideration to the conceptual issues involved. What happens in practice and what we think the law requires is that the court decides whether the connection of the negligent act or omission of the defendant to the plaintiff's loss was such that the defendant should be made liable for it. In the present case we would conclude that the defendants' negligence was sufficiently connected with the plaintiff's loss to be regarded as a cause of it."

¹⁴ See Stapleton, "Law, Causation and Common Sense", above n 7, 112.

¹⁵ Lord Hoffmann, "Causation", above n 8, 593.

unpack the concept of causation when used in language to attribute responsibility by reference to factual and moral notions.

Hart and Honoré viewed as essential the formulation of a legal rule as to legal responsibility that was able to be easily comprehended by ordinary people. This was a central attribute of law. Causal language, often in the form of metaphors, was the attempt by the courts to express common sense notions of cause. The common sense notion of causation involved the notion of causally relevant factors as part of the sufficient necessary conditions to produce a result. First, they identified as a causal connection cause and effect through deliberate voluntary acts or abnormal contingencies interfering with the ordinary course of events, as opposed to mere conditions precedent within the environment; such deliberate human acts or abnormal contingencies may likewise negative or put an end to a causal connection otherwise established. Secondly, they identified as a causal connection the explanation for an act through interpersonal transactions: X did something persuaded by the advice of Y. Thirdly, they identified as a causal connection the provision of an opportunity or means to do something – so-called “occasioning” of harm.

Hart and Honoré rejected the notion that the “but for” analysis was the only factual enquiry involved before the application of policy in determining the scope of the liability by reason of the particular legal rule. They accepted that policy was relevant, but not necessarily at the stage of the enquiry after the satisfaction of the “but for” test. They sought to isolate causal from policy questions. Once an affirmative answer to the “but for” test was found, the remaining issues involved two distinct issues: causation and policy. Causation at this point was influenced by common sense notions. Only after this was there the separate issue of whether the law will restrict (or enlarge¹⁶) liability by reference to the found causal connection by rules about scope (based on policy). These causal and policy or scope reasons may inform such

¹⁶ At this point it is worth noting *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22; [2003] 1 AC 32 (“*Fairchild*”) as perhaps an illustration of this enlargement of responsibility independently of a causal connection.

expressions as “proximate” or “legal” cause. They are also important to keep separate because of the variety of influences from policy or scope depending upon the subject matter and the moral, legal and societal content of the rule.

Hart and Honoré thus identified a three stage approach: the “but for” analysis, causal connection using common sense notions and then policy or scope limitations. Highly relevant to the consideration of causal link was the risk created by the wrongful conduct, foreseeability and an intuitive sense of fairness. They contested, however, the view that foreseeability should govern the extent of responsibility once negligence is shown.¹⁷

In the preface to the second edition, Hart and Honoré accept more readily how policy issues impinge on the determination of causal issues: (a) a policy or external legal rule may affect or determine the grounds of legal responsibility and thus how the causal requirement appears and in what shape; (b) liability can be truncated by policy;¹⁸ (c) the merger of causal with non-causal issues in legal thinking, for example remoteness or foreseeability as an element of common sense causal connection of occasioning harm and as part of a rule of truncation or limitation; and (d) the existence of policy rules in proof of factual connection and causation, such as onus rules.

Central to the work of Hart and Honoré were common sense notions of causation expressed in language reflecting a core of commonly agreed meaning and the pivotal place of the voluntary human act.

Wright

In the 1980s, in Chicago, Richard Wright published a number of powerful articles on causation in the law of torts both building on and criticising the work of Hart and Honoré. Wright saw three elements: (a) an enquiry as to whether there was tortious conduct; (b) the causal enquiry; and (c) an enquiry

¹⁷ The first edition of *Causation in the Law* was published in 1959, just before *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The “Wagon Mound” (No 1))* [1961] UKPC 1; [1961] AC 388 (“*Wagon Mound (No 1)*”).

about applicable policy or principle – the “proximate cause” enquiry. In Wright’s view, it was crucial to keep these enquiries separate.

Amongst Wright’s criticisms of Hart and Honoré, central was his view that the common sense causal enquiry over-emphasised the factual enquiry and under-emphasised policy. This was brought about, in significant part, by failing to keep separate the three enquiries referred to and a confusion between causation and responsibility.

The first element is the tortious conduct enquiry. This focuses the enquiry, giving it content and purpose. Was X’s conduct tortious and in what respect? The second element is the causal enquiry which he develops as a “necessary element of sufficient set” (a NESS enquiry). The NESS enquiry is a development of a “but for” test to deal with the problems of over-determined or duplicative¹⁹ and pre-emptive²⁰ causation. Wright acknowledges the importance of Hart and Honoré as the foundation for his approach.²¹ By the NESS test, a particular condition was a cause of a specific consequence if, and only if, it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.²² Thereafter policy was applied.

Stapleton

¹⁸ indeed enlarged: *Fairchild* [2003] 1 AC 32.

¹⁹ Richard W Wright, “Causation in Tort Law”, above n 6, 1791–4 for discussion of how the NESS test is suitable for dealing with cases of over-determined causation. Wright looks at the examples of over-determined causation of the case where C and D independently start separate fires, each of which would have been sufficient to destroy a plaintiff’s house and the fires converge and burn down the house and the case where a cable with a maximum safety load capacity of one tonne was weakened by C, such that it would break if subjected to a one tonne load and then D negligently puts a two tonne load on the cable, which would have caused it to break even if it were not weakened, and the cable breaks at the *weakened point*. Another archetypal example of over-determined causation is that of the two careless hunters who shoot a walker in the forest and it is impossible to tell which bullet killed the walker, with evidence that either bullet wound would have been sufficient to bring about the death.

²⁰ *Ibid.*, 1794–5 for discussion of how the NESS test is suitable for dealing with pre-emptive causation. Wright looks at the example of pre-emptive causation of the case where D shoots and killed P just as P is about to drink a cup of tea that has been poisoned by C. Wright also notes that in the case of the weakened cable (see discussion above n 17), if the cable breaks other than at the weakened point, the case is one of pre-emptive causation.

²¹ *Ibid.*, 1788–91.

²² *Ibid.*, 1790.

In an important body of work over 20 years, Professor Stapleton has put forward an influential account of causation, which embraces Wright's NESS test as a useful tool, though rejecting it as a comprehensive test of causation.²³

The starting point for causal analysis is the choice of interrogation perspective in order that the enquiry as to the "involvement" of specified factors can be understood. The interrogation may be directed to explanation, blame, scientific or physical role or relative involvement. This can be viewed, as Wright viewed the enquiry as to tortious conduct, as the purpose or focus of the enquiry; and it is to be specified at the outset. It frames the enquiry about involvement. Stapleton argues that the law should use the widest interrogation to capture all ways in which the factors are involved using the physical laws of nature and evidence of behaviour. She sees "involvement" as including three forms: (a) necessity; (b) duplicative necessity; and (c) contribution.

Necessity is where the factor is necessary for the existence of the phenomenon. Duplicative necessity is where the phenomenon would have still occurred but only because of the presence of another specified factor. This is the so-called "over-determined outcome".²⁴ Contribution is where the

²³ In "Causation in Tort Law", above n 7, 1789–90 Wright had argued that the NESS test accorded with the traditional Humean philosophical account of the meaning of causation. He then concluded the extended discussion of the NESS test at 1802 with:

"It should be clear by now that the NESS test not only resolves but also clarifies and illuminates the causal issues in the problematic causation cases that have plagued tort scholars for generations. It does so because it is not just a test for causation, but is itself the meaning of causation."

In "Choosing what we mean by 'Causation' in the Law", above n 3, 472–3, Stapleton accepts the critique of Fumerton and Kress, above n 6, of Wright's characterisation of the NESS test. For Stapleton the NESS test is not the meaning of causation, although it is of "potential practical value ... to the lawyer".

²⁴ Stapleton, "Choosing what we mean by 'Causation' in the Law", above n 3, 438 and 442 where Professor Stapleton gives the example of duplicative necessity of the case where "due to the carelessness of each of two unrelated hunters, a mountain walker is simultaneously shot by both and the medical evidence is clear that either shot would have been sufficient to result in instantaneous death" – neither shot is necessary for the death being duplicated by the other shot yet absent the other shot, each shot would have been necessary for the death.

phenomenon would occur without the presence of the specified factor but only because of the existence of other like contributing factors.²⁵

This wide factual interrogation of involvement accommodates what might be the very diverse range of enquiries that the law may make of the factual involvement. This wide factual interrogation also ensures that normative concerns are located elsewhere in the legal analysis.

Once the wide investigation of involvement has been undertaken, the normative questions in respect of responsibility based on duty, breach, inducement, duress or complicity can be addressed. These legal questions permit the individuation of the conduct (breach of contract, duty at law or in equity) and the identification of the “specified factor” for causal analysis and hypothesis. This individuation of the breach or conduct then makes irrelevant many factors that make up the factual involvement.

This first factual analysis of involvement is not entirely free of normative rules. Historical involvement of some factor may be more or less difficult to prove. Rules of evidence and onus formulated by reference to policy considerations may make proof more or less difficult. The principal place, however, for normative rules is in the second enquiry, after that of factual involvement, in the enquiry as to the scope of liability.

Relevant both to the formulation of any rules of proof and to the assessment of the scope of liability is the purpose of the relevant cause of action or legal context in which the question of causation is being asked. Stapleton’s view is that the cause-in-fact question of involvement and the scope of liability question into which normative and policy issues intrude should be kept separate.

²⁵ Ibid, 443 where Professor Stapleton describes the notion of “contribution” by considering the case where nine members of a club’s governing committee unanimously vote to expel a member in circumstances where a majority of six was all that was needed under the club rules – the vote of committee member number one was neither necessary nor sufficient to pass the motion and the

The appropriate scope of liability for consequences is to be decided upon after factual involvement is determined (with or without rules of evidence or onus of proof of facts). The scope rules discussed by Professor Stapleton incorporate not only questions that are sometimes referred to as legal causation or proximate cause, but also remoteness of damage. Thus this “scope of liability” enquiry takes up all broader normative questions (including foreseeability) as to legal responsibility that were previously in both a causation analysis and a remoteness analysis.²⁶

Professor Stapleton discusses²⁷ a number of approaches to the ascertainment of the “appropriate” scope of liability for the consequences of tortious conduct. She begins by asserting the inadequacy of “crude slogans” such as the damage being “within the scope of risk” created by the conduct or “within the scope of duty”.²⁸ The task of assessing the appropriate scope is to truncate the infinite stream of consequences of wrongful conduct by reference to the perceived purpose of the tort and “a range of associated legal rules and concerns”.²⁹ Professor Stapleton discusses appropriate scope by reference to three general areas: (a) normative choices relating to the position of normal expectancies and to the concept of damage; (b) the requirement that the consequences of the tort be a reasonably foreseeable type of loss; (c) other legal “concerns” that shape a court’s response to assessing the appropriate scope of liability.

Given the incorporation of Professor Stapleton’s ideas into the *Civil Liability Acts*,³⁰ it is appropriate to explore these ideas a little further. Normal

same could be said for each member’s vote, yet the motion passed. In Professor Stapleton’s terms each voting member’s role in the voting made a “contribution” to the outcome.

²⁶ See *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515 and 522–3 (“*March v Stramare*”); *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 412–3 (“*Bennett*”); *Chappel v Hart* (1998) 195 CLR 232, 243 [24].

²⁷ Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences”, above n 7; Stapleton, “Cause in Fact and the Scope of Liability for Consequences”, above n 7.

²⁸ cf *March v Stramare* (1991) 171 CLR 506 at 535 (McHugh J); *Roe v Minister for Health* [1954] 2 QB 66, 85; *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; *Nader v Urban Transit Authority of New South Wales* [1985] 2 NSWLR 501.

²⁹ Stapleton, “Cause in Fact and the Scope of Liability for Consequences”, above n 7, 412.

³⁰ The contribution of Professor Stapleton’s work to the thinking of the committee was expressly recognised in the Ipp Report (*Review of the Law of Negligence – Final Report* (September 2002) (“*Review of the Law of Negligence*”), [7.27], fn 6. The recommendations on causation made in the

expectancies and damage elaborate upon and qualify the factual “but for” analysis. The basic scope rule based on normal expectancies is that a defendant is at most liable for additional injury produced by the tort and not for the consequences that would have occurred anyway. In particular types of factual situations, however, the law faces normative choices about this, that is about the operation of the “but for” test: for example so-called “over-determined” outcomes where the same loss would have occurred by reason of other tortious conduct. The scope rule here is to ignore the other tort. A second scope rule concerns where the same loss would not have occurred, but a substantially identical or equivalent loss would have occurred. A third scope rule is where there is no clear substitute to assess the “but for” test: Is the question what would have happened had no conduct occurred or is it what would have happened had the conduct been different and not tortious? Foreseeability is discussed as relevant in an orthodox way for remoteness. The other “concerns” that are dealt with by Professor Stapleton are: (a) foreseeable but indirect consequences, such as what to do when a reasonable person in the defendant’s position would not have done more to protect the plaintiff from the consequences of what the defendant did; (b) whether to distinguish and shield particular defendants; (c) intervening factors – how the circumstances of the particular case and the normative considerations under the relevant cause of action influence the determination of the appropriate scope of liability such as the honesty of the tortfeasor, intervening acts and attenuation over time. Importantly, Stapleton is of the view that the place of intervening factors should not, as Hart and Honoré provide for, be packed into a factual enquiry under so-called causal common sense. Rather, the focus should be on substantive normative arguments about responsibility under the relevant cause of action or legal framework that explain conclusions that may be different in different legal frameworks.

In the scope of liability discussion, Professor Stapleton does not posit new rules of responsibility; but rather discusses the approaches the courts have taken to causation and responsibility (beyond the question of factual

Ipp Report were in essence adopted in the statutory reforms in the *Civil Liability Acts*, below n 94, enacted across the Australian states.

involvement) in a taxonomical context avowedly suited to the making of normative judgments by the courts.³¹

Lord Hoffmann

In 1999,³² Lord Hoffmann delivered a lecture to the Chancery Bar Association entitled “Common Sense and Causing Loss”. In 2005, his Lordship wrote an article in the *Law Quarterly Review* entitled “Causation”. These papers made a number of points of significant force and penetration.

First, the phrase “common sense” in this context can be, and often is, used to hide the true process of reasoning, conscious or subconscious. Secondly, though causation is a question of fact, too often not enough attention is paid to identifying what the relevant question is. Until one knows the correct question, common sense is not going to help one with the correct answer. Thirdly, essential to the articulation of the correct question is the identification of the correct rule of law of responsibility (which includes the relevant rule of compensation). Fourthly, error in reaching an answer to a causal question is often not because the facts have been misunderstood, or common sense was lacking, but because the wrong question has been asked, because an error has been made with the legal rule: that is, the true scope of the rule which imposes liability has been misunderstood. Fifthly, the true scope of the rule will generally involve two questions: (a) the grounds upon which the rule imposes liability; and (b) the kind of loss for which it provides compensation. The importance of this fifth element is to be understood by reference to similar injuries or losses following breaches of different kinds of duty: A climber told by a negligent doctor that his knee was fit to mountain-climb killed on the mountain in circumstances unconnected with his knee; and the same climber told by a dishonest doctor that his knee was fit in order to have an affair with the climber’s wife. If the first doctor is to be found not liable and the second liable, that is not because of common sense, but because of the scope of the

³¹ See *Review of the Law of Negligence*, above n 30, [7.45] which recognises that the task of scope of liability analysis is not undertaken by the application of detailed rules of principle.

substantive rule on which liability is based, for negligence on the one hand and dishonesty on the other. Sixthly, without denigrating the value of common sense, it should not be used to provide generalised answers without recourse to the specifics of the legal problem in question. The specifics of the legal problem in question will usually depend upon theory – not abstract or metaphysical theory, but the underpinning legal or “political” theory held by the judge about the proper scope of the rule – legal, equitable, civil or criminal. Such reasoning should be exposed, not suppressed. Seventhly, a general structure for causation can be sketched as follows: (a) the identification of the prescribed causal connection between the wrongful act and the damage or injury; (b) the question as to what is a sufficient causal connection is a question of law; (c) the usual or standard causal connections most commonly prescribed are the causal connections described by Hart and Honoré; (d) the law may deviate from these usual or standard causal connections, by reference to explained policy.

Lord Hoffmann was critical of the strict separation between cause-in-fact or historical connection or involvement and policy or cause-in-law. The early factual enquiry is not devoid of structure and should not be an open interrogation of the world; rather it is an enquiry structured upon asking the right question from a correct application of the applicable rule. There is in his Lordship’s view an over-complication in the approach of “cause-in-fact” and “cause-in-law”.

The hard cases about causation and related topics such as the scope of liability in negligent misrepresentation cases,³³ the degree of the required causal connection necessary to be proved in respect of the acquisition of a disease of uncertain aetiology,³⁴ or in respect of damage subsequent to a failure to warn of risk,³⁵ or the extent of recoverability for increased risk of

³² After delivery of the first of his Lordship’s influential opinions on causation: *Empress Car Co* [1999] 2 AC 22.

³³ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”).

³⁴ *Fairchild* [2003] 1 AC 32.

³⁵ *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434; *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134.

harm,³⁶ or loss of a chance³⁷ are all answered, not by common sense or by positing a cause-in-fact/cause-in-law dichotomy, but by selecting for legal policy reasons different criteria by reference to which to judge liability, that is legal responsibility and compensation – being a departure from the usual or standard criteria. These are not intuitive responses based on internalised moral notions of common sense. They are legal rules formulated and explained.

Governing principle

United Kingdom

Having completed the introductory section on theory with a discussion of Lord Hoffmann's extra-curial writing, it is convenient to begin with the approach to causal questions in the United Kingdom. For most of the 20th century, the approach to causation was founded on epithet or metaphor, supported by a practical or common sense approach: direct,³⁸ natural and probable,³⁹ direct and natural,⁴⁰ proximate,⁴¹ effective or real and effective.⁴² It was not a question of "philosophical speculation" but "ordinary everyday life",⁴³ answered by applying common sense to the facts of the case.⁴⁴ Until the abolition of the defence of contributory negligence this causal analysis was clouded by the last opportunity rule.⁴⁵ After *The Wagon Mound*,⁴⁶ causation, expressed as the direct result, no longer stood as the determinant of the scope of liability.

³⁶ *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537; *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176.

³⁷ *Sellars v Adelaide Petroleum NL* [1994] HCA 4; (1994) 179 CLR 332 ("Sellars").

³⁸ *Re Polemis and Furness, Whithy & Co* [1921] 3 KB 560 ("Re Polemis").

³⁹ *Haynes v Harwood* [1933] 1 KB 146, 156; *Dorset Yacht Co v Home Office* [1970] UKHL 2; [1970] AC 1004, 1028–30 ("Dorset Yacht").

⁴⁰ *The Edison* [1932] P 52, 62–4 and 74; on appeal *Liesbosch, Dredger v Edison, SS (Owners)* [1933] UKHL 2; [1933] AC 449.

⁴¹ *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 ("Yorkshire Dale Steamship").

⁴² *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350, 370 ("Leyland Shipping").

⁴³ *Monarch SS Co Ltd v AIB Karlshamns Oljefariker* [1948] UKHL 1; [1949] AC 196, 227 (Lord Wright) ("Monarch Steamship").

⁴⁴ *Stapley v Gypsum Mines Ltd* [1953] UKHL 4; [1953] AC 663, 681.

⁴⁵ See the discussion by Mason CJ in *March v Stramare* (1991) 171 CLR 506, 511–2.

In 1972, in *Alphacell Ltd v Woodward*,⁴⁷ Lord Wilberforce⁴⁸ reiterated that a common sense approach, without refinements such as “*causa causans*, effective cause or *novus actus*”, should be taken to causation. Lord Pearson⁴⁹ adopted the well-known passage from the speech of Lord Shaw of Dunfermline in *Leyland Shipping*,⁵⁰ the passages from the speeches of Viscount Simon LC and Lord Wright in *Yorkshire Dale Steamship*⁵¹ and of Denning LJ in *Cork v Kirby Maclean Ltd*.⁵² Lord Salmon⁵³ said that what caused a certain event to occur was “essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.”

In 1998, the perceived limitations of this approach were explored by the House of Lords in *Environment Agency v Empress Car Co (Abertillery) Ltd*.⁵⁴ The case concerned a pollution prosecution arising from the spillage of waste product from a tank that occurred after an unauthorised person had opened a tap which had no lock. The offence was “causing ... polluting matter ... to

⁴⁶ *Wagon Mound (No 1)*[1961] AC 388.

⁴⁷ *Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] AC 824 (“*Alphacell*”).

⁴⁸ *Alphacell* [1972] AC 824, 834.

⁴⁹ *Alphacell* [1972] AC 824, 844–5.

⁵⁰ *Leyland Shipping* [1918] AC 350, 369 (Lord Shaw):

“To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in the chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.”

⁵¹ *Yorkshire Dale Steamship* [1942] AC 691, 698 and 706, respectively:

(Visc Simon LC)

“The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for ‘the cause’ involves a selection of the governing explanation in each case.”

(Lord Wright)

“... This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards.”

⁵² *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402, 407.

⁵³ *Alphacell* [1972] AC 824, 847.

⁵⁴ *Empress Car Co* [1999] 2 AC 22 (Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Nolan, Lord Hoffmann and Lord Clyde).

enter controlled waters”. Lord Hoffmann gave the leading opinion.⁵⁵ His analysis embodied the approach that he wrote about in the two speeches to which I have referred. He agreed that causation should not be over-complicated, nor, he said, should it be over-simplified. The first and crucial matter was to recognise that common sense gave different answers depending upon the question asked and the purpose of the inquiry, the identification of which purpose depending upon the rule by which responsibility was being attributed. This recognition leads to the reality that the open question: Who caused X? is misleading. The proper question is: Did the defendant cause X, in the context and framework of the relevant rule of responsibility? Lord Hoffmann discussed the place of deliberate human acts and extraordinary natural events, causal factors that played such a large part in the analysis of Hart and Honoré. These matters play a large part in the attribution of responsibility through cause in a common sense way, in particular by reference to later intervening factors. It is at this point that the underlying rule of responsibility becomes vital: for example, whether the duty imposed by the rule was directed to avoidance of risk of harm from such third parties or natural (including extraordinary) events. The purpose and scope of the rule needs to be understood before common sense becomes helpful. In identifying the rule for the relevant provision before the House, Lord Hoffmann recognised that liability in the statute at hand was strict, in the nature of a public nuisance, and was apt to encompass circumstances where a third party’s act intervened in certain circumstances. He recognised that in some cases⁵⁶ foreseeability had been used as the discrimen in the rule of responsibility. His Lordship disagreed with the use of foreseeability as a criterion involved in causation in this way. The true common sense distinction in this context was between acts and events that were a normal and familiar fact of life and those that were abnormal and extraordinary.

⁵⁵ With which Lord Browne-Wilkinson, Lord Lloyd and Lord Nolan agreed.

⁵⁶ *Alphacell* [1972] AC 824; *Natural Rivers Authority v Wright Engineering Co Ltd* [1994] 4 All ER 281.

In 1999, the House of Lords returned to causation in *Reeves v Commissioner of Police*.⁵⁷ A prisoner in custody had committed suicide. His estate sued the police, who said that his death was caused by the intervention of his own hand. The House of Lords said that the death was caused by the breach of duty when that duty was imposed to guard against the very event that happened. The death was, of course, caused by the voluntary act of the deceased; but, for the purpose of the rule in question, it was also caused by the defendant because of the nature and purpose of their duty⁵⁸ (to exercise care to prevent this very thing happening).

In 2002, the House of Lords returned to causation in *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)*.⁵⁹ Lord Nicholls,⁶⁰ whose views were significantly influenced by Professor Stapleton's work, described the "commonly accepted approach" of a twofold enquiry: first, whether the wrongful conduct causally contributed to the loss, widely undertaken by a "but for" test; and secondly, a value judgment as to the extent of the loss for which the defendant ought fairly or reasonably or justly be held liable: "whether the harm is within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question."⁶¹ This second stage of the analysis was assisted, his Lordship said, by concepts of remoteness, proximate cause, intervening acts and foreseeability. Lord Nicholls said that when the outcome of the second enquiry, that is often intuitive and informed by common sense, is not obvious the purpose of the relevant rule of liability will become crucial: What is the scope of duty? What is the loss protected? (One may, perhaps, venture to suggest that by then the crucial mistake may already have been made by acceptance of the "obviousness" of an intuitive common sense response.) Lord Hoffmann emphasised⁶² that there was no universal causal requirement for liability in tort. The relevant causal connection depends upon the basis and purpose of liability. Liability cannot be

⁵⁷ *Reeves v Commissioner of Police* [1999] UKHL 35; [2000] 1 AC 360.

⁵⁸ See *Reeves v Commissioner of Police* [2000] 1 AC 360, 370 (Lord Hoffmann) citing *Empress Car Co* [1999] 2 AC 22.

⁵⁹ *Kuwait Airways* [2002] 2 AC 883.

⁶⁰ *Kuwait Airways* [2002] 2 AC 883, 1090–2 [69]–[76].

⁶¹ *Kuwait Airways* [2002] 2 AC 883, 1091 [20].

⁶² *Kuwait Airways* [2002] 2 AC 883, 1105–6 [127]–[130].

separated from causation. His Lordship illustrated this by reference to where the putative causal act need only be a necessary condition when the subsequent act of a third party intervenes (the workman leaving the house unlocked);⁶³ or when the act of the plaintiff intervenes (the suicide of the person the defendant's duty was to protect);⁶⁴ or when the act need not even be a necessary condition, but only added substantially to the probability or risk of harm.⁶⁵

It will be necessary to return in due course to other important House of Lords decisions in their proper place: valuation⁶⁶ and probabilistic causation.⁶⁷

Australia: March v Stramare and the rule of responsibility

In Australia, it is necessary to begin with the decision of the High Court in *March v Stramare*.⁶⁸ The judgment of Mason CJ (with which Toohey and Gaudron JJ agreed) stands for the propositions that where negligence is in issue, causation is essentially a question of fact to be answered by reference to common sense and experience and one into which considerations of policy and value judgments necessarily enter; and that the "but for" test is not a definitive test of causation. Whilst this short encapsulation of the case may seem to align the reasoning with Hart and Honoré and place it in some conflict with Professors Wright and Stapleton and Lord Hoffmann, an examination of the reasons of Mason CJ reveals a significant degree of commonality of approach.

The facts are well-known: one night, a driver, Mr March, intoxicated and driving at an excessive speed, collided with a truck with flashing lights that

⁶³ *Stansbie v Troman* [1948] 2 KB 48.

⁶⁴ *Reeves v Commissioner of Police* [2000] 1 AC 360.

⁶⁵ *McGhee v National Coal Board* [1973] UKHL 7; [1973] 1 WLR 1 ("*McGhee*"); *Bonnington Castings v Wardlaw* [1956] UKHL 1; [1956] AC 613 ("*Bonnington Castings*"); and *Fairchild* [2003] 1 AC 32.

⁶⁶ *SAAMCO* [1997] AC 191; *Nykredit Mortgage Bank v Edward Erdman Group Ltd* [1997] UKHL 53; [1997] 1 WLR 1627 ("*Nykredit*"); and *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] UKHL 10; [2000] 2 AC 190.

⁶⁷ *Fairchild* [2003] 1 AC 32 and *Barker v Corus (UK) Plc* [2006] UKHL 20; [2006] 2 AC 572 ("*Barker v Corus*").

⁶⁸ *March v Stramare* (1991) 171 CLR 506.

Stramare's employee had parked in the middle of the road. The question was whether the placement of the truck with its flashing lights in the middle of the road was a cause of Mr March's accident. It was held to be a cause.

Eight aspects of Mason CJ's valuable (if I may respectfully say) judgment should be noted. First, Mason CJ recognised that causation was a part of attribution of responsibility, not scientific enquiry.⁶⁹ Through the adoption of Viscount Haldane in *Thom or Simpson v Sinclair*⁷⁰ and Windeyer J in *National Insurance Co of New Zealand v Espagne*⁷¹ the theory of Mill of the sum of the conditions was rejected.

Secondly, he recognised that some confusion is caused by the overlapping terminology and conceptions in causation and measure of recoverable damages.⁷² Hence notions of "direct", "natural and probable", "direct and natural", "proximate cause", "real effective cause" and foreseeability can be seen to play mixed roles. He noted the view of modern commentators that these expressions concealed value judgments and unexpressed policy.

Thirdly, by reference to *Chapman v Hearse*,⁷³ he restated that reasonable foreseeability is not, in itself, a test of causation and, by reference to *Mahony v J Kruschich (Demolitions) Pty Ltd*⁷⁴ and *M'Kew v Holland & Hannon & Cubbitts*,⁷⁵ that it was not an exclusive criterion of responsibility. These passages recognised what might be called scope rules, but not in any neat and tidy way. As *Mahoney v Kruschich*⁷⁶ revealed, the determinant of lack of responsibility was based on the clarity of the conclusion (even if the "but for" test was satisfied and the consequence was foreseeable) that a line should be drawn and a *novus actus interveniens* recognised.

⁶⁹ *March v Stramare* (1991) 171 CLR 506, 509.

⁷⁰ *Simpson v Sinclair* [1917] AC 127, 135.

⁷¹ *National Insurance Co of New Zealand v Espagne* [1961] HCA 15; (1961) 105 CLR 569, 591.

⁷² *March v Stramare* (1991) 171 CLR 506, 509–10.

⁷³ *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 122.

⁷⁴ *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522.

⁷⁵ *M'Kew v Holland & Hannon & Cubbitts* [1970] SC (HL) 20 ("M'Kew").

⁷⁶ *March v Stramare* (1991) 171 CLR 506, 528.

Fourthly, he also recognised that a source of confusion in causal concepts was the defence of contributory negligence. This was a potent factor in the development of an underlying policy rule of responsibility that tended to assign responsibility to one cause, through the notion of “effective” cause and the development of the “last opportunity” rule.⁷⁷ The passing of contributory negligence legislation permitted greater flexibility in assigning responsibility to more than one cause, and eliminated a source of confusion in dealing with the last opportunity rule by reference to language of causation. Mason CJ noted that the passing of the absolute defence of contributory negligence permitted in some respects the adoption of a legal approach to causation similar to that taken in philosophy and science,⁷⁸ though identity of approach was not possible because the law concerned the allocation of responsibility.

Fifthly, Mason CJ emphasised⁷⁹ that concurrent and successive causes can be proved by establishing the “material contribution” of the relevant wrongful conduct,⁸⁰ that is any contribution that is not *de minimis*. This remains a fundamentally important consideration in the operation of causal issues in many contexts, to which I will return in due course.

Sixthly, in adopting the well-known line of United Kingdom and Australian cases requiring causation to be determined by the application of common sense,⁸¹ Mason CJ emphasised that causation was a question of fact. Mason CJ saw two difficulties in the approach of commentators who divide the issue of causation into two questions – the “but for” test and the further question of responsibility: (a) too great an emphasis on the “but for” test and (b) an implication that value judgment has no part to play in resolving causation, as a

⁷⁷ *Alford v Magee* [1952] HCA 3; (1952) 85 CLR 437, 452; *Chapman v Hearse* (1961) 106 CLR 124; and *Teubner v Humble* [1963] HCA 11; (1963) 108 CLR 491, 502.

⁷⁸ It is to be noted that maritime law never had the same rule as the common law; contributory negligence was never a defence in maritime law, but the subtle pressure of philosophy and science did not often intrude there either.

⁷⁹ *March v Stramare* (1991) 171 CLR 506, 514.

⁸⁰ *Bonnington Castings* [1956] AC 613, 618, 620 and 627; *McGhee* [1973] 1 WLR 1, 4–5.

⁸¹ *Leyland Shipping* [1918] AC 350; *Admiralty Commissioners v SS Volute* [1922] 1 AC 129; *Yorkshire Dale Steamship* [1942] AC 691; *Alphacell* [1972] AC 824; *McGhee* [1973] 1 WLR 1; *Fitzgerald v Penn* [1954] HCA 74; (1954) 91 CLR 268, 277–8.

question of fact.⁸² It can be respectfully doubted whether Hart and Honoré can be criticised for removing factual value judgments from the question of causation. Nevertheless, Mason CJ's comments reflected an anxiety that the question of causation not be deconstructed into parts, some of which would not be factual in character.

Seventhly, Mason CJ recognised the important role that the “but for” test plays in the resolution of causal questions.⁸³ His Honour also recognised⁸⁴ its inadequacy when it rises no higher than providing for a necessary condition, unless that condition increased the risk of the event; and its inadequacy when one has concurrent or successive causes. Whilst an important question to ask, any answer was to be tempered by the making of value judgments and infusion of policy considerations. (One is tempted to reflect upon the circular nature of the journey at this point. Hart and Honoré are not, I think, saying anything different; nor, I venture to suggest is Professor Stapleton in substance, though not structure, a subject to which I will return when dealing with the *Civil Liability Acts*.)

Eighthly, Mason CJ discussed the difficulties involved in the *novus actus* cases.⁸⁵ They illustrated the inadequacy of the “but for” test.⁸⁶ The conclusion of a break in the chain of causation can be (as it was in *M’Kew*) the product of a value judgment considering the second event (in *M’Kew* the unreasonableness of the plaintiff’s conduct in how he descended a steep staircase) given that it would be unjust to hold the defendant legally responsible for the injury even though it could be traced back to the defendant’s wrongful conduct. Relevant to that value judgment were the character of the intervening act – deliberate, voluntary, or negligent; the scope of the duty of the defendant and whether it encompassed not exposing the plaintiff to such events and acts; the foreseeability or not of the second event;

⁸² *March v Stramare* (1991) 171 CLR 506, 514 Mason CJ refers to Hart and Honoré, above n 5, and John G Fleming, *Law of Torts*, (7th Ed, 1985, Law Book Co).

⁸³ *March v Stramare* (1991) 171 CLR 506, 516 citing *Fitzgerald v Penn* (1954) 91 CLR 268; *ICI ANZ Ltd v Murphy* (1973) 47 ALJR 122; and *Duyvelshoff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410.

⁸⁴ *March v Stramare* (1991) 171 CLR 506, 516.

⁸⁵ *March v Stramare* (1991) 171 CLR 506, 517–8.

whether such event was likely to happen in the ordinary course of things as a natural or likely consequence of the defendant's negligence; whether the risk of the second event is increased by the defendant's breach. Thus, Mason CJ can be seen to recognise the importance of the underlying rule of responsibility.

The analysis of Deane J, was shorter but to substantially similar effect. Of primary significance to Deane J⁸⁷ was that the scope of duty of care extended to all users of the road including inattentive and intoxicated drivers.⁸⁸ The scope of duty (the relevant rule of responsibility) thus defined, causation followed. Deane J rejected⁸⁹ the "but for" test as an exclusive test of causation. It was contrary to authority and unreliable by its propensity to give both false negative and false positive conclusions.

McHugh J (with an analysis appearing to reflect in significant respects the work of Professor Stapleton) took a quite different view. He favoured the use of the "but for" test for causal involvement with a scope of risk analysis thereafter; the latter analysis enabling the relevant policy factors to be articulated and justified. McHugh J built on his commanding (if I may respectfully say) judgments in *Nader v Urban Transit Authority*⁹⁰ and *Alexander v Cambridge Credit Corp*⁹¹ in the Court of Appeal. The relationship between causation and remoteness was to be understood by understanding the scope of risk created.⁹²

I have dealt at some length with the various strands of Mason CJ's reasons in *March v Stramare* because, with the passage of time, the case tends to be over-simplified in recollection as concerned with only the application of

⁸⁶ Especially *M'Kew* [1970] SC (HL) 20.

⁸⁷ *March v Stramare* (1991) 171 CLR 506, 520–1.

⁸⁸ cf *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 ("Dederer").

⁸⁹ *March v Stramare* (1991) 171 CLR 506, 522–3.

⁹⁰ *Nader v Urban Transit Authority* (1985) 2 NSWLR 501, 530 ff.

⁹¹ *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 349–58 ("*Alexander v Cambridge Credit*").

⁹² *March v Stramare* (1991) 171 CLR 506, 534–6 citing *Roe v Ministry of Health* [1954] 2 QB 66, 85 and *Hughes v Lord Advocate* [1963] AC 837.

common sense. For instance, the Ipp Report⁹³ stated that the “current law in Australia (as laid down by the High Court) appears to be that whether the negligent conduct caused the harm in question is to be answered by the application of common sense”. This was said to provide “little guidance”. I would respectfully suggest this greatly undervalues the utility of the detailed and valuable body of reasons in *March v Stramare*. Mason CJ’s reasoning and discussion lead to the conclusion that the debate about causation may be one of structure (and so, perhaps, principle), but nevertheless the elements of analysis which Mason CJ would infuse into the common sense value judgment are essentially the same as those deployed in any scope of liability or risk analysis appended to the “but for” test, and any variant thereof. What a more clearly articulated structure may provide is a more stable and coherent framework for the approach to some of the value-laden questions (of causation and remoteness), such that it is harder for a decision-maker to disguise or not address critical reasoning in reaching what is ultimately often a contestable value-laden conclusion. I will come to the *Civil Liability Acts*⁹⁴ in due course, but at this point it is worth noting that the reason the approach to causation was the subject of Parliament’s attention was the desire to have articulated more clearly by judges the intellectual approach to their conclusions in the attribution of responsibility, including, in particular, the value judgments they were bringing to bear.⁹⁵

The test in *March v Stramare* has been applied in later decisions in the High Court: see for example *Bennett v Minister of Community Welfare*,⁹⁶ *Wardley Australia Limited v Western Australia*,⁹⁷ *Medlin v SGIC*,⁹⁸ *Unity Insurance*

⁹³ *Review of the Law of Negligence*, above at n 30, [7.25].

⁹⁴ *Civil Law (Wrongs) Act 2002* (ACT), ss 45 and 46; *Civil Liability Act 2002* (NSW), s 5D; *Civil Liability Act 2003* (Qld), ss 11 and 12; *Civil Liability Act 1936* (SA), s 34 (formerly *Wrongs Act 1936* (SA)); *Civil Liability Act 2002* (Tas), ss 13 and 14; *Wrongs Act 1958* (Vic) Pt X Div 3, s 51; *Civil Liability Act 2002* (WA), ss 5C and 5D.

⁹⁵ *Review of the Law of Negligence*, above n 30, [7.42].

⁹⁶ *Bennett* (1992) 176 CLR 408, 412–3 (Mason CJ, Deane and Toohey JJ), and 418–9 (Gaudron J).

⁹⁷ *Wardley Australia Limited v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ) (“*Wardley*”).

⁹⁸ *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1, 6–7 (Deane, Dawson, Toohey and Gaudron JJ) and at 20 (McHugh J) (“*Medlin*”).

Brokers Pty Ltd v Rocco Pezzano Pty Ltd,⁹⁹ *Chappel v Hart*,¹⁰⁰ *Marks v GIO Australia*,¹⁰¹ *Kenny & Good Pty Ltd v MGICA*,¹⁰² *Henville v Walker*¹⁰³ and *Roads and Traffic Authority v Royal*.¹⁰⁴

There have been hints, however, that common sense as a fundamental operative element in any causal analysis is under threat. In *Allianz Australia v GSF Australia*,¹⁰⁵ Gummow, Hayne and Heydon JJ referred in their concluding remarks¹⁰⁶ to McHugh J's critical remarks in dissent in *March v Stramare* to the usefulness of common sense. Gummow and Hayne JJ repeated this reference in *Travel Compensation Fund v Tambree*.¹⁰⁷

Canada – the “but for” test

In Canada, the “but for” test is the primary test of causation – a plaintiff must prove on the balance of probabilities, that “but for” the negligence of the defendant, the plaintiff's injury or loss would not have occurred.¹⁰⁸ The “but for” test applies to multi-cause injuries.¹⁰⁹ In *Resurfice Corp v Hanke*¹¹⁰ McLachlin CJ who delivered the opinion of the Court, re-affirming the role of the “but for” test, said at [23]:

“The ‘but-for’ test recognises that compensation for negligent conduct should only be made ‘where a substantial connection between the injury and the defendant’s conduct is present. It ensures that a defendant will not be held liable for

⁹⁹ *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603, 612 [22].

¹⁰⁰ *Chappel v Hart* (1998) 195 CLR 232, 238 [6] (Gaudron J), 242–3 [23]–[24] (McHugh J), 255–6 [62] (Gummow J), 268–9 [93] (Kirby J) and 281–2 [111] and 290 [148] (Hayne J).

¹⁰¹ *Marks v GIO Australia Holdings* [1998] HCA 69; (1998) 196 CLR 494, 512–3 [42] (McHugh, Hayne and Callinan JJ) and 530–1 [106] (Gummow J) (“*Marks*”).

¹⁰² *Kenny & Good Pty Ltd v MGICA* [1999] HCA 25; (1999) 199 CLR 413, 426 [19] (Gaudron J), 456–7 [118] (Kirby and Callinan JJ) (“*Kenny & Good*”).

¹⁰³ *Henville v Walker* (2001) 206 CLR 459, 480 [61] (Gaudron J), 489 [95] (McHugh J).

¹⁰⁴ *Roads and Traffic Authority v Royal* [2008] HCA 19; (2008) 82 ALJR 870, 878 [32] (Gummow, Hayne and Heydon JJ) and 896 [135] (Kiefel J) (“*RTA v Royal*”).

¹⁰⁵ *Allianz Australia v GSF Australia* [2005] HCA 26; (2005) 221 CLR 568 (“*Allianz v GSF*”).

¹⁰⁶ *Allianz v GSF* (2005) 221 CLR 568, 596–7 [97]–[98].

¹⁰⁷ *Travel Compensation Fund v Tambree t/a Tambree and Associates* [2005] HCA 69; (2005) 224 CLR 627, 642 [45] (“*Travel Compensation*”).

¹⁰⁸ *Horsley v MacLaren* [1972] SCR 441; *Athey v Leonati* [1996] 3 SCR 458; confirmed in *Resurfice Corp v Hanke* [2007] 1 SCR 333, 342–3 [21].

¹⁰⁹ *Resurfice Corp v Hanke* [2007] 1 SCR 333, 342–3 [21].

¹¹⁰ *Resurfice Corp v Hanke* [2007] 1 SCR 333; applied in *Fullowka v Pinkerton’s of Canada Ltd* [2010] SCC 5; [2010] 1 SCR 132.

the plaintiff's injuries where they 'may very well be due to factors unconnected to the defendant and not the fault of anyone': *Snell v Farrell* [[1990] 2 SCR 311] at p. 327 per Sopinka J."

However, in *Athey v Leonati*,¹¹¹ Major J who delivered the opinion of the Court noted at [14] that the "but for" test is the "general, but not conclusive, test for causation" acknowledging that in some circumstances the "but for" test is "unworkable". In those circumstances, causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. Major J said that a contributing factor is "material" if it falls outside the *de minimis* range. *Athey v Leonati* introduced some confusion as to when a "material contribution test" was applicable as an alternative test of causation. In *Resurface* the Court expressed¹¹² the position by positing a framework for "material contribution" as follows:

"[24] However, in **special** circumstances, the law has recognized exceptions to the basic "but for" test, and applied a 'material contribution' test. Broadly speaking, the cases in which the 'material contribution' test is properly applied involve two requirements.

[25] First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those **exceptional** cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of **fairness and justice** to deny liability by applying a 'but for' approach."
(emphasis added)

The judgment¹¹³ then goes on to give examples of when the material contribution test might be used: first, where two tortious sources caused the injury (the example of the two shots fired carelessly at a victim but it is

¹¹¹ *Athey v Leonati* [1996] 3 SCR 458.

¹¹² *Resurface Corp v Hanke* [2007] 1 SCR 333, 343-4 [24]-[25].

¹¹³ *Resurface Corp v Hanke* [2007] 1 SCR 333, 344-5 [27]-[28].

impossible to show which shot injured the victim); and secondly, where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed the negligent act (the example of not being able to show whether the blood donor giving tainted blood would not have given blood had an appropriate warning been given). These are narrow applications of the expression not encompassing the kind of “material contribution” utilised in *Bonnington Castings v Wardlaw*.¹¹⁴

The Supreme Court of Canada has emphasised that the “but for” test is to be the test for causation in most cases. There has been some mention of common sense, but not an equivalent “common sense test” as in *March v Stramare*. Indeed Mason CJ’s judgment in *March v Stramare* has never been discussed or referred to by the Supreme Court of Canada and there appear to be only three references in Canadian Courts, one of those at the appellate level.¹¹⁵

In *Athey* Major J did refer to the role of common sense, referring to the Supreme Court case of *Snell v Farrell*¹¹⁶ at 467:¹¹⁷

“In *Snell v. Farrell* ... this Court recently confirmed that the plaintiff must prove that the defendant’s tortious conduct caused or contributed to the plaintiff’s injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, ... and as was quoted by Sopinka J. ... it is ‘essentially a practical question of fact which can best be answered by ordinary common sense’. Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.”

New Zealand

The New Zealand Court of Appeal has emphasised that whether there is a sufficient connection between fault and damage to found liability is a question

¹¹⁴ [1956] AC 613.

¹¹⁵ *Lawrence v Prince Rupert (City)* (2005) 361 WAC 103 (British Columbia Court of Appeal); *DP v Allen* (Ontario Superior Court of Justice, 14 July 2004); *Murano v Bank of Montreal* (1995) 31 CBR (3d) 1 (Ontario Court of Justice (General Division – Commercial List)).

¹¹⁶ *Snell v Farrell* [1990] 2 SCR 311.

¹¹⁷ *Athey v Leonati* [1996] 3 SCR 458, 467 [16].

of fact and degree and the answer is to be reached by the application of common sense.¹¹⁸ What must be established is that in a common sense practical way the loss claimed was attributable to the breach of duty:¹¹⁹ the common formulation used is that a cause must be “material or substantial” before affecting liability.¹²⁰ *March v Stramare* has been specifically endorsed by that Court,¹²¹ and the shortcomings of the “but for” test as a conclusive test for factual causation recognised.¹²²

Caused or “materially contributed to”

Before proceeding any further one practical aspect of causation should be emphasised. It is an aspect of the weakness of the “but for” analysis as any comprehensive or exclusive test. Generally, unless the context dictates otherwise, the law sees it as sufficient for the impugned act or omission to have “materially contributed” to the loss,¹²³ being a contribution that is not *de minimis*. That such contribution can be made and recognised as causal, notwithstanding the failure of the “but for” test needs to be recalled at all times. In *Resurfixe*, “material contribution” was expressed as a special or exceptional notion widely by reference to increased risk. That same notion is present in *Fairchild* and *Barker v Corus* and in some judgments in the High

¹¹⁸ *Fleming v Securities Commission* [1995] 2 NZLR 514, 523 (“*Fleming*”) (Cooke P, Gault and Ellis JJ agreeing; Richardson and Casey JJ finding it unnecessary to deal with the question of causation on the facts); for a general discussion of the New Zealand position see Andrew Tipping, “Causation at Law and in Equity: Do We Have Fusion” (1998–2000) 7 *Canterbury Law Review* 443.

¹¹⁹ *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Cooper* [1996] 1 NZLR 392, 399 (McKay J), 403 (Henry J) and 407 (Thomas J) (“*Sew Hoy & Sons*”).

¹²⁰ *Fleming* [1995] 2 NZLR 514, 523 (Cooke P, Gault and Ellis JJ agreeing). References were made to: *Monarch Steamship* [1949] AC 196; *March v Stramare* (1991) 171 CLR 506; and *M’Kew* [1970] SC (HL) 20.

¹²¹ *Fleming* [1995] 2 NZLR 514 at 523 (Cooke P, Gault and Ellis JJ agreeing); followed in *Sew Hoy & Sons* [1996] 1 NZLR 392 (McKay J and Henry J). In *Sew Hoy & Sons* at 407–8 Thomas J cites *March v Stramare* for the principle that causation must be determined by applying common sense to the facts of each case but goes on to emphasise that common sense is not a test, but an approach to the factual question. The Supreme Court of New Zealand has not referred to, or discussed *March v Stramare* since its establishment in 2004.

¹²² *Fleming* [1995] 2 NZLR 514, 523 (Cooke P, Gault and Ellis JJ agreeing); *Sew Hoy & Sons* [1996] 1 NZLR 392, 403 (Henry J); *Bank of New Zealand v Guardian Trust* [1999] 1 NZLR 664, 681 (Richardson P, Gault, Henry and Blanchard JJ).

¹²³ *Norton Australia Pty Ltd v Streets Ice Cream Pty Ltd* [1968] HCA [61]; (1968) 120 CLR 635 at 643 (“*Norton v Streets*”); *Bonnington Castings* [1956] AC 613, 618, 620 and 627; *March v Stramare* (1991) 171 CLR 506, 514; *Snell v Farrell* [1990] 2 SCR 311 and *Athey v Leonati* [1996] 3 SCR 458. I will come in due course to *McGhee* [1973] 1 WLR 1.

Court of Australia. A somewhat different concept is the material contribution or addition of a factor to the outcome, such as adding to the load of dust in a disease of accumulation¹²⁴ or contributing to the water which flooded a property.¹²⁵

Three broad approaches

The above writings and cases reflect three broad approaches. First, a clear adherence to an encapsulated notion of common sense. Secondly, an acceptance of the need for practical common sense, but with a greater emphasis upon, as a first step, ensuring that the correct question is asked, such question to be drawn from the correct rule of responsibility (including the rule of compensation). This has been reflected in, or accompanied by, more emphasis and precision being given to the content of the duty of care, the risk created by the breach and the purpose of the rules of responsibility and compensation. Thirdly, an avowedly structured approach of clear, and to the extent possible, strict division between: (i) the pure factual analysis of the relationship between the defendant's act or omission and the damage; and (ii) the evaluation by so-called scope rules of the imposition of liability. This structured approach is hinged on the enquiry as to the degree of the factual connection and the "but for" test as the central construct around which move other considerations attending the decisions to affix (or not) responsibility and to award compensation.

I am unpersuaded that the legal content is differently provided for by these approaches or that they will lead to different results. I see no philosophical challenge to the relevance of the notion of practical common sense. Nor do I see any disagreement that causation is not a separate essential universal concept, rather it is part of the ultimate normative decisions to attribute responsibility and to award compensation. What appears to be in issue is the

¹²⁴ *Bonnington Castings* [1956] AC 613.

¹²⁵ For a helpful discussion of the different ways that the phrase "material contribution" is employed, in particular by reference to *Resurfice Corp v Hanke* [2007] 1 SCR 333 in Canada, see D Cheifetz, "Causation in Tort Since *Resurfice*: Overview" (2008) and "Causation in Canada in the Third

structure of analysis, not the substance of the legal rules. The “rules of scope” in the third approach are not new legal rules; they are a recognition of the “concerns” of the courts and they reflect the same kinds of relational and corrective considerations that have always attended causal decision-making. The importance of the structure of the third approach is said to lie in the promotion of greater clarity in judicial decision-making. Whether that occurs remains to be seen. The third approach may be an exercise in over complication; or, it may, by dividing factual involvement from “scope rules”, encourage a clearer discussion between the rules of responsibility and compensation, on the one hand, and factual involvement of the defendant’s act or omission, on the other.

The importance of the statutory framework

To the extent that a question of causation will differ according to the purpose for which the question is asked, which will in turn depend upon the nature and scope of the legal rule of responsibility,¹²⁶ any governing statute is the key to that analysis. Its text and purpose will assist in identifying the correct rule of legal responsibility and the correct approach to compensation; further, its purpose and informing principles and norms will assist in understanding the relationship between factual involvement, responsibility and compensation.

The Trade Practices Act

The movement away from common law analogues and an increasingly subtle analysis based on the TPA and its informing statutory values is dramatically illustrated by the cases concerning s 82 of the TPA over the last 25 years. The TPA is one of the central pieces of legislation controlling commercial life in Australia. Its shortly stated object¹²⁷ reflects its “high public policy”:¹²⁸

Millennium: Nothing *Is* Now Enough” (2007–2008), available online:
<www.bbburn.com/articles/Resurface_status.pdf>.

¹²⁶ *Travel Compensation* (2005) 224 CLR 627, 642 [45] (Gummow and Hayne JJ) citing *Chappel v Hart* (1998) 195 CLR 232, 256 [63]–[64] (Gummow J), 285 [122] (Hayne J); and *Empress Car Co* [1999] 2 AC 22, 29 and 31 (Lord Hoffmann).

¹²⁷ *Trade Practices Act 1974* (Cth), s 2.

¹²⁸ *Marks* (1998) 196 CLR 494, 528 [99] (Gummow J).

“to enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection”.

Part VI of the TPA¹²⁹ contains a wide range of enforcement mechanisms and remedies. Central amongst them are s 80 (injunctions), s 82 (damages) and s 87 (other flexibly moulded remedies). All operate upon, amongst other things, contraventions of Pts IV, IVA, IVB and V. These Parts concern restrictive trade practices (Pt IV), unconscionable conduct (Pt IVA), industry codes (Pt IVB) and consumer protection, including s 52 (Pt V). The norms and informing principles of these provisions are various and wide.

In 1985, in *Gates v City Mutual Life Assurance Society Ltd*¹³⁰ the High Court¹³¹ placed the TPA into a common law framework. Gibbs CJ saw a tortious approach to damages as appropriate. Mason, Wilson and Dawson JJ thought the tortious measure of damages to be applicable in most, if not all, cases under Part V.¹³² In 1992, in *Wardley Australia Limited v Western Australia*,¹³³ Mason CJ, Dawson, Gaudron and McHugh JJ¹³⁴ stated that s 82(1) should be understood as taking up the common law practical or common sense concept of causation in *March v Stramare*, though their Honours did add: “except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act”. That qualifying rider has become the crucial part of any causal analysis. Nevertheless, in 1995, in *Kizbeau Pty Ltd v W G & B Pty Ltd & McLean*¹³⁵ Brennan, Deane, Dawson, Gaudron and McHugh JJ¹³⁶ once again stated that actions based on s 52 are analogous to actions for torts and thus rules for assessing damages in tort, and not contract, provided more appropriate guides in most, if not all, cases.

¹²⁹ *Trade Practices Act 1974* (Cth), ss 75B–87CAA. (The Act has from 2011 been amended. See *Competition and Consumer Act 2010* (Cth), Pt VI ss 75B–87CA.)

¹³⁰ *Gates v City Mutual Life Assurance Society Ltd* [1986] HCA 3; (1986) 160 CLR 1 (“*Gates v City Mutual*”).

¹³¹ *Gates v City Mutual* (1986) 160 CLR 1, 6 (Gibbs CJ) and 11–5 (Mason, Wilson and Dawson JJ).

¹³² *Gates v City Mutual* (1986) 160 CLR 1, 14–5.

¹³³ *Wardley* (1992) 175 CLR 514.

¹³⁴ *Wardley* (1992) 175 CLR 514, 525.

¹³⁵ *Kizbeau Pty Ltd v W G & B Pty Ltd & McLean* [1995] HCA 4; (1995) 184 CLR 281 (“*Kizbeau*”).

In 1998, in *Marks v GIO Australia Holdings Ltd*,¹³⁷ the Court began to move away from common law analogues upon which to analyse the application of the TPA and began to emphasise the statute, the facts and the relationship between them, bearing in mind the informing considerations and purposes of the TPA Act. Gaudron J¹³⁸ emphasised that the task is to identify the loss suffered by the conduct that was a contravention of the TPA, not to impose common law constructs of reliance or expectation damages or consequential loss. McHugh, Hayne and Callinan JJ¹³⁹ likewise posited the task by reference to the words of the statute, and that once cause is established the amount of recovery should not be limited by reference to common law analogues. Gummow J explained the fundamental remedial and protective purpose of the Act and its “high public policy” requiring the fullest relief which the fair reading of its language would allow. His Honour emphasised the diverse legal norms created by the TPA and rejected the analysis of compensation by reference necessarily to common law constructs.¹⁴⁰ In relation to causation Gummow J reiterated what he had said in *Chappel v Hart*¹⁴¹ as to the importance of what Lord Hoffmann had said in *Empress Car Co*¹⁴² that the ascertainment of the purpose and scope of the rule of responsibility (here s 52) is essential before any “common sense” answer can be given.¹⁴³

Peering through the undoubted change of emphasis in *Marks* to predict accurate outcomes is not easy (as will be seen in *Murphy v Overton Investments Pty Limited*).¹⁴⁴ The facts of *Marks* and the different approaches of the Justices reveal that difficulty. Investors borrowed money from GIO induced by a representation that the interest rate would be at a given base

¹³⁶ *Kizbeau* (1995) 184 CLR 281, 290.

¹³⁷ *Marks* (1998) 196 CLR 494.

¹³⁸ *Marks* (1998) 196 CLR 494, 503–4 [15]–[17].

¹³⁹ *Marks* (1998) 196 CLR 494, 510 [38].

¹⁴⁰ *Marks* (1998) 196 CLR 494, 528–9 [99]–[103].

¹⁴¹ *Chappel v Hart* (1998) 195 CLR 232, 276–7.

¹⁴² *Empress Car Co* [1999] AC 22, 30–2.

¹⁴³ See also in this respect Gummow J in *Rosenberg v Percival* (2001) 205 CLR 434, 460 [85]; and *Campomar Sociedad Limited v Nike International Limited* [2000] HCA 12; (2000) 202 CLR 45, 83–84 [98] and 85 [103].

¹⁴⁴ *Murphy v Overton Investments Pty Limited* [2004] HCA 3; (2004) 216 CLR 388 (“*Murphy v Overton*”).

rate plus 1.25 per cent margin. In fact, the loan agreement permitted GIO to charge a higher rate, which it did. The agreement also permitted the borrower to leave the facility and refinance without any penalty in such circumstances. The applicants did not prove that they would or could have obtained better funding if they had not relied on the representation and entered into the arrangement. They pressed an analogue with contract expectation damages. McHugh, Hayne and Callinan JJ expressed what might be called a traditional causation analysis, saying that a party who is misled suffers no prejudice or disadvantage unless it is shown that he or she could have acted or refrained from acting in some other way which would have been of greater benefit or less detriment than the course adopted.¹⁴⁵ The applicants had not proved that they were worse off, though the interest was higher than represented; the rate was better than that offered by GIO's competitors and the borrower was allowed to quit without penalty. Importantly, and differently, Gaudron and Gummow JJ¹⁴⁶ both assumed that the applicants were worse off when the interest rate increased. However, their Honours found that the loss was caused by the decision not to withdraw from the facility. Had this contractual right to exit the facility not existed both Gaudron and Gummow JJ would have concluded that there was loss caused by the contraventions by reason of the increase in rate, without more (though this conclusion was eschewed as being the product of expectation damages based on a contract analogy). Whilst the TPA and its informing purposes were expressed to be the basis of this, it was left largely unexplained why making good the representation represents loss by conduct in contravention of the Act. It may be that approaching the matter in this way best fulfils a policy of extracting compliance with the norms of the statutes. But this was not said.

In 1999, in *Henville v Walker*¹⁴⁷ there was an apparent difference of approach between Gleeson CJ and Gaudron J, on the one hand, and McHugh, Gummow and Hayne JJ, on the other, which at first sight appears important. The case must be read, however, in conjunction with the 2002 decision in *I &*

¹⁴⁵ *Marks* (1998) 196 CLR 494, 512 [42].

¹⁴⁶ *Marks* (1998) 196 CLR 494, 505 [24] (Gaudron J) and 536 [188]–[119] (Gummow J).

¹⁴⁷ *Henville v Walker* (2001) 206 CLR 459.

L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd.¹⁴⁸ In *Henville*, the applicant, an architect, contemplated a construction project of a small block of home units. Two commercial integers were critical to his decision to go ahead with the project: likely sale prices of the units when built and the estimated cost of construction. The applicant asked the respondent, an estate agent, about likely prices. He received a misleadingly high response. His own feasibility study, however, incompetently underestimated the costs. If either integer had been estimated accurately the project would not have appeared profitable and would not have proceeded. With both integers estimated inaccurately, the architect decided to go ahead. Gleeson CJ and Gaudron J restricted recovery to the difference between the advised sale price and the actual sale prices. This amount did not recompense the applicant for his whole loss on the project. The reasons of Gleeson CJ employed a causal analysis to isolate part of the losses referable to the misleading conduct, as distinct from that caused by the applicant's own negligence. At first blush, this appears to be a causal approach akin to that employed by Lord Hoffmann in the valuers' negligence cases to which I will come.¹⁴⁹ Gleeson CJ, however, did not approach the question by a limitation on scope or content of duty, nor did he apportion loss caused by the contravention. Rather, his analysis in *Henville* was a causal one (in which he saw some loss caused by the conduct and other loss not). In *I & L Securities*, Gleeson CJ made clear that once a causal relationship between the conduct and the loss had been shown there was no place for considerations such as contributory negligence or apportionment of damage in reducing the consequences of loss caused by the conduct in contravention of the TPA. The whole loss in *I & L Securities* (where a lender had lent to a borrower to develop land induced by a misleading valuation) was recoverable because it was one indivisible loss that had flowed from the inducement and so was caused by the conduct.

The consequences of detaching analysis under the TPA from the familiar constructs of contract and tort can be seen in *Murphy v Overton*

¹⁴⁸ *I & L Securities v HTW Valuers* [2002] HCA 41; (2002) 210 CLR 109.

¹⁴⁹ *SAAMCO* [1997] AC 191; *Nykredit* [1997] 1 WLR 1627.

Investments.¹⁵⁰ This was a joint judgment of the whole Court.¹⁵¹ As to principle of approach, at one level of analysis, the judgment is pellucid. It was said to be wrong to approach Part VI of the Act by beginning the enquiry attempting to draw analogy from the general law.¹⁵² Analogies may be helpful, but they tended to distract attention from construing the Act.¹⁵³ “Loss and damage” was to be given no narrow meaning and not restricted to any one or more constructs.¹⁵⁴ The facts were that the appellants entered into a contractual arrangement concerning entry into the respondent’s nursing home. They relied on a brochure which inaccurately and misleadingly stated a weekly sum of maintenance charges of \$55.71, based on certain criteria. Under the contractual documentation, they could be, and later were, charged more for weekly outgoings, based on a wider set of criteria. It was found that if the truth had been known they would not have entered the arrangement. However, there was no evidence that the appellants paid more for entry into the arrangements than they were worth, nor was there evidence as to what they would have done had they not entered these arrangements and entered this nursing home. The trial judge and the Full Court found no loss proved. The High Court disagreed, stating that when the appellants came to be charged more than was represented, they suffered loss.¹⁵⁵ One is not

¹⁵⁰ *Murphy v Overton* (2004) 216 CLR 388.

¹⁵¹ Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

¹⁵² *Murphy v Overton* (2004) 216 CLR 388, 407 [44].

¹⁵³ I would add at this point, construction of the *Trade Practices Act 1974* (Cth) is not necessarily difficult, it is application of it that is.

¹⁵⁴ *Murphy v Overton* (2004) 216 CLR 388, 407 [45].

¹⁵⁵ *Murphy v Overton* (2004) 216 CLR 388, 410 [55] and 413–4 [66]–[67]:

“[66] The appellants had been induced by the respondent’s conduct to undertake an obligation which may, but need not, have been more onerous than the respondent’s representation led them to believe. When the respondent started to charge all the outgoings it was entitled to charge, the appellants suffered a loss. The amount of that loss was not to be determined, as the majority of the Full Court held, only by comparing the financial position of the appellants according to whether they entered this lease or took some other accommodation. The appellants did not contend that they had suffered loss in that way. **The appellants suffered loss because the continuing financial obligations they undertook when they took the lease proved to be larger than they had been led to believe. The question then became: how much larger was that burden?**

[67] Answering that question is not easy. It would be necessary to take account of a number of considerations. First, the appellants knew that outgoings might increase. When they took the lease they knew, or at least must be taken to have known, that unexpected outgoings could occur in the future: unexpected both as to the subject-matter of the expense and the amount. It would be wrong to compensate them for their incurring outgoings of that kind, but how is proper account to be taken of that fact?” (emphasis added)

permitted to call these expectation damages. They represent, however, the difference between what has transpired and the belief as to what would transpire based on and induced by the representation.

We have come a long way from *Gates*, *Wardley* and *Kizbeau*. The loss in *Murphy* conformed with the loss that Gaudron and Gummow JJ assumed in *Marks* had there been no exit clause.

The requirement to have regard to the governing statute to identify the rule is unquestioned. What that means in any given circumstances is not as easy to discern with confidence. If it is as simple as the assertion of loss in *Murphy*, the rule can be simply stated as including loss as follows: In circumstances where a belief has been engendered by misleading or deceptive conduct, loss arises by being required to act in a way more disadvantageous than as one believed one would have to act in reliance on the conduct. This loss may flow irrespective of the results of any investigation of what the plaintiff would have done (other than not entering the impugned arrangement) had the misleading or deceptive conduct not occurred. It cannot be doubted that such disadvantage by reference to the belief and the reality could be an element of being worse off, but to constitute it as an available recoverable loss by reference to the relevant rule of responsibility taken from the TPA is a significant step. The explication of the underlying rule of responsibility and compensation is, as yet, incomplete.

Civil Liability Acts

In 2002, the Australian States and Territories passed uniform legislation in what was called “tort law reform”. This followed an enquiry by the Commonwealth under the leadership of Justice David Ipp¹⁵⁶ then a member of the New South Wales Court of Appeal. For convenience only, I will refer to the New South Wales legislation.¹⁵⁷ The drafting and promulgation of the Acts

¹⁵⁶ *Review of the Law of Negligence*, above n 30. The other members of the committee were Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh.

¹⁵⁷ *Civil Liability Act 2002* (NSW).

reflected the ideas and influence of Professor Stapleton and the structural approach of Lord Nicholls in *Kuwait Airways*,¹⁵⁸ and, to a point, the approach of McHugh J in *March v Stramare*.

Many of the provisions of the legislation apply to personal injury, but the definition of harm in s 5 in Part 1A includes “damage to property” and “economic loss” as separate and distinct types of harm. “Commercial torts” are therefore covered. Section 5A provides for coverage of Part IA as follows:

“This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.”

Section 3B has a long list of exclusions. I do not stay to consider what “or otherwise” may cover and the possibility of breach of equitable duties conforming to negligence being included.¹⁵⁹ Sections 5D and 5E deal with causation:

“DIVISION 3: CAUSATION

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
- (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (*scope of liability*).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

¹⁵⁸ *Kuwait Airways* [2002] 2 AC 883, 1090–2 [69]–[76].

¹⁵⁹ See Barbara McDonald, “Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia” (2005) 27 *Sydney Law Review* 443.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.”

I will leave s 5D(3) aside. The balance of s 5D reflects a structural approach broadly conforming to the analysis and writing of Professor Stapleton. The Ipp Report discussed¹⁶⁰ causation as a two pronged test: factual causation and liability for consequences. Explicit recognition was given to the influence of the work of Professor Stapleton.¹⁶¹ The discussion in the Ipp Report, with one exception, did not avow any change to the common law. It cited the need for a suitable framework in which to resolve individual cases, which would encourage explicit articulation of reasons by judges for imposing or not imposing liability. It described s 5D and its statutory structure as a “suitable framework in which to resolve individual cases” and as “helpful legislative guidance”.¹⁶² Whether it did indeed change the common law is not free from doubt.¹⁶³ That it propounded a structure conforming more to the approach of McHugh J in *March v Stramare* than that of Mason CJ would tend to indicate that it did. Further, though s 5D is found under the divisional heading

¹⁶⁰ *Review of the Law of Negligence*, above n 30, [7.26]–[7.49].

¹⁶¹ *Ibid*, [7.27] and see also *Ruddock v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269, 285–6 [84]–[89] (Ipp JA).

¹⁶² *Ibid*, [7.48] and [7.49].

¹⁶³ See McDonald, above n 159.

“Causation”, it appears to encompass all limits on scope of liability, including remoteness.¹⁶⁴

The Ipp Report recognised, through a non-exhaustive discussion of the common law, the various kinds of considerations that might make up the value judgments or normative considerations under s 5D(1)(b) or s 5D(2) or s 5D(4): causal overdetermination with results attributable to more than one sufficient condition;¹⁶⁵ intervening causes; successive causes; the cumulative operation of two or more factors to cause indivisible harm and material contribution; other expressions of material contribution of joint and concurrent tortfeasors; the place of increase in risk; foreseeability; the state of the plaintiff to be taken as found; the place of sheer coincidence; the importance of the relevant rule of responsibility.¹⁶⁶ The Report stated that for the resolution of individual cases, there can only be a case by case approach, rather than by application of detailed rules or principles.

The one explicit change to the common law, or at least a strand of approach in the common law was s 5E. This concerned the filling of evidentiary gaps by shifting the onus of proof in causation.¹⁶⁷ I will return to this below. Other than the onus of proof, the discussion in the Report left the development of legal principle in respect of such matters as material contribution to harm and the relationship between materially increasing risk and causation to the courts.

In 2003, in *Ruddock v Taylor*,¹⁶⁸ Ipp JA, in a concurring judgment, took the opportunity to express his view that s 5D embodies the principles of the common law. This was premised on his Honour’s view that the two stage test explicit in Professor Stapleton’s work and in s 5D was a structure that

¹⁶⁴ Indeed the Ipp Report was explicit in its combining of questions of causation and remoteness, see *Review of the Law of Negligence*, above n 30, [7.25].

¹⁶⁵ See the discussion in Hart and Honoré, *Causation in the Law* (2nd Ed), above n 5, 111–7, 122–5, 128–9 and 235–53; Wright, “Causation in Tort Law” and “Once More into the Bramble Bush”, above n 6; Stapleton, “Unpacking Causation”, above n 7; *The Havenshaw’s Grange* [1905] P 307; *Carolgie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 293; *Baker v Willoughby* [1970] AC 467; *Jopling v Associated Dairies* [1982] AC 794.

¹⁶⁶ See generally Dominic Villa, *Annotated Civil Liability Act 2002* (2004, Lawbook Co), 46–62.

¹⁶⁷ *Review of the Law of Negligence*, above n 30, [7.27]–[7.36].

¹⁶⁸ *Ruddock v Taylor* (2003) 58 NSWLR 269.

conformed with the common law, implicitly, *March v Stramare*. In later cases in the New South Wales Court of Appeal, reference was made on a number of occasions to the “two stage test of causation” (as part of the common law) referring to what Ipp JA said in *Ruddock v Taylor*. See *Tambree v Travel Compensation Fund*,¹⁶⁹ *Harvey v PD*,¹⁷⁰ *Graham v Hall*,¹⁷¹ *Elayoubi v Zipser*,¹⁷² *Nguyen v Cosmopolitan Homes*,¹⁷³ *Coastwide Fabrication & Erection Pty Ltd v Honeywell*,¹⁷⁴ *Mobbs v Kain*¹⁷⁵ and *Stojan (No 9) Pty Ltd v Kenway*.¹⁷⁶ As Ipp JA pointed out in *Harvey*, some support could be taken for his view that the two stage test conformed to the common law from what was said by Hayne J in *Pledge v Roads and Traffic Authority*.¹⁷⁷

A different view (though not an unequivocal one) has been expressed in the High Court. First, in *Tambree*,¹⁷⁸ Gummow and Hayne JJ likened the use of the two stage structure to the three stage *Caparo* approach to duty rejected in *Sullivan v Moody*.¹⁷⁹ Then, in *Adeels Palace Pty Ltd v Moubarak and Bou Najem*,¹⁸⁰ the Court,¹⁸¹ in joint reasons, said that s 5D which must be applied

¹⁶⁹ *Tambree t/as R Tambree & Associates v Travel Compensation Fund* [2004] NSWCA 24; (2004) Aust Contract Reports 90-195, [146] per Sheller JA (with whom Mason P and Ipp JA agreed).

¹⁷⁰ *Harvey v PD* [2004] NSWCA 97; (2004) 59 NSWLR 639, 655–6 [106] (Santow JA) and 670–1 [185]–[191] (Ipp JA). Spigelman CJ at 643 [11] expressly reserved his position on the two-stage test for causation.

¹⁷¹ *Graham v Hall* [2006] NSWCA 208; (2006) 67 NSWLR 135, 146–7 [78] (Ipp JA, with whom Giles and McColl JJA agreed).

¹⁷² *Elayoubi v Zipser* [2008] NSWCA 335, [55] (Basten JA, with whom Allsop P and Beazley JA agreed).

¹⁷³ *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246, [67]–[70] (McDougall J, with whom McColl and Bell JJA agreed).

¹⁷⁴ *Coastwide Fabrication & Erection Pty Ltd v Honeysett* [2009] NSWCA 134, [59] (McDougall J, with whom Ipp and Young JJA agreed).

¹⁷⁵ *Mobbs v Kain* [2009] NSWCA 301, [107] (McColl JA, with whom Macfarlan JA agreed).

¹⁷⁶ *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364, [142] (McColl JA, with whom Ipp and Basten JJA agreed).

¹⁷⁷ *Pledge v Roads and Traffic Authority* [2004] HCA 13; 78 ALJR 572, 574–5 [10]:

“The questions that are relevant to legal responsibility are first, whether, as a matter of history, the particular acts or omissions under consideration (here the acts or omissions which led to the presence of the foliage, and the parking bays, and the absence of warning signs) *did* have a role in happening of the accident. It is necessary then to examine the role that is identified by reference to the purposes of the inquiry – the attribution of legal responsibility. It is at this second level of inquiry that it may be necessary to ask whether, for some policy reason, the person responsible for that circumstance should nevertheless be held not liable [Stapleton, ‘Unpacking “Causation” in Cane and Gardner (eds), *Relating to Responsibility*, (2001) 145 at 166–73]”.

¹⁷⁸ *Travel Compensation* (2005) 224 CLR 607.

¹⁷⁹ *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562.

¹⁸⁰ *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; (2009) 239 CLR 420 (“*Adeels Palace*”).

and that it expresses the relevant questions in a way that **may** differ from what was said by Mason CJ in *March v Stramare*. There was no further discussion of that question. The appeal turned on questions of fact applying the “but for” test. Nor did the Court discuss s 5D(2).

The requirement to follow s 5D is clear. What its statutory content is and any continuity with developing common law concepts awaits judicial elucidation. In *Woolworths Limited v Strong*¹⁸² Campbell JA (with whom Handley AJA and Harrison J agreed) said that s 5D(1) excluded notions of “material contribution” and increase in risk. To the extent that his Honour was referring only to factors which gave a negative “but for” answer to the question in s 5D(1)(a), so much is clear. But the notion of cause at common law incorporates “materially contributed to” in a way which would satisfy the “but for” test. Some factors which are only contributing factors can give a positive “but for” answer. (Both the driver who goes through the red light and the driver with whom he collides who is not looking contribute to the accident. If each had not occurred the accident would not have occurred. The facts of *Henville v Walker* provide another example.) However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the “but for” test) are taken up by s 5D(2) which, though referring to “an exceptional case”,¹⁸³ is to be approached “in accordance with established principle”.¹⁸⁴

Two further aspects of s 5D are worthy of note at this point. First, it may tend to increase the cost and complexity of litigation. The answering of the “but for” enquiry in s 5D(1)(a) is mandatory. The Parliament has posed an issue that must be resolved. In a case such as *Bonnington Castings*, that resolution may involve detailed expert evidence of an engineering, medical, epidemiological or other kind. In a case based on negligent misrepresentation that may involve detailed cross-examination and interrogation as to the degree of inducement the representation had and whether “but for” it the act in reliance

¹⁸¹ *Adeels Palace* (2009) 239 CLR 420, 440 [43] and [44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹⁸² *Woolworths Limited v Strong* [2010] NSWCA 282.

¹⁸³ cf the approach of the Canadian Supreme Court in *Resurfice Corp v Hanke* [2007] 1 SCR 333.

¹⁸⁴ cf *March v Stramare* (1991) 171 CLR 506, 514 and *Bonnington Castings* [1956] AC 613.

would have been done. After that (possibly expensive) enquiry, two possibilities open up: either s 5D(1)(b) or s 5D(2). Both potentially involve similar normative enquiries, but from different perspectives: one exclusionary (s 5D(1)(a)) and one inclusionary (s 5D(2)). Without s 5D one would prove material contribution or relevant inducement. Secondly, if scientific evidence, including epidemiology is to be relevant to the enquiry under s 5D(1)(a), is the enquiry as to necessary condition to be an entirely factual one based on the modes of thought of the relevant scientific discipline involved, or can more general non-scientific judgments intrude?¹⁸⁵

In light of the paragraphs of the Ipp Report to which I have referred, one would have thought that there remained ample room to develop principles that inform s 5D that will keep it conformable with the development of the common law. It is perhaps both pointless and mischievous to seek to conjure up facts that would pass or fail s 5D but not the common law test. Section 5D is not apt in its terms to give a result that offends common sense. That said, Mason CJ in *March v Stramare* clearly and expressly disavowed a two-staged test. It was McHugh J who adopted a two-staged test which was redolent of s 5D. Further, the terms of s 5D(2) and (4) are apt to encompass the expression and development of common law principles of limitation and expansion of the scope of liability assuming the passing or failing of the “but for” test. This is particularly so if one gives proper weight to the evident purpose of the provisions as revealed in the discussion in the Ipp Report.

The Marine Insurance Act

A brief examination of causation in marine insurance reminds one that, in some circumstances, a question about causation is encapsulated and rooted in common sense answered only by recourse to an evaluative human assessment which in all likelihood will be utterly contestable, founded in common sense and underlain by diffuse logic.

¹⁸⁵ cf Spigelman CJ in *Seltsam Pty Limited v McGuinness; James Hardie & Coy Pty Limited v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262, 284–5 [136] (“*Seltsam v McGuinness*”).

The *Marine Insurance Act 1906* (UK) was the last of the great codifications of Sir Mackenzie Dalzell Chalmers.¹⁸⁶ It was adopted around the Commonwealth.¹⁸⁷ It remains a model upon which modern codes are drafted.¹⁸⁸ Section 55(1) of the UK Act¹⁸⁹ provides that subject to the provisions of the Act and the terms of the policy, the insurer is only liable for a loss “proximately caused by a peril insured against”. In the immediately following subsection, clarification is given as to what the insurer is not liable for by reference to language of loss “attributable to” as well as “proximately caused”. The Act elsewhere uses other language: “caused”: s 64 (s 70), “caused by or directly consequential on”: s 66 (s 72). It is unnecessary to go into these refinements.

The context of marine insurance is generally accident and liability insurance, usually in a commercial context. There will generally be a confusion of causes or influences of events that give rise to a claim. What is required as a matter of legislative command is “proximately caused”.¹⁹⁰ In some of the cases and commentary, the view was expressed that the notion of “proximate” cause bore within it the assumption that for answering a question about the response of an insurance policy there could be only one proximate cause.¹⁹¹ That is not what the statute says. It uses an adjectival phrase “any loss **proximately caused**”. Modern cases do not make this demand.¹⁹² Nor was it a rule of law before codification.¹⁹³

¹⁸⁶ See also the *Bills of Exchange Act 1882* (UK) and the *Sale of Goods Act 1873* (UK).

¹⁸⁷ For Australia see the *Marine Insurance Act 1909* (Cth).

¹⁸⁸ See the similarities in the *Maritime Code of the People’s Republic of China*, arts 216–256.

¹⁸⁹ The equivalent Australian provision is *Marine Insurance Act 1909* (Cth), s 61(1).

¹⁹⁰ For the place of proximate cause in insurance law generally, see Martin Davies, “Proximate Cause in Insurance Law” (1995) 7 *Insurance Law Journal* 284; Malcolm Clarke, “Insurance: The proximate Cause in English Law” (1981) 40 *Cambridge Law Journal* 284. See *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5 for an extensive discussion of causation in maritime insurance.

¹⁹¹ *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997, 1006; *Howard Fire Insurance Co v Norwich and New York Transportation Company* 79 US 194 (1870); Raoul P Colinvaux, *The Law of Insurance* (4th Ed, 1979), [4.32].

¹⁹² *JJ Lloyd Instruments v Northern Star Insurance Co* (‘*The Miss Jay Jay*’) [1987] 1 Lloyd’s Rep 32.

¹⁹³ *Grill v General Iron Screw Collier Co Ltd* (1866) LR1 CP 600, 611; *Ocean Steamship Co Ltd v Liverpool and London War Risks Association Ltd* [1946] KB 561, 575; *Reischer v Borthwick* [1894] 2 QB 548, 551.

The *locus classicus* of the notion of “proximate cause” is, of course, *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*.¹⁹⁴ The ship (*Ikaria*) was torpedoed well forward by a German submarine. With the assistance of tugs, though beginning to settle by the head, she limped into Le Havre harbour where she berthed at a quay. A gale sprang up, causing her to bump against the quay. The harbour authorities feared she might sink and block the quay and so ordered her to a mooring inside the outer breakwater. While moored there, she took the ground at each ebb tide, floating with the flood tide. This placed strain on her structure and, after two days, her bulkheads gave way and she sank, becoming a total loss. The policy covered perils of the sea, but had a war exclusion. Each of their Lordships¹⁹⁵ said the answer was to be given by the common sense response to the facts properly understood. Lord Shaw of Dunfermline’s famous discussion¹⁹⁶ made clear that fine distinctions were to be avoided, the proximate cause was not to be judged as the nearest in time, but as “proximate in efficiency”, that is not “destroyed” or “impaired” by other causes, but rather the question was as to the efficiency of the operating factor upon the result. If one cause has to be selected (as it was here for the reasons below) it is done by the qualities of “reality, predominance and efficiency”. This accorded with the “principles of a plain business transaction”. For there to be recovery in this case it was necessary to persuade the court that the loss was proximately caused by the perils of the sea and was not proximately caused by war because of the exclusion of the latter risk from the cover. Not surprisingly, that attempt failed.

It is not particularly profitable to multiply factual examples. One starts with the recognition that there is a business contract among participants in the maritime commercial community. The attribution of the notion of proximate, or real or effective cause to such person involves “the commonplace tests which the ordinary business person conversant with such matters would adopt”¹⁹⁷ or “what a business or seafaring man would take to be the cause without too

¹⁹⁴ *Leyland Shipping* [1918] AC 350.

¹⁹⁵ Lord Finlay LC, Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Shaw of Dunfermline.

¹⁹⁶ *Leyland Shipping* [1918] AC 350, 368–70.

¹⁹⁷ *Yorkshire Dale Steamship* [1942] AC 691, 702 (Lord Macmillan).

microscopic analysis but on a broad view”.¹⁹⁸ Where one has more than one proximate cause¹⁹⁹ recovery depends upon the proper construction of the policy. If one proximate cause is a relevant peril and the other is not (but not an excluded peril) the policy will respond;²⁰⁰ if one is an insured peril, but the other is an excluded peril (as was the case in *Leyland Shipping*), the policy will not respond.²⁰¹ (This is why the Court was looking for one cause. If a cause was war, the policy did not respond.)

The requirement of proximateness, efficiency and reality relevant for insurance, here marine insurance, stems from the notion that unless the parties agree otherwise it is to be taken that the insured peril had to have that degree of reality or efficiency in order for the policy to respond. Once that rule of responsibility is grasped, the answer to the causal question is one, made upon examination of the facts, which is “broad”, “common sense” and “in accordance with business realities”. The answer may be contestable, the logic to reach the answer may be diffuse, but what else is there to say? What intellectual process has been disguised? The marine underwriter has his or her answer, and gets on with business in the market.

The importance of the identification of the correct legal principle and any legal policy underlying it

The rules of responsibility and compensation do not arise only under statute. The relevant legal context and rule at general law are also important.

Equity

This is a discussion of torts. Nevertheless, a discussion of causation in non-contractual wrongs in commercial law requires advertence to the operative principles in Equity. This is especially so given the frequency with which

¹⁹⁸ *Yorkshire Dale Steamship* [1942] AC 691, 706 (Lord Wright).

¹⁹⁹ As in *Heskell v Continental Express* [1950] 1 All ER 1033.

²⁰⁰ *The Miss Jay Jay* [1987] 1 Lloyd’s Rep 32.

equitable relationships, structures, duties and rights find their place in commercial law.²⁰²

It is not proposed to go over the same ground as the valuable papers in past conferences.²⁰³ Nevertheless it will be necessary to touch on some of the matters covered by them.²⁰⁴ Equity has a separateness that goes beyond history. Its principles and its origins in legal theory derive from notions of conscience, fidelity, trust, vulnerability, fraud, surprise and mistake.²⁰⁵ In many respects, like torts, it is fault-based; but great care needs to be taken in the ascription of the elements of fault in any given case and in understanding the purpose of the rule creating the standard against which fault is assessed. In its modern form, Equity takes its place with the common law in a system of justice unified in administration. Its principles, sometimes, look very similar to common law principles: see, for example, the duties of a director to the company to exercise care.²⁰⁶ Nevertheless, the nature of the equitable relationship and duty, and how it operates in a given set of circumstances is a factor critical to understanding the place (or not, as the case may be) of causation in the deployment of equitable remedies. That said, the rules of

²⁰¹ *Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Ltd* [1973] QB 57; and see the discussion in *McCarthy v St Paul International Insurance* [2007] FCAFC 28; (2007) 157 FCR 402, 429–38 [88]–[116].

²⁰² Paul D Finn (Ed), *Equity and Commercial Relationships* (1987, Law Book Co); Peter Millett, “Equity’s Place in the Law of Commerce” (1998) 114 *Law Quarterly Review* 214; Simone Degeling and James Edelman (Eds), *Equity in Commercial Law* (2005, Law Book Co); A F Mason, “The Place of Equity and Equitable Remedies in the Common Law World” (1994) 110 *Law Quarterly Review* 238.

²⁰³ See in particular J D Heydon, “Are the Duties of Company Directors to Exercise Care and Skill Fiduciary” and Joshua Getzler, “Am I My Beneficiary’s Keeper? Fusion and Loss-Based Fiduciary Remedies” in Simone Degeling and James Edelman (Eds), above n 202, 185 and 239.

²⁰⁴ The subject of equitable compensation and the causal elements therein has been dealt with in a number of articles: Ian Davidson, “The Equitable Remedy of Compensation” (1981–1982) 13 *Melbourne University Law Review* 349; WMC Gummow, “Compensation for Breach of Fiduciary Duty” in Timothy Youdan (Ed), *Equity Fiduciaries and Trusts* (1989); J D Davies, “Equitable Compensation: Causation, Foreseeability and Remoteness” in Donovan WM Waters (Ed), *Equity, Fiduciaries and Trusts* (1993); Michael Tilbury, “Equitable Compensation” in Patrick Parkinson (Ed), *Principles of Equity* (1996); Steven B Elliott, “Remoteness Criteria in Equity” (2002) 65 *Modern Law Review* 588; Michael O’Meara, “Causation, Remoteness and Equitable Compensation” (2005) 26 *Australian Bar Review* 51.

²⁰⁵ Ralph A Newman, *Equity and Law: A Comparative Study* (1961, Oceanea Publications, New York), especially Chapters I and II; Peter W Young, Clyde Croft and Megan L Smith, *On Equity* (2nd Ed, 2009, Law Book Co), Ch 1.

²⁰⁶ *Permanent Building Society (In Liq) v Wheeler* (1994) 11 WAR 187; *Bristol and West Building Society v Mothew* [1998] Ch 1; J D Heydon, “Are the Duties of Company Directors to Exercise Care and Skill Fiduciary”, above n 203; *AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 7 ACSR 759 (“*AWA v Daniels*”).

causation in Equity can be said to be, to a point, in a “state of flux”.²⁰⁷ This is, in part, due to the joint administration of the two bodies of law and, in part, to the intrusion of Equity into commercial relationships.

The first and most obvious point to make is that liability for breach of trust is often strict. A failure to follow the terms of the trust is not alleviated (except by operation of statute)²⁰⁸ by a lack of fault. Yet, of course, a trustee has a duty of prudence in the handling and investment of trust property.²⁰⁹ The defaulting trustee’s duty is to effect restitution to the trust estate.²¹⁰ The rule was always a strict one “however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive”.²¹¹ Street J (as he then was) in his much cited and luminous judgment in *Re Dawson*²¹² said:²¹³

“Considerations of causation, foreseeability and remoteness do not readily enter into the matter.

...

The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no such breach.

...

The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract.”

²⁰⁷ Young, Croft and Smith, above n 205, 123 [2.480].

²⁰⁸ See for example *Trustee Act 1925* (UK), s 61; *Trustee Act 1925* (NSW), s 85; *Trusts Act 1973* (Qld), s 76; *Trustee Act 1958* (Vic), s 67; *Trustee Act 1936* (SA), s 36; *Trustees Act 1962* (WA), s 75; *Trustee Act 1898* (Tas), s 50; *Trustee Act 1925* (ACT), s 85; *Trustee Act 1980* (NT), s 49A.

²⁰⁹ *Cowan v Scargill* [1985] Ch 270, 276 and 289; *Fouche v Superannuation Fund Board* [1952] HCA 1; (1952) 88 CLR 609, 641; *Youyang Pty Ltd v Minter Ellison* [2003] HCA 15; (2003) 212 CLR 484 (“*Youyang*”).

²¹⁰ *Maguire & Tansey v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 (“*Maguire v Makaronis*”); *Re Dawson* [1966] NSW 211; *Target Holdings Ltd v Redferns* [1995] UKHL 10; [1996] 1 AC 421, 434 (“*Target*”).

²¹¹ *Clough v Bond* (1838) 3 My and Cr 490, 496–7; 40 ER 1016, 1018 (Lord Cottenham LC); *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159 (Lord Eldon MR).

²¹² *Re Dawson* [1966] 2 NSW 211.

²¹³ *Re Dawson* [1966] 2 NSW 211, 215–6.

Whilst causation can thus be seen to be attenuated, a “but for” analysis was posited by his Honour. As some of the earlier discussion concerning the “but for” test reveals, the test can lead to false positive as well as false negative findings.²¹⁴ What Street J was distinguishing as irrelevant was a requirement for proximate or effective cause or the operation of the doctrine of *novus actus interveniens*. In *Maguire v Makaronis*, Brennan CJ, Gaudron, McHugh and Gummow JJ²¹⁵ also made clear that in the field of equitable compensation there is no place for the doctrine of *novus actus interveniens*. To the extent that such a “but for” analysis gave a wide scope for liability that was to the defaulting fiduciary’s account.

Many American cases have found trustees liable in the absence of any causal connection between the default and the loss, in particular (a) when there has been a failure to earmark trust funds; (b) if the trustee mingled trust funds with his own or those of other funds; and (c) if the trustee violated a duty to keep exclusive control of trust money.²¹⁶ These cases of absence of any causation are harsh, but prophylactic: an encouragement to due performance of trustee obligations. The rigidity of the rule was not universal.²¹⁷ Critical was the kind of breach involved: self-dealing would lead to liability even if the loss resulted from general economic conditions.²¹⁸ Also, if a trustee applied trust money in the acquisition of an unauthorised investment, he or she was liable to restore to the trust the amount of the loss on its realisation.²¹⁹

Critical to any analysis of the place of causal connexion in the equitable remedy will be the nature and character of the rules of responsibility, compensation and restitution involved. Thus a rule that holds a fiduciary to a

²¹⁴ As for the capacity of the “but for” test to be over-exclusionary see *Kuwait Airways* [2002] 2 AC 883, 1092 [73], John G Fleming, *Law of Torts* (9th Ed, 1998, Law Book Co), 222–30; and Basil S Markesinis and Simon F Deacon, *Tort Law* (4th Ed, 1999), 178–91; *March v Stramare* (1991) 171 CLR 506, 515–7 (Mason CJ); *Fairchild* [2003] 1 AC 32, 44 [10] (Lord Bingham).

²¹⁵ *Maguire v Makaronis* (1997) 188 CLR 449, 470.

²¹⁶ See Note (1936) 50 *Harvard Law Review* 317; William F Fratcher, *Scott on Trusts* (4th Ed, 1998, Little Brown & Co) Vol III §205.1, 243–8.

²¹⁷ *Scott on Trusts*, above n 216, Vol IIA §179.3, §179.4 and Vol III §205.1.

²¹⁸ *Scott on Trusts*, above n 216, Vol III, 246.

²¹⁹ *Knott v Cottee* (1852) 16 Beav 77; 51 ER 705; and *In re Duckwari Plc* [1999] Ch 253, 262; referred to by Lord Neuberger of Abbotsbury PJ delivering the reasons of the Court of Final

high duty to act in the interests of another and selflessly, will not readily permit such a person to require his beneficiary to prove that his proven default was a proximate cause of loss. Thus, the remedial rules will be structured to enforce, not undermine, such a strict duty.²²⁰

Also critical will be the nature and character of the remedy sought. A breach of fiduciary duty (eg self-dealing without disclosure and consent) will immediately generate a right to rescind the relevant transaction without the need to demonstrate any causal nexus²²¹ (that is whether the transaction would have been entered if the disclose had been made). Different considerations apply to compensation for breach of fiduciary duty. There, a “sufficient connection” between the breach of duty and the profit derived or loss sustained or asset held must be demonstrated.²²² The relevant causal connection is determined by the purpose of the rule, the purpose of the remedy and the nature and circumstances of the breach.

As to wrongful gain or profit, the question is whether the profit was obtained **by reason of** the fiduciary position or **by reason of** taking advantage of opportunity or knowledge derived therefrom.²²³ As to property, tracing rules elongate in time and place the connection necessary to be established, such rules being formulated with presumptions (often contrary to the likely facts) against the defaulting fiduciary: such as in *In re Hallett's Estate*²²⁴ and *In re Oatway*.²²⁵ As to loss, in *Maguire*,²²⁶ Brennan CJ, Gaudron, McHugh and Gummow JJ said that the principle underlying *Re Hallett's Estate* (that whenever an act can be done rightfully, the fiduciary is not allowed to say, against the person entitled to the property or right, that he has done it

Appeal of Hong Kong in *Akai Holdings Ltd (in liquidation) v Thanakharn Kasikorn Thai Chamkat (Mahachon)* (8 November 2010), [150] (“*Thanakharn Kasikorn*”).

²²⁰ *Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544, 557–8 (“*Warman*”); *Maguire v Makaronis* (1997) 188 CLR 449, 465.

²²¹ *Maguire v Makaronis* (1997) 188 CLR 449, 467.

²²² *Maguire v Makaronis* (1997) 188 CLR 449, 468; *Nocton v Lord Ashburton* [1914] AC 932, 956–7; *Thanakharn Kasikorn*, [150]–[152].

²²³ *Maguire v Makaronis* (1997) 188 CLR 449, 468; *Warman* (1995) 182 CLR 544, 557; *Phipps v Boardman* [1967] 2 AC 46.

²²⁴ *In re Hallett's Estate* (1879) 13 Ch D 696, 727.

²²⁵ *In re Oatway* [1903] 2 Ch 356, 360–1; explained by Learned Hand J in *Primeau v Granfield* (1911) 184 F 480, 484–5 as a form of “protective election”.

wrongfully) attends any exposition of the apparently causal phrase used by Lord Haldane LC in *Nocton*, “by [the fiduciary] acting”. The restitutionary obligation is central. The nature of the remedy will vary to reflect the nature of the obligation and the nature and character of the breach. “Generalisations may mislead”.²²⁷ As Kirby J put it in *Maguire*:²²⁸

“[Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is ‘practically just’ as between the parties. The fiduciary must not be ‘robbed’; nor must the beneficiary be unjustly enriched.”

At least two important questions remain for resolution: first, the extent to which remedies for breach of equitable duties of a similar kind or character to common law (or statutory) duties, especially in a commercial context, will be regulated by causal analyses conforming to those at common law; and, related to that question, secondly, the continued force (or not) of the Privy Council decision in *Brickenden v London Loan & Saving Co.*²²⁹

In *Permanent Building Society v Wheeler*,²³⁰ Ipp J doubted the equitable character of a trustee’s duty of care. This is not a topic without controversy.²³¹ In *Daniels v AWA*²³² a majority of the Court of Appeal of New South Wales characterised the obligation of care of directors as tortious (as well, of course, as statutory). This too is not a topic without controversy.²³³

In 1989, in *LAC Minerals Ltd v International Corona Resources Ltd*²³⁴ La Forest J approved of the proposition²³⁵ that to say simple carelessness of a (fiduciary) solicitor was a breach of a fiduciary obligation was a “perversion of words”. In 1991, a majority of the Supreme Court of Canada in *Canson*

²²⁶ *Maguire v Makaronis* (1997) 188 CLR 449, 469.

²²⁷ *Youyang* (2003) 212 CLR 484, 499 [36].

²²⁸ *Maguire v Makaronis* (1997) 188 CLR 449, 496 (approved by the Hong Kong Court of Final Appeal in *Thanakharn Kasikorn*, [150]–[152]).

²²⁹ *Brickenden v London Loan & Saving Co* [1934] 3 DLR 465.

²³⁰ *Permanent Building Society v Wheeler* (1994) 14 ACSR 109, 157–8.

²³¹ Heydon, above n 203.

²³² *AWA v Daniels* (1992) 7 ACSR 759.

²³³ Heydon, above n 203.

²³⁴ *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 85 DLR (4th) 14 at 2D.

²³⁵ of Southin J in *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362.

*Enterprises Ltd v Broughton & Co*²³⁶ held that damages for breach of fiduciary duty fell to be measured by analogy with common law rules of remoteness. The minority²³⁷ considered that the equitable principles of compensation applied. In 1995, in *Henderson v Merrett Syndicates Ltd*²³⁸ Lord Browne-Wilkinson characterised the liability of a negligent fiduciary as equivalent to his liability at common law. In 1996, however, in *Target Holdings Ltd v Redfern*,²³⁹ Lord Browne-Wilkinson restated the principles (if I may say respectfully) somewhat more in accordance with accepted equitable principle.²⁴⁰ His Lordship referred to *Canson* and quoted extensively with approval from the minority judgment of McLachlin J. Two passages should be noted, one from the judgment of McLachlin J²⁴¹ in *Canson* approved by Lord Browne-Wilkinson²⁴² and one from the opinion of his Lordship:

(McLachlin J)

“While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution in specie is limited to the property under the trustee’s control, so equitable compensation must be limited to loss flowing from the trustee’s acts in relation to the interest he undertook to protect. Thus, Davidson states [‘The Equitable Remedy of Compensation’ (1982) 3 *Melbourne U.L. Rev.* 349] ‘It is imperative to ascertain the loss resulting *from breach of the relevant equitable duty*’ (at p. 354 emphasis added).”

...

(Lord Browne-Wilkinson)

“Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.”

²³⁶ *Canson Enterprises Ltd v Broughton & Co* [1991] 3 SCR 534; (1991) 85 DLR (4th) 129 (“*Canson*”).

²³⁷ expressed by McLachlin J (as her Ladyship then was), *Canson* (1991) 85 DLR (4th) 129, 160–3.

²³⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205.

²³⁹ *Target* [1996] 1 AC 421, 428–41.

²⁴⁰ citing at 434 *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159; *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016; *Re Dawson* [1966] 2 NSW 211 and *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

²⁴¹ *Canson* (1991) 85 DLR (4th) 129, 160.

²⁴² *Target* [1996] 1 AC 421, 439.

In 1997, in the Court of Appeal in *Swindle v Harrison*,²⁴³ a case concerned with a breach of fiduciary duty by a solicitor who had failed to disclose a secret profit from a loan taken by his client to complete the transaction, where no fraud was alleged, Evans LJ applied a common law causation test. In 1998, in *Bristol and West Building Society v Mothew*,²⁴⁴ Millett LJ agreed with Ipp J, La Forest J and Lord Browne-Wilkinson in *Henderson* and said:

“Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.”

In 1999, the New Zealand Court of Appeal approved the approach of Evans LJ in *Swindle* in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*.²⁴⁵

In *Maguire*,²⁴⁶ *Pilmer v Duke Group Limited (In Liq)*²⁴⁷ and *Youyang*,²⁴⁸ the High Court sounded a clear warning bell over the too enthusiastic harmonisation of the causal approach in equity and common law. In *Youyang*,²⁴⁹ the Court said:

“... [T]here must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.”

²⁴³ *Swindle v Harrison* [1997] 4 All ER 705.

²⁴⁴ *Bristol and West Building Society v Mothew* [1998] Ch 1, 17.

²⁴⁵ *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 681–2.

²⁴⁶ *Maguire v Makaronis* (1997) 188 CLR 449.

²⁴⁷ *Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31; (2001) 207 CLR 165, 196–7 [71]–[72] and 201 [85] (“*Pilmer*”). See also *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; 203 CLR 579, 587–8 [15]–[17] and 621–3 [135]–[141].

²⁴⁸ *Youyang* (2003) 212 CLR 484.

²⁴⁹ *Youyang* (2003) 212 CLR 484, 500 [39].

The Court approved²⁵⁰ the following from McLachlin J's judgment in *Canson*:²⁵¹

“The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.”

Why this caution is legitimate, is perhaps illustrated by a fiduciary's duty to exercise care. If the lack of care is in the management or administration of the trust property, a qualitative difference may be seen to exist between such a fault and tortious fault under a duty of care arising by reference to other considerations of proximity. After all, at common law, if the trustee were a bailee, he or she would face the reversal of an onus of proof should the property be lost or damaged. *Caffrey v Darby* was a case of negligent administration of trust property. Why should the stringency of an attenuated “but for” test not be appropriate? Nevertheless, it may be difficult to cavil with the conclusion of Lord Browne-Wilkinson in *Henderson* when considering questions such as professional negligence by someone who is a fiduciary and who has a cognate responsibility and liability in contract and tort.

The resolution of the doctrinal questions implicit in the equiparation of common law and equitable duties and principles is part of the ascertainment of the relevant rule of responsibility in circumstances where similarly expressed duties have different theoretical and ethical sources that are not merely a product of history.²⁵² Further, common sense plays its part in the

²⁵⁰ *Youyang* (2003) 212 CLR 484, 500–1 [40]; in *Pilmer* (2001) 207 CLR 165, 196 McHugh, Gummow, Hayne and Callinan JJ referred to this passage in *Canson* as well as the passage from McLachlin J's (as her Honour then was) judgment in *Norberg v Wynrib* [1992] 2 SCR 226, 272.

²⁵¹ *Canson* [1991] 3 SCR 534, 543.

²⁵² R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th Ed, 2002, Butterworths), 831–41.

analysis, as is clear from a number of authorities.²⁵³ Given the nature of equitable compensation, that is unexceptional, as long as it is not a substitute for identifying the relevant equitable rule and applying it with the stringency that such rule and the relevant breach and remedy require.

The comments of the High Court in *Youyang* are also to be understood against the background of the discussion of *Brickenden* in *Maguire*.²⁵⁴ *Brickenden* is a case that has had its share of criticism.²⁵⁵ It has, however, been widely followed.²⁵⁶ *Brickenden* was the solicitor to a lender. He received a benefit from the loan made to one Biggs, being payment from Biggs out of the proceeds of the loan moneys owed to him by Biggs as well as commissions and fees in connection with the mortgages for those loans. *Brickenden* was held liable to the lender (his client) for the full loss it suffered on the loan to Biggs. In delivering the advice of the Board,²⁵⁷ Lord Thankerton stated the following principle:

“When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent’s action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.”

In *Maguire*, Brennan CJ, Gaudron, McHugh and Gummow JJ did not find it necessary to consider the correctness of *Brickenden*, noting that it turned on whether the loss claimed could properly be said to have been sustained within

²⁵³ *Canson* (1991) 85 DLR (4th) 129, 163; *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 273 (“*O’Halloran*”); *Target* [1996] 1 AC 421, 439; *G M & A M Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113, [65]–[66].

²⁵⁴ *Maguire v Makaronis* (1997) 188 CLR 449, 470–4.

²⁵⁵ J D Heydon, “Causal Relationship Between a Fiduciary’s Default and the Principal’s Laws” (1994) 110 *Law Quarterly Review* 328.

²⁵⁶ *Commonwealth Bank v Smith* (1991) 42 FCR 390, 394 (FCAFC); *Gemstone Corporation v Grasso* (1994) 62 ASR 239, 243, 245 and 252 (FCSASC); *Palmisano v Hyman* (Deane J, FCA, 30 March 1977); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 97 (NZCA); *Gathergood v Blundell & Brawn* [1991] 1 NZLR 405; *Estate Realities Ltd v Wignall* [1991] 3 NZLR 482, 493 (NZCA); *Sims v Craig Bell & Bond* [1991] 3 NZLR 535, 545–6 (NZCA); *Witten-Hannah v Davis* [1995] 2 NZLR 141, 148 and 157 (NZCA); *Haira v Burberry Mortgage Finance & Savings* [1995] 3 NZLR 396, 407–8 (NZCA); *Wan v McDonald* (1991) 33 FCR 491, 520–1 (Burchett J).

²⁵⁷ Constituted by Lords Merrivale, Thankerton, Russell of Killowen, Wright and Alness.

the meaning of what Lord Haldane said in *Nocton v Lord Ashburton* “by” the solicitor having acted in breach of duty. Their Honours did, however, note that the question would be whether there was “an adequate or sufficient connection” between the compensation claimed and equitable breach. The assessment of that was assisted by recognising the policy of holding the fiduciary to the high standards of his office. Their Honours concluded,²⁵⁸ in somewhat Delphic fashion (if I may say without intended disrespect):

“It may be that concern with respect to the apparent rigour of the reasoning in *Brickenden* reflects what has been seen as a tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. Whilst that be so, it is not self-evident that the response should rest in a general denial of the applicability of the reasoning in *Brickenden* to delinquent fiduciaries, particularly solicitors and other professional advisers.”

Kirby J in *Maguire*²⁵⁹ and Spigelman CJ, Sheller JA and Stein JA in *Beach Petroleum NL V Kennedy*²⁶⁰ subjected *Brickenden* to close scrutiny. As their Honours pointed out, the breadth of Lord Thankerton’s statement of principle must be understood by reference to the facts of, and arguments in, the case. The non-disclosed facts were “material”, indeed potently causal. The reasons of the Canadian Supreme Court display the contest between competing causal influences: *Brickenden*’s non-disclosure and the dereliction of duty by the lender’s directors. *Brickenden* was responsible for the non-disclosure of material facts. The materiality could be seen from a finding by the trial judge recounted by the Privy Council that “there was no equity in the properties ... above the prior [disclosed] mortgages” and that the sum lent which paid out *Brickenden* could not have been recouped from a sale at that time. In these circumstances, a rule which denied to the defaulting fiduciary, who had failed to disclose **material** information concerning a conflict of duty and interest and thus who had failed in his solemn duty of undivided loyalty, the ability to prove a competing or better cause being the dereliction of the decision maker of the client, is explicable, indeed utterly sensible. On a “but for” test, the dereliction

²⁵⁸ *Maguire v Makaronis* (1997) 188 CLR 449, 474.

²⁵⁹ *Maguire v Makaronis* (1997) 188 CLR 449, 488–95.

²⁶⁰ *Beach Petroleum NL V Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1, 91–4 [434]–[451] (“*Beach Petroleum*”).

of duty of the directors could be put to one side as a concurrent wrongful cause.²⁶¹

In *Beach Petroleum*²⁶² the Court said that *Brickenden* was not authority for the general proposition that, in no case involving breach of fiduciary duty, may the Court consider what would have happened if the duty had been performed. Kirby J said much the same in *Maguire*.²⁶³

The above discussion illuminates the proposition that “causation in Equity is not susceptible to the formulation of a single test. It is necessary to identify the purpose of the particular rule to determine the approach to issues of causation”.²⁶⁴ This reflects once again the important proposition emphasised by Lord Hoffmann that causation is not a self-contained essential idea, but a part of the logical, moral and practical process of attribution of responsibility and of awarding compensation.

The duty to warn

In certain circumstances, the general law will impose a duty to warn. The approach to this in Australia and the United Kingdom is illustrative of the significant changes in approach to causation that have taken place by reference to rules of responsibility and scope of duty.

In *Rogers v Whitaker*²⁶⁵ the High Court stated that except in the case of an emergency or where disclosure would be damaging to the patient, a medical practitioner has a duty to warn a patient of a material risk inherent in proposed treatment. A risk was material if a reasonable person in the patient’s position if warned would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the patient would be likely to attach significance to it. This duty was part of the content of the single

²⁶¹ cf *Elayoubi v Zipster* [2008] NSWCA 335, [51].

²⁶² *Beach Petroleum* (1999) 48 NSWLR 1, 93 [444].

²⁶³ *Maguire v Makaronis* (1997) 188 CLR 449, 492–3.

²⁶⁴ *O’Halloran* (1998) 45 NSWLR 262, 274–5 with reference to *Empress Car Co* [1999] 2 AC 22 (Lord Hoffmann); cf *Barnes v Hay* (1988) 12 NSWLR 337 (Mahoney JA).

²⁶⁵ *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479.

comprehensive duty of doctor to patient. Causation did not arise in the High Court in *Rogers v Whitaker*. The trial judge had found that Mrs Whitaker would not have undergone the surgery had she been advised of the relevant risk, a finding that was confirmed in the Court of Appeal. The point was not pressed in the High Court.

This aspect of the duty returned to the Court in *Chappel v Hart*,²⁶⁶ this time with the debate centring on causation. Though the subject is divorced from commercial law, an analysis of the approach of the Court to vindication of this duty helps one understand how the content of the legal rule affects the causal response and will assist in understanding any causal link where there is a duty to speak in a commercial context, in particular, one based on vulnerability.

Mrs Hart underwent an operation carried out **with** due skill and care by Dr Chappel who, though he had warned Ms Hart that there was a risk of a perforated oesophagus, had not warned her of the risk of infection. The infection damaged her laryngeal nerve and led to the paralysis of the right vocal cord. If she had been warned of the risk of infection she would not have undergone the surgery when she did, but would have engaged the most experienced surgeon available (who was not Dr Chappel). There was some evidence to suggest that the chance of perforation was related to the skill of the doctor, but occurrence of infection was extremely rare.

To a significant degree the reasoning of Gaudron J is consistent with the equiparation of breach and causation through a shifting onus of proof once breach and the creation of risk of a kind that eventuated in the harm suffered is proved. This approach (although in substance supported by Kirby J) has not found general support in the High Court. More significant for present purposes were the views of Gummow J on causation (with which Kirby J also agreed). After citing²⁶⁷ *March v Stramare*, Gummow J referred to the then recent

²⁶⁶ *Chappel v Hart* (1998) 195 CLR 232.

²⁶⁷ *Chappel v Hart* (1998) 195 CLR 232, 255–6 [62] (almost as a matter of formality).

opinion of Lord Hoffmann in *Empress Car Co*²⁶⁸ in which the necessity to articulate the correct legal rule before applying common sense had been emphasised. Gummow J stressed²⁶⁹ that the nature and purpose of the duty concerned the right to know of the risks to make an informed judgment. His Honour noted the acceptance in argument by Dr Chappel that on another occasion it was unlikely that Mrs Hart would suffer the infection, given its random and rare occurrence. Thus, the “but for” test was satisfied, but only by reason of sheer coincidence. However, given the nature and purpose of the duty that was sufficient for Gummow J.²⁷⁰

McHugh J and Hayne J were in the minority. McHugh J²⁷¹ said that with the rejection of the “but for” test in *March v Stramare* it was not enough that but for the breach **this** injury would not have occurred. Both McHugh J and Hayne J concluded that the lack of warning had not materially increased the risk of injury – it exposed Mrs Hart to the same risk of injury as she would face in due course. To hold Dr Chappel liable was to attribute responsibility for a random coincidence.

The reasons of Gummow J and his utilisation of the “but for” test in support of the nature and purpose of the duty reveal the potentially powerful influence in causation analysis of the rule of responsibility to which Lord Hoffmann has given emphasis. It can marginalise *March v Stramare* if its content is seen to justify a departure from notions of common sense proximate or efficient cause. It also makes more explicable the movement away from the tortious analogue in TPA claims in the way exhibited in *Marks and Murphy*.

In *Chester v Afshar*²⁷² the House of Lords confronted the same issue as in *Chappel v Hart*. The facts were similar. Whilst in *Chappel* it was likely that Mrs Hart would have undergone the surgery in the future, in *Chester* it was shown that if warned the plaintiff would not have undergone the surgery then, but it

²⁶⁸ *Empress Car Co* [1999] 2 AC 22.

²⁶⁹ *Chappel v Hart* (1998) 195 CLR 232, 256–7 [65].

²⁷⁰ *Chappel v Hart* (1998) 195 CLR 232, 258 [70].

²⁷¹ *Chappel v Hart* (1998) 195 CLR 232, 243 [25].

²⁷² *Chester v Afshar* [2005] 1 AC 134.

was not shown that she would not have undergone it later. Lord Bingham of Cornhill and Lord Hoffmann rejected the existence of the causal connection. Lord Steyn, Lord Hope of Craighead and Lord Walker of Gestingthorpe found the relevant causal connection. To a significant degree, this disagreement exhibited the same fault lines as existed between the reasons of Gummow J and McHugh J and Hayne J in *Chappel v Hart*.

For the minority, Lords Bingham and Hoffmann, the “but for” test should not be taken to be met by sheer coincidence. The breach did not increase the risk; coincidence caused the loss. Where the breach is a failure to warn of a risk, the plaintiff must show that he or she would have taken the opportunity to avoid or reduce that risk. The majority, though all influenced by the reasons in *Chappel v Hart*, accepted that they were modifying causal analysis in aid of vindicating the relevant rule of responsibility. What was critical for Lords Steyn, Hope and Walker was the content of the duty of care and the rights of autonomy of the patient supported by it.²⁷³ To deny compensation even in the coincidental circumstances was to undermine the value of the duty itself. *Chester v Afshar* and *Fairchild* (discussed below) reveal the practical effect on judicial method of the recognition that causation is not a separate universal concept and of the importance of the rule of responsibility. The reasoning of their Lordships in the majority may be contestable; but it is a transparently clear normative judgment, based on a given (albeit tenuous) factual relationship between breach and harm.

There will be no causal link, however, if the patient would have gone ahead with the treatment at the same time as in fact he or she did. That was found to be the position in *Rosenberg v Percival*.²⁷⁴ This causal question was to be determined by reference to this patient, not by reference to some reasonable patient.²⁷⁵ Nor will there be a causal link if the event or misfortune suffered by the plaintiff had no relationship to the risk against which he or she should

²⁷³ *Chester v Afshar* [2005] 1 AC 134, 146 [24] (Lord Steyn), 153 [55] and 154 [59] (Lord Hope), 163 [91] (Lord Walker).

²⁷⁴ *Rosenberg v Percival* (2001) 205 CLR 434.

²⁷⁵ *Rogers v Whitaker* (1992) 175 CLR 479, 490; *Chappel v Hart* (1998) 195 CLR 232, 246 [32] and 272 [93]; and *Rosenberg v Percival* (2001) 205 CLR 434, 443 [24].

have been warned, such as if the patient had an adverse reaction to anaesthesia.²⁷⁶

Though these are personal injury cases, they reveal the consequences of applying underlying policy of the rule of responsibility to any causal analysis. This is just as relevant in a commercial case if the duty to warn or speak arises in a context of reliance or vulnerability.

Negligent misrepresentation

The legal developments in the House of Lords and High Court in the last 15–20 years in this field reflect a central consideration in the law of torts: the utilisation of the scope of duty of care to control the attribution of responsibility. The relevant rule of responsibility in the scope of duty governs the place of causation.

The principal difference between the United Kingdom and Australia has been the approach to the ascertainment of the duty of care and its content. In Australia, the High Court, in a number of cases,²⁷⁷ has categorically rejected, not only its own previously enunciated general ascertainment of proximity, but also the two stage approach in *Anns v Merton London Borough Council*²⁷⁸

²⁷⁶ *Chappel v Hart* (1998) 195 CLR 232, 257 [66]; *Chester v Afshar* [2005] 1 AC 134.

²⁷⁷ *Hill v Van Erp* [1997] HCA 9; (1997) 188 CLR 159, 210 (McHugh J), 237–9 (Gummow J); *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 193–4 [7]–[10] (Gleeson CJ), 197–8 [25]–[27] (Gaudron J), 208–12 [70]–[82] (McHugh J), 251 [191] (Gummow J), 268–70 [245]–[247], 273 [255], 275 [259], 277–8 [267], 283–6 [279]–[287], 288–9 [292]–[296] (Kirby J), 300–3 [330]–[335] (Hayne J), 318–9 [389], 321–2 [393], 323–4 [398]–[400], 326 [406] (Callinan J) (“*Perre v Apand*”); *Crimmins v Stevedoring Committee* [1999] HCA 59; (1999) 200 CLR 1, 13 [3] (Gleeson CJ), 32–3 [73], 33–4 [77] (McHugh J), 56 [149] (Gummow J), 80 [222] (Kirby J), 96–7 [270]–[274] (Hayne J) (“*Crimmins*”); *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512, 630–1 [316] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 578–9 [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317, 355–6 [104]–[107] (McHugh J), 405 [257], 409 [266]–[268] (Hayne J) (“*Tame*”); *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, 583 [99] (McHugh J), 624–5 [234]–[236] (Kirby J) (“*Graham Barclay Oysters*”); *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552, 564 [30] (McHugh J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, 528–9 [18] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (“*Woolcock*”); *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422, 433 [28] (McHugh J), 444–5 [66]–[68] (Gummow J) (“*Vairy*”); *Imbree v McNeilly* [2008] HCA 40; (2008) 248 ALR 647, 658 [41]–[42] (Gummow, Hayne, Kiefel JJ), 681 [141], 690 [181] (Kirby J); *Stuart v Kirkland-Veenstra* [2009] HCA 15, [132] (Crennan and Kiefel JJ).

²⁷⁸ *Anns v Merton London Borough Council* [1978] AC 728.

based on reasonable foreseeability, the expanded three stage approach in *Caparo Industries v Dickman*²⁷⁹ and any reformulation of these such as in Canada in *Cooper v Hobart*.²⁸⁰ This rejection of any formula or test the application of which will yield an answer to the question of whether a duty exists and its content has been accompanied by the identification of an approach to assist in undertaking the same task. This approach is to undertake a close analysis of the facts of the relationship between plaintiff and putative tortfeasor by reference to “salient features” affecting the appropriateness of imputing a legal duty to take reasonable care and its content.²⁸¹

The consequences for causation in this approach to duty can be seen in the different approaches to valuers’ and auditors’ negligence cases. The United Kingdom cases reveal a greater simplicity brought about by the shaping of a clear duty of care enunciated at a level of abstraction. The Australian cases demand close involvement with the facts of the case at hand and eschew delineation of principle at a level of abstraction.

Negligent valuers

²⁷⁹ *Caparo Industries plc v Dickman & Ors* [1990] UKHL 2; [1990] 2 AC 605 (“*Caparo Industries v Dickman*”).

²⁸⁰ *Cooper v Hobart* (2001) 206 DLR (4th) 193.

²⁸¹ *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* [1976] HCA 65; (1976) 136 CLR 529, 576–7 (Stephen J); *Perre v Apand* (1999) 198 CLR 180, 192 [5], 194–5 [11]–[15] (Gleeson CJ), 218–31 [100]–[133] (McHugh J), 252–61, [196]–[221] (Gummow J), 300–7 [330]–[348] (Hayne J), 326–7 [406]–[413] (Callinan J); *Crimmins* (1999) 200 CLR 1, 13 [3] (Gleeson CJ agreeing with McHugh J), 23–4 [42]–[43] (Gaudron J), 39–51 [93]–[133] (McHugh J), 96–7 [270]–[272] (Hayne J), 113–7 [343]–[360] (Callinan J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254, 262–7 [13]–[30] (Gleeson CJ), 288 [98], 291–4 [108]–[118] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 577–83 [43]–[63] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame* (2002) 211 CLR 317, 329–35 [6]–[28] (Gleeson CJ), 341 [54] (Gaudron J), 361–2 [123]–[125] (McHugh J), 397–9 [237]–[241] (Gummow and Kirby JJ), 425–31 [323]–[336] (Callinan J); *Graham Barclay Oysters* (2002) 211 CLR 540, 555–64 [9]–[40] (Gleeson CJ), 570 [58] (Gaudron J, agreeing with Gummow and Hayne JJ), 577–83 [84]–[99] (McHugh J), 596–610 [145]–[186] (Gummow and Hayne JJ), 617 [213], 629–31 [245]–[251] (Kirby J), 663–4 [320]–[321] (Callinan J); *Woolcock* (2004) 216 CLR 515, 529–33 [19]–[33] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 547–60 [74]–[116] (McHugh J); *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234, 243 [24] (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ); *Vairy* (2005) 223 CLR 422, 442–8 [58]–[78] (Gummow J); *Dederer* (2007) 234 CLR 330, 345 [44] (Gummow J); *Stuart v Kirkland-Veenstra* [2009] HCA 15; (2009) 237 CLR 215, 248–54 [87]–[114] (Gummow, Hayne and Heydon JJ), 259–62 [130]–[138] (Crennan and Kiefel JJ).

In *SAAMCO*,²⁸² there were three appeals. Lord Hoffmann wrote the leading opinion.²⁸³ The case was decided as a matter of principle at a level of some abstraction: as the identification of the content of the scope of the duty of care owed by a valuer, in the absence of a contractual warranty as to the accuracy of the valuation. The essential first question was: For what kind of loss is the plaintiff entitled to compensation? This was to be answered by identifying the scope of the duty of care. The scope of the duty was reasonable care for the accuracy of the information. So, liability was restricted to the consequences of the information being inaccurate. Even in circumstances where the lender would not have lent at all had there been non-negligent provision of information, the causal question is governed by the nature of loss compensated for by the scope of duty. What was recoverable was no more than the extent to which the valuation was wrong and the security diminished thereby. The principle was reiterated in *Nykredit* (in dealing with the question of interest and costs in one of the three appeals within *SAAMCO*).²⁸⁴

These cases were applied in *Platform Home Loans Ltd v Oyston Shipways Ltd*.²⁸⁵ *SAAMCO* was, however, controversial.²⁸⁶ It has been followed in New Zealand,²⁸⁷ but not in Australia. In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*,²⁸⁸ the High Court dealt with the duty of care of valuers. The facts were not complex. In April 1990 (about six months before a dramatic fall in property values) a real estate valuer was engaged by a bank (Macquarie) to provide a valuation of a partially completed development as it stood and as completed. The request extended to include other parties including a trustee company lender (PC) and the mortgage insurer (MGICA). The valuations were \$5.35 (as was) and \$5.5 million (on completion). The valuation report stated that the property was “suitable security for investment of trust funds to the extent of 65 per cent of our valuation for a term of 3–5 years”. The true value at the date of

²⁸² *SAAMCO* [1997] AC 191; and see also *Nykredit* [1997] 1 WLR 1627.

²⁸³ With whom Lord Goff of Chieveley, Lord Jauncey of Tullilchettle, Lord Slynn of Hadley and Lord Nicholls of Birkenhead agreed.

²⁸⁴ *Nykredit* [1997] 1 WLR 1627, 1638; see also Lord Nicholls of Birkenhead at 1631–2.

²⁸⁵ *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190; see in particular at 208–10 (Lord Hobhouse of Woodborough) and 212–4 (Lord Millett).

²⁸⁶ For example it was criticised by Professor Stapleton in Stapleton, “Negligent Valuers and Falls in the Property Market”, above n 7.

²⁸⁷ *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 682–3.

the valuations was \$3.9 to \$4 million on an as-completed basis. PC advanced 65 per cent of \$5.5 million (\$3.575) to the developer. The loan was secured by a first mortgage and insured by MGICA. The developer defaulted. A little over a year later (July 1991) PC entered into possession and in January 1992 the property was sold for \$2.65 million, which was accepted to be its value when sold. As in *SAAMCO*, the lender and the insurer would not have lent or insured had the valuation not been negligent. The lender's loss (\$1,977,513.67) was paid by the insurer. The trial judge in the Federal Court (Lindgren J) and the Full Court declined to follow *SAAMCO*. The valuers appealed.

No member of the High Court was prepared to state the duty at the level of abstraction in *SAAMCO*. Gaudron J fundamentally rejected the notion that the duty only protects some security margin; in the case at hand it was the decision to enter and the ability to recoup if the loan were entered. McHugh J did not follow *SAAMCO* in point of analysis, but reached a similar result. His view (which was agreed with in this respect by Gummow J) was that both scope of duty and foreseeability are relevant; but that the principles to apply were contract principles in assessing damages.²⁸⁹ This was because the duty

²⁸⁸ *Kenny & Good* (1999) 199 CLR 413.

²⁸⁹ McHugh J said in *Kenny & Good* (1999) 199 CLR 413, 431 [35]:

“... that is the proper approach whether the plaintiff was a contracting party or merely a person for whose benefit the valuation was made. Speaking generally, the valuer is liable only for such losses as a reasonable person would regard as flowing naturally from the negligent valuation or which are of a kind that should have been within the valuer's contemplation. In the absence of a contrary undertaking or special circumstances, the aggrieved party cannot recover any part of the difference between the true value of the property and the price recovered at the time of the sale. The aggrieved party's damages are confined to the difference between the price paid for the property and the price that would have been paid on the basis of a true valuation together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the valuation contract or arrangement. In the case of money lent on a valuation, the damages are confined to the difference between what was lent and what would have been lent on the true value of the property together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the contract or arrangement. In either case, losses do not include the consequences of subsequent market declines.”

was equivalent to contract.²⁹⁰ As to decline in value, his Honour expressed the view that any foreseeable fall in value was or should be built into the assessment of true value and, in so far as any decline occurred beyond this it was not reasonably foreseeable and should be regarded as outside the contemplation of the parties.²⁹¹ It did not matter for McHugh J that the lender would not have entered the arrangement, because the issue was not one of causation, but remoteness. In the case at hand, however, McHugh J found the valuer liable for the whole market decline because of the warranty of safety of lending that was given. Gummow J noted that *SAAMCO* and *Nykredit* establish that the valuer's duty of care had a settled and limited scope that was formulated at some level of abstraction and which foreclosed questions of causation, remoteness and measure of damages. His Honour made the important point that the difference in approach in point of principle was that in Australia the existence and scope of the duty requires scrutiny of the precise relationship between the parties. This process of ascertainment, and identification of content, of the duty precedes and governs the consequential enquiries of causation, remoteness and measure of damages.

Negligent Auditors

Claims for recovery by third parties who invest or deal with companies and claim reliance on the auditor's report have met with limited success. However, it has been limiting the scope of the duty of care, rather than causal analysis that has restricted liability. This approach is most evident in the United Kingdom where, in *Caparo Industries plc v Dickman*,²⁹² the House of Lords concluded that a duty of care arises generally only when the plaintiff is in the contemplation of the defendant as a member of a class who is likely to rely on the advice for the same purposes as that for which it has been prepared by the defendant. The plaintiff company, Caparo, had claimed damages from the auditors of a company which it had taken over. Caparo alleged that the

²⁹⁰ *Hedley Byrne & Co Ltd v Heller & Partners* [1963] UKHL 4; [1964] AC 465, 529–30; *Spring v Guardian Assurance Plc* [1994] UKHL 7; [1995] 2 AC 296, 324; *Hill v Van Erp* (1997) 188 CLR 159, 223.

²⁹¹ I have some difficulty with this as a matter of valuation theory.

²⁹² *Caparo Industries v Dickman* [1990] 2 AC 605.

auditors had negligently carried out their audit and negligently prepared their statutory report causing Caparo to suffer a loss when it was later revealed that the acquired company's profits had been overstated and the share price subsequently fell. The House of Lords held that the auditors owed no duty of care to Caparo. The High Court has not followed *Caparo* in respect of the principle for establishing the existence of a duty of care,²⁹³ but nevertheless has limited claims by third parties against auditors by reference to scope of duty in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*.²⁹⁴

There is little doubt, however, that auditors owe a duty of care to the client company. Claims by client companies give rise to interesting questions of causation. It is useful to start with *Alexander v Cambridge Credit Co Ltd*.²⁹⁵ The auditors of *Cambridge Credit* had failed to note that the accounts did not show provisions that should have been made. Had the appropriate note been made, it was highly probable that a receiver would have been appointed. The company was put into receivership three years after the negligent audit and a claim was made for breach of contract for the increase in the deficiency of assets required to meet liabilities over those three years. The trial judge (Rogers J) found for the company.²⁹⁶ An appeal to the New South Wales Court of Appeal was allowed (Mahoney and McHugh JJA, Glass JA dissenting)²⁹⁷ on the basis that there was no causal connection between the breach of contract and the damage. It was held that the "continued existence" of the company which allowed trading losses was not enough alone, to be held to be causative of the loss.²⁹⁸

²⁹³ *Perre v Apand* (1999) 198 CLR 180, 193–4 [9]–[10] (Gleeson CJ), 210–2 [77]–[82], 212–213 [83], 216 [93] (McHugh J), 300–2 [330]–[333] (Hayne J); *Sullivan v Moody* (2001) 207 CLR 562, 579 [49] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

²⁹⁴ *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* [1997] HCA 8; (1997) 188 CLR 241; see in particular the judgment of McHugh J at 276–81 for an extensive survey the position taken as to the duty of care owed by auditors to third parties in various common law jurisdictions at the time. It was only New Zealand that had adopted a less restrictive approach to duty of care in *Scott Group Ltd v McFarlane* [1977] NZCA 8; [1978] 1 NZLR 553 (Court of Appeal), but as McHugh J notes at 278–9 the analysis in *Scott* was based on *Anns v Merton London Borough Council* which conflated proximity and foreseeability.

²⁹⁵ *Alexander v Cambridge Credit* (1987) 9 NSWLR 310.

²⁹⁶ *Cambridge Credit Corporation Ltd & Anor v Hutcheson & Ors* (1985) 9 ACLR 545. The long procedural history of the matter in the Commercial Division in the Supreme Court of New South Wales is outlined in *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 317–21.

²⁹⁷ Mahoney and McHugh JJA, Glass JA dissenting.

²⁹⁸ *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 334–5 (Mahoney JA):

The judgments in *Alexander v Cambridge Credit* were discussed and followed by the English Court of Appeal in *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)*.²⁹⁹ This was a claim in both contract and tort by two companies (Galoo and Gamine) who allegedly incurred trading losses as a result of relying on the negligent auditing of the defendant.³⁰⁰ The claim was framed as “but for” the negligence, a fraud which had occurred would have been discovered and the companies would have been put into liquidation and thus ceased to trade. If they had ceased to trade, they would have avoided the further trading losses which they in fact incurred. The claim failed for lack of causation. Giving the principal judgment, Glidewell LJ expressly applied a common sense approach to the question – with reference to *Monarch Steamship*³⁰¹ and *March v Stramare*³⁰² – distinguishing between provision of opportunity to make losses and causing them.³⁰³

“To allow the company to continue in existence is, in a sense, to expose it to all of the dangers of being in existence. But allowing the company to remain in existence does not, without more, cause losses from anything which is, in that sense, a danger incident to existing. There are some dangers loss from which will raise causal considerations and some will not. But the company's case has been conducted on the basis that there is not to be — and there has in fact not been — a detailed examination of what particular things caused the fall in net value of the company between 1971 and 1974 and the nature for this purpose of them.

In the end, the company's case has been that the loss it claims was caused by the breach because, and because alone, the breach allowed the company to continue in existence. Some of the incidents flowing from its existence during 1971–1974 may be the results of the breach; some, for example, those flowing from earthquakes or the like, will not be. But the basis of the plaintiffs' claim has been such that no inquiry is to be or has been pursued, for this purpose, into what in fact happened, why and the relationship of what happened to the breach. I do not think that that is enough to establish a causal relationship.”

And at 359 (McHugh JA):

“In the proved circumstances of this case, I do not think that the issue of the certificates by the auditors constituted a cause of Cambridge's loss of \$145,000,000. The existence of a company, as counsel for Cambridge conceded, cannot be a cause of its trading losses or profits. Yet that is what the case for Cambridge comes to. Except in the sense that the issue of the certificates induced the trustee not to take action against Cambridge and thereby permitted Cambridge to exist as a trader, the issuing of the certificates was not one of the conditions which were jointly necessary to produce the loss of \$145,000,000. To assert in these circumstances that the issue of the certificates was a cause of the loss in my opinion is to depart from the commonsense notion of causation which the common law champions.”

²⁹⁹ *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)* [1994] 1 WLR 1360.

³⁰⁰ A claim by a third plaintiff as a third party investor who relied on the auditor's report failed for want of duty of care, with reference to the House of Lords decision in *Caparo Industries v Dickman* [1990] 2 AC 605.

³⁰¹ *Monarch Steamship* [1949] AC 196.

As was noted by the New Zealand Court of Appeal in *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand*,³⁰⁴ these cases should not be taken as authority that negligent auditors reports can never be causative of trading loss to the company. In that case, dealing with the question of whether a company which continued trading after its auditors negligently certified its accounts can recover from the auditors the trading losses which it then incurred, the Court held that an application to strike out the claim was not appropriate. It was a question of causation in the particular case and the company could have the opportunity to attempt to establish a causal link as there could be additional factual circumstances where that causal link could be established, such as a mistaken belief as to the value of stock, or a mistaken belief that the company was trading in a profitable manner which meant that the company continued to trade **in the same way**, incurring further losses. What this approach highlights is that in such claims when the question of causation arises there is need to consider the relationship between breach, the risk created by the breach and the loss. A bare claim that the company should have ceased to trade and thus incurred trading losses may not succeed. It may be different if the auditor negligently failed to alert the board of hugely risky practices undertaken by the company that could cause much greater losses in the future, or a incompetent methodology of trading which created risks in the future. The AWA litigation – *AWA Ltd v Daniels Trading as Deloitte Haskins & Sells*³⁰⁵ before Rogers J at trial and then *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson*³⁰⁶ on appeal – serves as a useful example. AWA claimed damages for the losses incurred by a seemingly successful foreign exchange manager who, undetected, lost \$49.8 million³⁰⁷ in forward foreign exchange contracts. It was alleged that the loss was caused by the auditors' repeated failure to report gross deficiencies in the company's records and internal

³⁰² *March v Stramare* (1991) 171 CLR 506.

³⁰³ *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)* [1994] 1 WLR 1360.

³⁰⁴ *Sew Hoy & Sons* [1996] 1 NZLR 392.

³⁰⁵ *AWA v Daniels* (1992) 7 ACSR 759.

³⁰⁶ *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 (“*Daniels v Anderson*”).

³⁰⁷ In the last quarter of the 1980s – a significant sum.

controls. These matters went to the very risk that was created by the breach. Rogers J found the negligence of the auditors causative of the loss and the finding was upheld on appeal.

Deceit

In the tort of deceit the rule of responsibility is one that provides a remedy for intentionally dishonest conduct. For this remedy, there is no limitation based on foreseeability.³⁰⁸ As Lord Steyn pointed out in *Smith New Court*³⁰⁹ the removal of foreseeability as a limitation on recovery of damages in deceit means that the limits of responsibility are set out by causation, mitigation and remoteness, which are overlapping, though distinct concepts.

This leads to the question as to how causation in fraud should be expressed. The usual phrase is “directly flowing”.³¹⁰ This is “really caused by”³¹¹ including consequential losses, the plaintiff not being limited to comparing values at the date of acting on the deceit. These considerations, together with moral quality attached to the rule of responsibility mean that there is no basis for constructing a limitation, whether through the content of the duty of care or in scope rules for causation, that would limit recovery of a plaintiff as in *SAAMCO*. A broad notion of what is consequential under the “but for” test (tempered by common sense) is called for.³¹²

One aspect of Lord Steyn’s reasons in *Smith New Court* illuminates an important underpinning aspect of the emphasis being given in the modern

³⁰⁸ *Clark v Urquhart* [1930] AC 28, 68; *Potts v Miller* [1940] HCA 43; (1940) 64 CLR 282, 298–9; *Toteff v Antonas* [1952] HCA 16; (1952) 87 CLR 647, 650; *Doyle v Olby (Ironmongers)* [1969] 2 QB 158; *South Australia v Johnson* (1982) 42 ALR 161; *Gould v Vaggelas* [1985] HCA 85; (1985) 157 CLR 215; *Gates v City Mutual* (1986) 160 CLR 1; *Smith New Court Securities v Citibank NA* [1996] UKHL 3; [1997] AC 254 (“*Smith New Court*”); *Palmer-Bruyn and Parker Pty Ltd v Parsons* [2001] HCA 69; (2001) 208 CLR 388; *Henville v Walker* (2001) 206 CLR 459, 473 [30]–[31].

³⁰⁹ *Smith New Court* [1997] AC 254, 284–5.

³¹⁰ *Clark v Urquhart* [1930] AC 28, 68; *Doyle v Olby (Ironmongers)* [1969] 2 QB 158, 167–8.

³¹¹ *Smith New Court* [1997] AC 254, 265 (Lord Browne-Wilkinson), 282 (Lord Steyn).

³¹² *Smith New Court* [1997] AC 254, 284–5 (Lord Steyn).

cases to the rule of responsibility in causation: the interweaving of law and morality.³¹³

The legal and forensic rules relevant to proof

All claims must be proved if they are to succeed. The usual rule of proof is the balance of probabilities. That is the essential forensic rule which gives content to the relevant causal link between the impugned act or omission with the resultant damage or loss. Forensic or procedural rules of proof often provide the practical mechanism for proof of difficult causal questions. These issues arise in both commercial and non-commercial contexts. The law exhibits pragmatism in its day-to-day administration. One of the reasons for that is the need to fashion expedient rules of recovery which facilitate just and fair outcomes by reference to the nature and character of the underlying rules of responsibility and compensation. As Wigmore said³¹⁴ the legal or ultimate burden of proof is determined by the substantive law “upon broad reasons of experience and fairness”. Justice and fairness are qualities that must inspire confidence and loyalty in the administration of justice from defendants as well as plaintiffs. To speak of pragmatic and expedient rules to facilitate just outcomes must not be seen as a code for always solving a plaintiff’s particular evidential difficulties.

This discussion of the topic of evidence and onus of proof (as with many other topics in the law) can helpfully commence with some words of Lord Mansfield:³¹⁵

“It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted”.

Similar examples of a practical approach to how much evidence is required to draw an inference in a context of the party having the means of knowledge

³¹³ *Smith New Court* [1997] AC 254, 280.

³¹⁴ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd Ed, 1940, Little Brown & Co), Vol 9, §2486, 278.

³¹⁵ *Blatch v Archer* (1774) 1 Cowp 63, 65; 98 ER 969, 970; this passage was quoted in *Farrell v Snell* [1990] 2 SCR 311, 328; and *Fairchild* [2003] 1 AC 32, 46 [13] (Lord Bingham).

can be cited in many cases since the Ancien Regime.³¹⁶ An important element of this approach is that:³¹⁷

“in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively”.

In some circumstances, it is not so much who has the better knowledge to prove a fact, but who has put the plaintiff in the position in which it finds itself. For example, in intellectual property cases for instance, where it has been shown that the infringer has wrongly taken advantage of the property of another for commercial gain, difficult questions sometimes arise as to establishing how much of a profit made by an infringer is attributable to the wrongful infringement or use and how much is attributable to the capital, skill or other legitimate attributes or endeavours of the infringer. If profits are made by the use of something which only came into existence by the infringement, all profits must be accounted for.³¹⁸ The owner of the intellectual property is not required to establish how much use was made of its property,³¹⁹ once infringement is established. The onus is on the infringer to identify how much profit is reasonably attributable to its innocent efforts.³²⁰ Reasonable or rational apportionment is made without any attempt at mathematical precision.³²¹

In cases concerning the damage to goods in their transport, causation issues are sometimes disentangled using rules of evidence that assist the party with the ultimate onus, who has consigned goods to the carrier. In *Davis v*

³¹⁶ *Hollis v Young* [1909] 1 KB 629; *Dunlop Holdings Ltd Application* [1979] RPC 523, 544; *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367, 371–2 (“*Hampton Court v Crooks*”); *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; J D Heydon, *Cross on Evidence* (8th Aust Ed, 2010, Butterworths), [7160] 304, fn 123 and the cases and references there cited.

³¹⁷ James Fitzjames Stephen, *A Digest of the Law of Evidence* (5th Ed, 1887, Macmillan), 111, cited in *Cullen v Welsbach Light Company of Australasia Ltd* [1907] HCA 3; (1907) 4 CLR 990, 1013–4; see also *Hampton Court v Crooks* (1957) 97 CLR 367, 371–2.

³¹⁸ *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* [1968] HCA 50; (1968) 122 CLR 25, 43 (“*Colbeam Palmer*”).

³¹⁹ *Colbeam Palmer* (1968) 122 CLR 25, 45; *Hamilton-Brown Shoe Co v Wolf Bros & Co* 240 US 251 (1915).

³²⁰ *Colbeam Palmer* (1968) 122 CLR 25, 45; *Sheldon v Metro-Goldwyn Pictures Corp* 309 US 290 (1940); *Mishawaka Rubber & Woolen Manufacturing Co v SS Kresge Co* 316 US 203 (1942).

³²¹ *Colbeam Palmer* (1968) 122 CLR 25, 46.

*Garrett*³²² a barge with a cargo of lime deviated from its voyage and whilst out of its course encountered bad weather and rough sea wetting the lime, causing it to heat and catch fire. To save those on board the barge was run on shore where both barge and cargo of lime were lost. There was a possibility that the weather and sea would have likewise affected the barge had the proper course of the voyage been maintained. Tindall CJ expressed the matter in a way that the wrongdoer could not “apportion or qualify his own wrong”.³²³ The evidential onus clearly had shifted to the wrongdoer in that an inference could be drawn; but it can be seen to be an onus of exculpation, not merely of raising a doubt or even eliminating an inference. The wrongdoer had, by its wrong, caused the difficulty of proof. Some of the cases in which this principle is most clearly expressed are contractual deviation cases,³²⁴ some are bailment cases where goods have been stored in an unauthorised place.³²⁵

It is unnecessary to canvass exhaustively the shifting onuses in proving a claim for cargo damage under a bill of lading,³²⁶ but one view of the proper approach was described by Viscount Sumner in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd*³²⁷ and Mocatta J in *Government of India v Chandris*³²⁸ that if a plaintiff has shown a prima facie case by delivery of cargo

³²² *Davis v Garrett* (1830) 6 Bing 715; 130 ER 1456.

³²³ *Davis v Garrett* (1830) 6 Bing 715, 724; 130 ER 1456, 1459:

“But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss might have happened but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.”

³²⁴ *Davis v Garrett* (1830) 6 Bing 715; 130 ER 1456; *A/S Rendal v Arcos Ltd* (1937) 58 LI LR 287, 297 (Lord Wright, with whom Lord Atkin, Lord Thankerton and Lord MacMillan agreed); *James Morrison & Co Ltd v Shaw, Savill, and Albion Company Ltd* [1916] 2 KB 783, 795 and 800; *Tate & Lyle Ltd v Hain Steamship Co Ltd* (1936) 55 LI LR 159, 177 (Lord Wright, with whom Lord Thankerton, Lord Macmillan and Lord Maughan agreed).

³²⁵ *Lilley v Doubleday* (1881) 1 QBD 510; *Gibaud v Great Eastern Railway Company* [1921] 2 KB 426.

³²⁶ For detailed discussion of the topic see Steven Rares, “The Onus of Proof in a Cargo Claim – Articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention” (2008) 31(2) *Australian Bar Review* 159 (delivered as a lecture in MIG/MLAANZ lecture series at the Federal Court of Australia, 23 July 2008; [2008] FedJSchol 22).

³²⁷ *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223, 241.

³²⁸ *Government of India v Chandris* [1965] 2 QB 204, 216.

in good order and condition and damage at out-turn, but the carrier has shown that only part of the damage has been caused by its breach, it (the carrier) must show how much is (and is not) a result of that cause otherwise it will be liable for all the damage.³²⁹

These kinds of issues arise in particular in some difficult personal injury cases such as medical negligence and dust disease cases, but the questions are also relevant to any tort, commercial or non-commercial, including, for instance, product liability. The task of the plaintiff is to prove on the balance of probabilities that the wrongful act or omission caused or contributed to the injury. This involves direct evidence or a legal inference that must amount to more than conflicting inferences of equal degree or probability such that choice between them is conjecture; the evidence must permit the conclusion that, from all the circumstances, the relevant fact can be inferred or affirmatively drawn.³³⁰ Of course, common experience and any expert evidence is relevant. Indeed common experience may provide the answer when expert evidence cannot,³³¹ though if expert evidence regards an affirmative answer as lacking justification either as a probable inference or as an accepted hypothesis common experience cannot provide an answer.³³²

It is in this area that one comes to the issue of the consequences (in terms of proof) of the defendant's wrongful act or omission materially increasing the risk of a certain type of harm and that harm in fact being suffered. In *Betts v*

³²⁹ See also *The 'Panaghia Tinnou'* [1986] 2 Lloyd's Rep 586, 592; and *Islamic Investment Co Isa v Transorient Shipping Ltd (The 'Nour')* [1999] 1 Lloyd's Rep 1, 14–5; but cf *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad* [1998] HCA 65; (1998) 196 CLR 161.

³³⁰ *Holloway v McFeeters* [1956] HCA 25; (1956) 95 CLR 470, 480–1; *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352, 358–9.

³³¹ *Adelaide Stevedoring Co Ltd v Forst* [1940] HCA 45; (1940) 64 CLR 538, 563–4; and *EMI (Australia) Ltd v Bes* [1970] 2 NSWLR 238, 242; and see the valuable discussion of legal approach to scientific questions by O'Meally J (as his Honour then was) in *McDonald v State Rail Authority (NSW)* (1998) 16 NSWCCR 695, 714–7.

³³² *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538, 569; *Australian Iron & Steel Ltd v Connell* [1959] HCA 54; (1959) 102 CLR 522, 535–6 (Menzies J) and *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724.

*Whittingslowe*³³³ Dixon J, in discussing the decision of the English Court of Appeal in *Vyner v Waldenberg Pty Ltd*,³³⁴ said:

“It is not necessary to inquire whether their Lordships meant more than that the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty.”

This was not an unqualified statement of principle by Dixon J. He went on to say:

“**In the circumstances of this case** that proposition is enough. For, in my opinion, the facts warrant no other inference inconsistent with liability on the part of the defendant.” (emphasis added)

Dixon J was using the conjunction of breach of duty and eventuation of the harm that might thereby be caused as part of the process of drawing an inference. That is how the case has been understood in High Court³³⁵ and other Australian cases.³³⁶ This orthodox approach is not consistent with some dicta in the High Court.³³⁷ Some of those dicta³³⁸ purport only to deal with the evidentiary onus, but they may be seen to go further. If (as was frankly recognised by Lord Wilberforce in *McGhee*)³³⁹ the breach of duty and increase in risk thereby was not enough alone to draw the inference, then to require evidence from the defendant to avoid a causal connection is to reverse the effective legal onus on this issue. It is certainly not contentious if the increase in risk and injury are otherwise unexplained allowing an inference to be drawn.³⁴⁰ Once, however, alternative causes are shown to be sufficiently open to deny an inference of causation to be drawn, for liability to be found

³³³ *Betts v Whittingslowe* [1945] HCA 31; (1945) 71 CLR 637, 649.

³³⁴ *Vyner v Waldenberg Pty Ltd* [1946] KB 50, which was specifically overruled in *Bonnington Castings* [1956] AC 613.

³³⁵ *RTA v Royal* (2008) 82 ALJR 870, 878 [31] (Gummow, Hayne and Heydon JJ) and 897 [143] (Kiefel J).

³³⁶ *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504, [254]–[256] and *Flounders v Millar* [2007] NSWCA 238; (2007) 49 MVR 53, [4]–[38] and cases there cited.

³³⁷ *Bennett* (1992) 176 CLR 408, 420–1 (Gaudron J); *Chappel v Hart* (1998) 195 CLR 232, 238–9 (Gaudron J), 257–9 (Gummow J, but in the context of the particular duty in that case and recognising Gummow J’s views in *RTA v Royal* at [31]) and 273 (Kirby J); and *Naxakis v Western General Hospital* [1999] HCA 22; (1999) 197 CLR 269, 279 (“*Naxakis*”).

³³⁸ *Chappel v Hart* (1998) 195 CLR 232, 373 (Kirby J).

³³⁹ *McGhee* [1973] 1 WLR 1.

either the legal onus has to shift to fill the gap or a different substantive causation rule has to be applied.

Courts have, in some cases, however, abandoned the need for a plaintiff to show that a **particular** defendant caused the plaintiff's harm. In *Summers v Tice*³⁴¹ both negligent shooters who had shot simultaneously in the plaintiff's direction were held responsible for the striking of the plaintiff by one bullet.

Bailment is a relationship that, upon its proof and the non-return or return in a damaged condition, of the goods the onus of disproving negligence lies on the bailee.³⁴²

In *Bonnington Castings v Wardlaw*³⁴³ the silica dust that caused the pursuer's pneumoconiosis came from two sources in his employer's factory: "innocent" dust from the pneumatic hammer at which he worked in respect of which no known practical method of extracting or preventing dust was available; and "guilty" dust from swing grinders that were fitted with an extraction device which was negligently not kept free from obstruction. The medical evidence permitted the conclusion that pneumoconiosis was caused by the gradual accumulation of silica dust inhaled (guilty and innocent dust together). The guilty dust being material in its contribution to the disease, causation was proved.³⁴⁴ The House overruled *Vyner v Waldenberg Bros Ltd*³⁴⁵ to the extent that it can be taken to have said that the onus of proof lay on an employer to show that breach of a safety regulation was not the cause of an accident.³⁴⁶

³⁴⁰ As may be the better understanding of at least Gaudron J and Gummow J in *Chappel v Hart* (1998) 195 CLR 232.

³⁴¹ *Summers v Tice* 199 P2d 1 (1948); 5 ALR (2nd) 91 referred to in *Cook v Lewis* [1951] SCR 830.

³⁴² Norman Palmer, *Bailment* (1979, Law Book Co), 40–3; Joseph Story, *Bailments* (1843, Little Brown), 80–1 [79], 280–1 [278]; Norman Palmer and Ewan McEndrick, *Interests in Goods* (2nd Ed, 1998, LLP), 478–80.

³⁴³ *Bonnington Castings* [1956] AC 613.

³⁴⁴ *Bonnington Castings* [1956] AC 613, 618 (Viscount Simonds agreeing with Lord Reid), 621–3 (Lord Reid), 623–4 (Lord Tucker), 625–6 (Lord Keith of Avonholm).

³⁴⁵ *Vyner v Waldenberg Bros Ltd* [1946] KB 50.

³⁴⁶ *Bonnington Castings* [1956] AC 613, 618, 619–20, 624–5, 626–7.

In *McGhee v National Coal Board*,³⁴⁷ the pursuer who worked in a brickworks contracted dermatitis. He was usually employed in emptying pipe kilns, but shortly before he felt excessive irritation of the skin he had been sent to empty brick kilns where work was hotter and dustier. Shortly thereafter, he went off work suffering dermatitis. The breach of duty relied upon (and admitted) was not providing washing facilities after finishing work in the brick kilns. The medical evidence was to the effect that the dermatitis was caused by repeated minute abrasions of the outer skin followed by some damage to underlying cells, of a kind not scientifically understood. Profuse sweating over time softened the skin and made it easily injured. Dust would adhere to the skin in the kiln and exertion would cause abrasion. Washing was the only practical way of removing the danger. His bicycling home caked with sweat and dust would only exacerbate the position. Enough, however, was known about the disease to enable a conclusion that it was not like pneumoconiosis in that it was not caused by all the dust and sweat and exertion. However, it was clear that not providing showers materially increased the risk of contracting dermatitis. The House of Lords found for the pursuer. Two interpretations have been placed on the case. The first is reflected in Lord Bridge's analysis (adopted by all members of the House of Lords)³⁴⁸ in *Wilsher v Essex Area Health Authority*³⁴⁹ that *McGhee* did not stand for any principle that the onus of proof was reversed. It was said to be (with the exception of Lord Wilberforce's opinion) an example of a robust and pragmatic approach to causal inferential fact finding of material contribution.³⁵⁰ The second is reflected in the analysis of Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Rodger of Earlsferry in *Fairchild v Glenhaven Funeral Services*³⁵¹ that in circumstances such as *McGhee* either a material increase in risk is an adequate "causal" link or no relevant distinction was to be drawn between materially increasing the risk and materially contributing to (that is causing) the injury.³⁵² (I will return in

³⁴⁷ *McGhee* [1973] 1 WLR 1.

³⁴⁸ Lord Fraser of Tullybelton, Lord Lowry, Lord Griffith and Lord Ackner.

³⁴⁹ *Wilsher v Essex Area Health Authority* [1988] AC 1074 ("*Wilsher*").

³⁵⁰ This interpretation of *McGhee* as a case of inference was the view of Lord Hutton in *Fairchild*.

³⁵¹ *Fairchild* [2003] 1 AC 32; See also the discussion of the Canadian authorities in *Farrell v Snell* [1990] 2 SCR 311.

³⁵² See below for the debate in *Barker v Corus* [2006] 2 AC 572 as to what was decided in *Fairchild*.

the next section to the treatment by the House of Lords in *Fairchild* and *Barker v Corus of McGhee* as a separate substantive rule of causation.)

There are a number of dicta in the High Court about *McGhee*.³⁵³ The issue of the relationship between breach and causation and between causing an increase in risk, material contribution and onus of proof was expressly left open in *Bennett v Minister of Community Welfare*,³⁵⁴ was expressly disavowed by the plaintiff/respondent in *Amaca Pty Ltd v Ellis*,³⁵⁵ nor was the point taken in *Tabet v Gett*.³⁵⁶ Until the High Court deals with the matter

³⁵³ See *Bennett* (1992) 176 CLR 408, 420–1 (Gaudron J); *March v Stramare* (1991) 171 CLR 506, 516–7 (Mason CJ); *Chappel v Hart* (1998) 195 CLR 232, 272–4 [93]; *RTA v Royal* (2008) 82 ALJR 870, 888–9 [94] (Kirby J) and 897–8 [143] (Kiefel J); *Amaca Pty Ltd v Ellis*; *State of South Australia v Ellis*; *Millennium Inorganic Chemicals Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111, 123 [12] (“*Amaca v Ellis*”); *Tabet v Gett* (2010) 240 CLR 537, 558 [40] (Gummow ACJ) and 588 [149] (Kiefel J); and see also the discussion by Spigelman CJ of *McGhee* and related cases in *Seltsam v McGuinness* (2000) 49 NSWLR 262, 278–80 [102]–[120].

³⁵⁴ *Bennett* (1992) 176 CLR 408, 416:
“It is unnecessary for us to consider what would have been the position in the event that the advice obtained by the appellant in 1976 constituted independent legal advice conforming to normal standards and procedures. Whether such advice would have constituted the supervening cause or a concurrent cause along with the Director’s omission to obtain advice is an interesting and, on the fact as we see them, an academic question. In order to answer that question, it might be necessary to consider the view that there is no real distinction between breach of duty and causation (See *McGee v National Coal Board* [1973] 1 WLR 1 at p 8; [1972] 3 All ER 1008 at p 1014, per Lord Simon of Glaisdale; *Quigley v The Commonwealth* (1981) 55 ALJR 579 at p 581; 35 ALR 537 at p 539, per Stephen J), as well as the question whether a failure to take steps which would bring about a material reduction of the risk amounts to a material contribution to the injury. These questions have been considered in Canada in the context of a possible shift in the onus of proof (*Nowsco Well Service Ltd v Canadian Propane Gas & Oil Ltd* (1981), 122 DLR (3d) 228; *Letnik v Metropolitan Toronto Municipality*, [1988] 2 SCR 399; (1988) 49 DLR (4th) 707; *Haag v Marshall* (1989), 61 DLR (4th) 371; *Snell v Farrell* [1990] 2 SCR 311; (1990) 72 DLR (4th) 289; *Lankenau Estate v Dutton* (1991), 79 DLR (4th) 705) but it seems that the problem still awaits final resolution. There is no occasion to consider it here.”

³⁵⁵ *Amaca v Ellis* (2010) 240 CLR 111, where at 123 [12] the Court said:
“The plaintiff expressly disavowed any argument in these appeals that demonstrating only that the exposure to asbestos increased the risk of contracting lung cancer was sufficient to establish causation. It was the plaintiff’s case in this Court, as it had been in the courts below, that she could succeed only if she showed that Mr Cotton’s exposure to asbestos had caused or contributed to (in the sense of being a necessary condition for) his developing lung cancer. This being the way in which the case was presented, it will be neither necessary nor appropriate to consider issues of the kind considered by the House of Lords in *McGhee v National Coal Board* [[1972] UKHL 7; [1973] 1 WLR 1], *Fairchild v Glenhaven Funeral Services Ltd* [[2002] UKHL 22; [2003] 1 AC 32], and *Barker v Corus UK Ltd* [[2006] UKHL 20; [2006] 2 AC 572]. See also *Sienkiewicz v Greif (UK) Ltd* [[2009] EWCA Civ 1159] or by the Supreme Court of Canada in *Resurfice Corp v Hanke* [[2007] 1 SCR 333].”

³⁵⁶ *Tabet v Gett* (2010) 240 CLR 537.

otherwise, the unanimous joint judgment of the High Court in *St George Club Ltd v Hines*³⁵⁷ represents the law in Australia:³⁵⁸

“In an action at law a plaintiff does not prove his case merely by stating that it was possible that his injury was caused by the defendant’s default.”

As Spigelman CJ said in *Seltsam v McGuinness*³⁵⁹ it can be difficult to distinguish between permissible inference and conjecture. The process of concluding one way or the other is often contestable. The difference, however, is real.³⁶⁰

Probability, risk and scope rules

The use of statistical probabilities in legal proof has been much discussed.³⁶¹ In *Seltsam v McGuinness*,³⁶² Spigleman CJ made the following points: First, evidence of possibility including expert evidence and epidemiological research or other statistical evidence is admissible and is to be weighed with other evidence in any causation question. Secondly, the necessary conclusion is an inference that this causal fact (with this act and this plaintiff) was more probable than not. Thirdly, the inability of medical science to give an answer

³⁵⁷ *St George Club Ltd v Hines* (1961) 35 ALJR 106, 107.

³⁵⁸ See also *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724 (Mason J) and in the Court of Appeal [1975] 2 NSWLR 190, 197 (Glass JA); *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275 [80]–[84].

³⁵⁹ *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275 [84].

³⁶⁰ *Jones v Great Western Railway Co* (1930) 144 LT 194, 202 (Lord Macmillan); *Carr v Baker* (1936) 36 SR (NSW) 301, 306 (Jordan CJ); *Caswell v Pavell Duffryn Associated Collieries Ltd* [1940] AC 152, 169–70 (Lord Wright); *Seltsam v McGuinness* (2000) 49 NSWLR 262, 275–6.

³⁶¹ Glanville Williams, “The Mathematics of Proof” [1979] *Criminal Law Review* 297; Jonathan L Cohen, “The Logic of Proof” [1980] *Criminal Law Review* 91; Richard Eggleston, “The Probability Debate” [1980] *Criminal Law Review* 678; John G Fleming, “Probabilistic Causation in Tort Law” (1989) 68 *Canadian Bar Review* 661; Joseph K McLaughlin and Ronald Brookmeyer, “Epidemiology and Biostatistics” in Robert J McCunney (Ed), *A Practical Approach to Occupational and Environmental Medicine* (2nd Ed, 1994, Little Brown & Co); and see the large number of articles cited by Spigelman CJ in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, 272 [64]–[66]; Richard Eggleston, *Evidence, Proof and Probability* (2nd Ed, 1983); D H Hodgson, “The Scales of Justice: Probability and Proof in Legal Fact Finding (1995) 69 *Australian Law Journal* 731; D H Hodgson, “Probability: the Logic of the Law” (1993) 13 *Oxford Journal of Legal Studies* 457; D H Hodgson, “Probability: The Logic of the Law – a Response” (1995) 15 *Oxford Journal of Legal Studies* 51; Note (1997) 71 *Australian Law Journal* 33; Mike Redmayne, “Standards of Proof in Civil Litigation” (1999) 62 *Modern Law Review* 167; David Hamer, “The Civil Standard of Proof Uncertainty: Probability, Belief and Justice” (1994) *Sydney Law Review* 506.

³⁶² *Seltsam v McGuinness* (2000) 49 NSWLR 262.

does not foreclose conclusion.³⁶³ Fourthly, increased risk does not satisfy the requirements of causing or materially contributing to.³⁶⁴ Fifthly, in discussing the American authorities on epidemiological evidence and related risk³⁶⁵ he noted that it was said that an increase in “relative risk” of a factor of 2, if proved by evidence demonstrated that the agent is responsible for an equal number of diseases as all other background factors. Thus a relative risk of 2 implies a 50 per cent likelihood that the exposed individual’s disease was caused by the agent. A relative risk of more than 2 implied that it was more probable than not. Spigelman CJ then said:³⁶⁶

“The predominant position in Australian case law is that a balance of probabilities test requires a court to reach a level of actual persuasion. This process does not involve a mechanical application of probabilities.

...

In Australian law, the test of actual persuasion does not require epidemiological studies to reach the level of a Relative Risk of 2.0, even where that is the only evidence available to a court. Nevertheless, the closer the ratio approaches 2.0, the greater the significance that can be attached to the studies for the purposes of drawing an inference of causation in an individual case. The ‘strands in the cable’ must be capable of bearing the weight of the ultimate inference.”

Relative risk was discussed by the High Court recently in *Amaca v Ellis*³⁶⁷ in dealing with lung cancer in a smoker said to have been caused by exposure to asbestos. The Court rejected the Western Australian Court of Appeal’s conclusion that the multiplicative or synergistic effect of smoking and asbestos made the latter a materially contributing cause. Crucially, it was not proven that smoking and asbestos **must** work together; the evidence only suggested that they might. Without this, the plaintiff was left with a relative risk factor for asbestos under 2 and for smoking greatly over 2. No witness assigned a probability greater than 23 per cent to the chance that the cancer was caused

³⁶³ *EMI (Australia) v Bes* [1970] 2 NSWLR 238, 242.

³⁶⁴ *Bendix Minter Pty Ltd v Barnes* (1997) 42 NSWLR 307, 315–6.

³⁶⁵ *Seltsam v McGuinness* (2000) 49 NSWLR 262, 278–85 [102]–[137].

³⁶⁶ *Seltsam v McGuinness* (2000) 49 NSWLR 262, 284–5 [136]–[137].

³⁶⁷ *Amaca v Ellis* (2010) 240 CLR 111.

by exposure to asbestos. The case was unlike *Bonnington Castings* where the “guilty” dust was proved to have contributed to the accumulation of dust that resulted in the disease. The issue in *Amaca v Ellis* was “whether **one** substance that can cause injury **did** cause injury”. Material contribution arose only if a connection was established (not a risk or heightened risk created).³⁶⁸

I turn to the significant developments in English law on causation in respect of certain types of injury. The unanimous decision of the House of Lords in *Fairchild*³⁶⁹ was to the effect³⁷⁰ that:

“Where an employee had been exposed by different defendants, during different periods of employment, to inhalation of asbestos dust in breach of each defendant’s duty to protect him from the risk of contracting mesothelioma and where that risk had eventuated but, in current medical knowledge, the onset of the disease could not be attributed to any particular or cumulative wrongful exposure, a modified proof of causation was justified; that in such a case proof that each defendant’s wrongdoing had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements for his liability; and that, accordingly, applying that approach and in the circumstances of each case, the claimants could prove, on a balance of probabilities, the necessary causal connection to establish a defendant’s liability.”

This apparent clarity must be understood in the context of the strong disagreement in *Barker v Corus*³⁷¹ about what *Fairchild* did decide. It can be said, however, that each of their Lordships concluded that in the circumstances before them, where all the defendants negligently increased the risk of the disease that eventuated, but it was impossible to say which caused the disease in this man, it would be an affront to justice to require more than that increase in risk as the relevant causal or factual criterion of involvement upon which to found responsibility for compensation. Very much at the root of this policy decision was an aspect of underpinning legal theory referred to extra-curially by McLachlin J³⁷² that tort law, as an aspect of the rule of law, is concerned with righting wrongful conduct. If, what are (by

³⁶⁸ *Amaca v Ellis* (2010) 240 CLR 111 at 136, [68]. The United Kingdom Supreme Court in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10 has also discussed the notion of relative risk in some detail.

³⁶⁹ *Fairchild* [2003] 1 AC 32.

³⁷⁰ Taken from the headnote in *Fairchild* [2003] 1 AC 32.

³⁷¹ *Barker v Corus* [2006] 2 AC 572, between, in particular, Lord Hoffmann and Lord Rodger.

legitimate human perception), self-evident wrongs cannot be recognised by the law's rules and thus go unremedied, people who legitimately feel themselves victims will be left with a sense of injustice. A legitimate sense of injustice should not be the product of the rule of law. The place of justice and fairness was both explicit and central in the reasoning of Lord Bingham,³⁷³ Lord Nicholls,³⁷⁴ Lord Hoffmann³⁷⁵ and Lord Rodger.³⁷⁶

McGhee was closely analysed by all their Lordships. All but Lord Hutton expressed the view (contrary to *Wilsher*) that *McGhee* was not merely an example of robust drawing of inferences.

The explicit change to causal principle that materially increasing the risk of injury was sufficient factual tortious involvement for causation to be established and for the attribution of compensatory responsibility was narrowly confined by all their Lordships.³⁷⁷ Central to such confinement were the following: all the contributing risk was tortiously caused by the defendants, the causal element was singular (only exposure to asbestos), medical science could not ever explain which of the present defendants "caused" (in the traditional sense) the disease, but one of them did.

In 2006, the House of Lords returned to the issue of causation in the exceptional *Fairchild* context in *Barker v Corus (UK) Plc*³⁷⁸ when the House of Lords was called upon to consider whether, and if so, how one would rateably apportion responsibility among tortfeasors if their relevant causal involvement was only increasing the risk of harm and, importantly, how one should deal with "innocent" exposure which was present in *Barker*,³⁷⁹ but which had not been present in *Fairchild*. By this time, the House of Lords had rejected, by a

³⁷² Beverley M McLachlin, "Negligence Law – Proving the Connection" in Nicholas J Mullany and Allen M Linden (Eds), *Torts Tomorrow: A Tribute to John Fleming* (1998).

³⁷³ *Fairchild* [2003] 1 AC 32, 66 [33].

³⁷⁴ *Fairchild* [2003] 1 AC 32, 69 [40].

³⁷⁵ *Fairchild* [2003] 1 AC 32, 73 [56].

³⁷⁶ *Fairchild* [2003] 1 AC 32, 112 [155].

³⁷⁷ *Fairchild* [2003] 1 AC 32, 40 [2] and 55 [21] (Lord Bingham), 70 [43] (Lord Nicholls), 74 [61] (Lord Hoffmann), 91 [108] (Lord Hutton), 118 [170] (Lord Roger).

³⁷⁸ *Barker v Corus* [2006] 2 AC 572 (Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Baroness Hale of Richmond).

³⁷⁹ "Innocent" in the sense that the plaintiff caused some of his own exposure.

narrow majority, the attempt to extend circumstances in which causation or compensation could be based on increasing the risk of harm by its rejection, in *Gregg v Scott*,³⁸⁰ of loss of a chance as the basis for recovery in medical negligence cases.

All the members of the House came to the view, assisted by their analysis of *McGhee*, that the exceptional approach in *Fairchild* should extend to circumstances where not all the exposure was tortiously caused by the defendants.³⁸¹ Thus it was not fatal to the plaintiff's case that he had exposed himself to asbestos. The members of the House, however, placed a restriction on the width of the exception: there must only be one causative agent.³⁸² Lord Hoffmann recanted his view previously expressed in *Fairchild* that this limitation was unprincipled. With respect, it may be doubted that his former view lacked force. Just as the departure from usual causal analysis is a normative judgment based on justice and fairness, so the limits of that departure are likewise policy based. Any principle was the choice of policy, not logic.

As to individual responsibility to the plaintiff, all of the members of the House, save for Lord Rodger, were of the view that the responsibility amongst defendants should be on the basis of respective length and intensity of exposure. The liability of each to the plaintiff was founded upon tortiously increasing risk by exposure; it was just that their mutual responsibility should be based on the extent of that risk caused by each.³⁸³ Lord Rodger was in dissent on the question of proportionate responsibility. His view was that all defendants should be liable in full. His major disagreement was with the interpretation of *Fairchild* and *McGhee* as cases limited to material increase in

³⁸⁰ *Gregg v Scott* [2005] 2 AC 176.

³⁸¹ Caveat with Lord Rodger: *Barker v Corus* [2006] 2 AC 572, 610 [100]–[102].

³⁸² *Barker v Corus* [2006] 2 AC 572, 587 [24] (Lord Hoffmann), 599 [64] (Lord Scott), 611 [104] (Lord Walker), 615 [121] (Baroness Hale).

³⁸³ *Barker v Corus* [2006] 2 AC 572, 589–90 [35]–[36] (Lord Hoffman), 599 [62] (Lord Scott), 612 [109] (Lord Walker), 616 [126] (Baroness Hale).

risk and not as cases where such can be taken as sufficient to cause or contribute to the disease.³⁸⁴

The United Kingdom Supreme Court has affirmed the *Fairchild* approach to proof of causation in mesothelioma cases in the context of one defendant: *Sienkiewicz v Greif*.

Whilst the House of Lords was astute to limit the exception in *Fairchild* and *Barker v Corus*, it is founded on the broad basis of avoiding injustice. This underpinning moral norm will continue to press where scientific research identifies a likely causal relationship, but cannot explain individual human responses. For commercial law, its importance is in the pricing and management of insurance risks and the forecasting of, and provision for, product liability claims, such as pharmaceuticals and chemicals.

Identification of harm – economic loss and loss of a chance

The identification of harm said to be caused is a critical integer in any analysis of responsibility and liability. Before an analysis of causation is embarked upon one needs to understand what it is that is said to have been caused. In contract, this will be principally determined by the terms of the obligation breached in the contractual milieu of the parties and the events that have happened. A covenant to deliver a particular horse that is breached may cause a number of kinds of loss to the promisee, all or only some of which may be within contemplation of the parties: the loss of the value in the particular animal above its price; the liability to an on-buyer to whom the promisee has promised the horse; damages for not being able to sell goods to be transported by the horse; the loss of the chance to win prize money at races: Has the breach of contract deprived the innocent party of a valuable benefit or only the chance of obtaining a valuable benefit? If the former, the plaintiff must prove on the balance of probabilities that the breach deprived it of the benefit. If the latter, the plaintiff need prove on the balance of

³⁸⁴ Lord Rodger's view was seen as the preferable policy response by Parliament: *Compensation Act 2006 (UK)*, s 3.

probabilities the loss of a chance of obtaining the benefit, leaving the assessment of the value of that opportunity to an assessment of possibilities and probabilities.³⁸⁵

The notion of a lost chance or opportunity is well known in contract.³⁸⁶ An assessment as to what the innocent party has lost by the breach will depend on the terms of the promise made in its contractual milieu and the events that have happened. Loss of a chance will be recoverable where either the contract as a whole³⁸⁷ or the particular provision³⁸⁸ was such as to promise an opportunity or chance to obtain a benefit and in other cases where the loss of a business or commercial opportunity is a consequence of the breach and the loss of the opportunity or chance falls within rules of remoteness.³⁸⁹

Damages for loss of a chance is not limited to contract damages. In *Sellars v Adelaide Petroleum*³⁹⁰ the High Court permitted damages for loss of a business opportunity in tort and under the TPA. The addition of the adjective “business” or “commercial” to the phrase “loss of opportunity” or “loss of chance” is crucial. In Australia,³⁹¹ the United Kingdom³⁹² and Canada,³⁹³ (but not elsewhere)³⁹⁴ it has been critical in the restriction of such recovery and in the rejection of loss of a chance as a basis for recovery in medical negligence or tort cases generally. It may be accepted that the distinction is not rigidly logical.³⁹⁵ In *Sellars*, the High Court only dealt with commercial

³⁸⁵ *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 (“*Amann Aviation*”); *Sellars* (1994) 179 CLR 332; *Howe v Teefy* (1927) 27 SR (NSW) 301.

³⁸⁶ *Chaplin v Hicks* [1911] 2 KB 786.

³⁸⁷ *Chaplin v Hicks* [1911] 2 KB 786.

³⁸⁸ *Amann Aviation* (1991) 174 CLR 64.

³⁸⁹ See generally J W Carter, Elisabeth Peden, Greg J Tolhurst, *Contract Law in Australia*, (5th Ed, 2007, LexisNexis), 856–8.

³⁹⁰ *Sellars* (1994) 179 CLR 332.

³⁹¹ *Tabet v Gett* (2010) 240 CLR 537.

³⁹² *Gregg v Scott* [2005] 2 AC 176; *Hotson v East Berkshire Area Health Service* [1987] AC 750.

³⁹³ *Laferriere v Lawson* [1991] 1 SCR 541.

³⁹⁴ *Matsuyama v Birnbaum* 890 NE 2d 819 (Supreme Judicial Court, Massachusetts) and see (2009) 122 *Harvard Law Review* 1247; Lara Khoury, “Causation and Risk in the Highest Courts of Canada, England and France” (2008) 124 *Law Quarterly Review* 103.

³⁹⁵ See the judgment in *Rufo v Hosking* [2004] NSWCA 391; (2004) 61 NSWLR 678. The view of the Court in *Gett v Tabet* (2009) 254 ALR 504, that *Rufo* should not be followed was based on a view that it was not open to an intermediate court of appeal in Australia to make this change in the law. As to this, Gummow ACJ in *Tabet v Gett* (2010) 240 CLR 537, 553 [25] agreed that the question was only one for the High Court.

opportunities.³⁹⁶ There is intrinsically something that can be valued in money's worth in a commercial opportunity. As Lord Hoffmann put it in *Gregg v Scott*,³⁹⁷ “most cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can plausibly be characterised as an item of property, like a lottery ticket.” This distinction was emphasised by the Court of Appeal in *Gett v Tabet*³⁹⁸ and by the High Court³⁹⁹ on appeal in the same case. The distinction was helpfully discussed by Professor Stapleton⁴⁰⁰ in her description of a “present damage to economic value” formulation of loss. The use of this asset or valuation model has its limits, but it is essential if loss of a chance is not to be a head of damage which re-orders the law of torts. It can be accepted that the lost commercial opportunity to negotiate on a particular hypothesis in *Sellars* would be difficult to consider as a property concept; yet it would be easily recognised by a business person as a circumstance worth paying for. The worth of the advantageous position is to be assessed partly by reference to the ultimate benefit that might be obtained and partly by reference to how much would be paid to keep that negotiating advantage. The difficulty with the translation of loss of a chance into tort generally is that it confuses and potentially weakens rights of recovery. Gaudron J discussed this in *Chappel v Hart*.⁴⁰¹ It was the physical injury that Mrs Hart complained of, not her lost opportunity. To construct a loss of opportunity case is just to say that damages are caused solely by the increase in risk. There may be, as elsewhere discussed, a case for relaxing causal connections in certain kinds of cases; it is quite another thing to award damages generally in the law of torts for increased risk alone.

Finally, it is necessary to be clear as to what has to be proven in order to recover for loss of a chance where it is recoverable. The principles appear to be as follows. The courts distinguish between the occurrence or non-

³⁹⁶ See the analysis in *Gett v Tabet* (2009) 254 ALR 504, [339]–[345].

³⁹⁷ *Gregg v Scott* [2005] 2 AC 176, 197 [83].

³⁹⁸ *Gett v Tabet* (2009) 254 ALR 504, [332]–[363].

³⁹⁹ See *Tabet v Gett* (2010) 240 CLR 537, 560 [49]–[50] and 562 [58] (Gummow ACJ) and 581–2 [124] (Kiefel J, with whom Hayne, Bell and Crennan JJ agreed).

⁴⁰⁰ Stapleton, “Cause-in-fact and Scope of Liability for Consequences”, above n 7; and see Brian Coote, “Chance and the Burden of Proof in Contract and Tort” (1988) 62 *Australian Law Journal* 761.

⁴⁰¹ *Chappel v Hart* (1998) 195 CLR 232, 237–9 [5]–[8].

occurrence of historical events on the one hand and past hypothetical events on the other.⁴⁰² Whether an event did or did not happen is determined on the balance of probabilities.⁴⁰³ Whether an event will or will not happen is determined by prediction, conjecture and weighing up probabilities.⁴⁰⁴ As to past hypothetical events – what would or might have happened if the world had been different in some way – the approach is different depending upon the nature of the enquiry.⁴⁰⁵ Causation, even involving such hypothetical events is to be proved on the balance of probabilities.⁴⁰⁶ The qualification upon the last proposition is that if the loss to be proved is a loss of a commercial opportunity or chance the plaintiff must prove some loss, that is that the lost opportunity or chance would have been taken had the default not occurred.⁴⁰⁷ Thus, what the plaintiff would or would not have done in taking up the opportunity or chance in the hypothetical circumstances of an absence of breach is to be assessed on the balance of probabilities.⁴⁰⁸ However, how others would have acted in that opportunity is part of the valuation of the chance or opportunity, not part of the proof of existence.⁴⁰⁹ Past hypothetical events when part of the assessment of damages, including the assessment of the value of the lost chance or opportunity, are assessed conjecturing the probabilities and possibilities.⁴¹⁰

⁴⁰² *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638, 642–3 (Deane, Gaudron and McHugh JJ) and 639–40 (Brennan and Dawson JJ) (“*Malec*”).

⁴⁰³ *Malec* (1990) 169 CLR 638, 642–3.

⁴⁰⁴ *Malec* (1990) 169 CLR 638, 642–3; *Davies v Taylor* [1974] AC 207.

⁴⁰⁵ John G Fleming, “Probabilistic Causation in Tort Law: a Postscript” (1991) 70 *Canadian Bar Review* 136.

⁴⁰⁶ *Mallett v McMonagle* [1970] 2 AC 166, 176; *Sykes v Midland Bank Everton and Trustee Co* [1971] 1 QB 113; *Sellars* (1994) 179 CLR 332, 355; *Gett v Tabet* (2009) 254 ALR 537, 575–82 [332]–[363].

⁴⁰⁷ *Sellars* (1994) 179 CLR 332, 355; *Daniels v Anderson* (1995) 37 NSWLR 438, 530; *Heenan v Di Sisto* [2008] NSWCA 25; (2008) 13 BPR 25,213, [32]; *Allied Maples Group v Simmons & Simmons* [1995] 1 WLR 1602 (“*Allied Maple*”).

⁴⁰⁸ *Sellars* (1994) 179 CLR 332, 353; *Heenan v Di Sisto* (2008) 13 BPR 25,213, [32]; *Hall v Foong* (1995) 65 SASR 281, 292 and 381; *Hanfley Pty Ltd v NS Hope & Associates* [1990] 2 Qd R 218, 228; *Sykes v Midland Bank* [1971] 1 QB 113, 127; *Lillicrap v Nalder* [1993] 1 WLR 94, 99.

⁴⁰⁹ *Allied Maple* [1995] 1 WLR 1602, 1613; *Heenan v Di Sisto* (2008) 13 BPR 25,213, [32]; *Daniels v Andersen* (1995) 37 NSWLR 438, 530; *Spring v Guardian Assurance Plc* [1995] 2 AC 296, 327.

⁴¹⁰ *Malec* (1990) 169 CLR 638; *Sellars* (1994) 179 CLR 332; *Daniels v Anderson* (1995) 37 NSWLR 438. Earlier Australian cases which say that no loss has been proved without showing that the benefit would have accrued can be taken to have been overtaken and distinguished by *Sellars*: see the discussion in this respect of *Gates v City Mutual* (1986) 160 CLR 1 and *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* [1984] HCA 59; (1984) 157 CLR 149, especially at

Concluding Remarks

Causation is part of the legal analysis which attributes legal responsibility and awards compensation in a just and coherent way conformable with the legal rule at hand. This object is both a legal and a human one. Rules of human responsibility and compensation, to be supported by, and have the loyalty of, society need to reflect its underlying norms of fairness and justice to both claimant and respondent and have a degree of simple coherence. Hence, the law's concern with the occurrence causing or contributing to the loss.⁴¹¹ Hence also, the law's desire to apply causation (and other rules of scope) liberally and not rigidly so as to avoid injustice.⁴¹² To put the matter slightly differently, and though said in respect of assessment of damages, as Cooke J (as he then was) said in *Takaro Properties Ltd v Rawling*,⁴¹³ assessment of damages is "a pragmatic subject ... [which] does not lend itself to hard-and-fast rules".

The growing willingness of the courts⁴¹⁴ to adapt the rules for, and to regulate, responsibility and liability of parties according to a perceived just outcome conformable with an appropriately nuanced rule of responsibility reflects the declining influence of formalistic, scientific or analytical jurisprudence of a century, or even half a century, ago. Law is not merely the living command of the past represented by the analytically determined product of the *ratio decidendi* of authoritative and binding cases. Immanent within it are notions of fairness and justice. The detailed analyses of their Lordships in *Fairchild* reveal an approach that assumed the validity of moral judgments known intuitively, and established by analysis, discussion and reflection.⁴¹⁵ There is

⁴¹¹ 351–3; the Full Federal Court decisions of *WCW Pty Ltd v Bolster* (6 January 1993) and *Gove v Montague Mining Pty Ltd* [2000] FCA 1214 are likewise of doubtful authority.

⁴¹² *Norton v Streets* (1968) 120 CLR 635, 643; *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 350 (McHugh J).

⁴¹³ *Monarch Steamship* [1949] AC 196, 232; *Wenham v Ella* [1972] HCA [43]; (1972) 127 CLR 454, 466 (Walsh J); *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, 351 (McHugh J).

⁴¹⁴ *Takaro Properties Ltd v Rawling* [1986] 1 NZLR 22, 69.

⁴¹⁵ Exhibited by *Marks* (1998) 196 CLR 494; *Murphy v Overton* (2004) 216 CLR 388; *Chappel v Hart* (1998) 195 CLR 232; *Chester v Afshar* [2005] 1 AC 134; *SAAMCO* [1997] AC 191; *Fairchild* [2003] 1 AC 32; and *Barker v Corus* [2006] 2 AC 572.

⁴¹⁵ cf Jerome Hall, *Living Law of Democratic Society* (1949), 80–1; see W G Friedmann, *Legal Theory* (5th Ed, 1967, Columbia University), 154–5.

no Benthamite derision of justice and morality. Rather, justice, as a moral concept, has a relationship with utility in the binding of society through loyalty to the rule of law in the character of the analysis of John Stuart Mill – the “sentiment of justice”.⁴¹⁶ This reflects a scepticism about a static analytical ideal and a greater confidence in the contemporaneous (judicial) perceptions of what is socially or intuitively just. However, the analyses that led to these conclusions were rigorous and comprehensive; though involving a policy choice, the technique that was deployed is an illustration of the exercise of judicial power, based on the analysis of precedent, of underlying principle and drawing upon basal notions of justice and fairness that inform both legal theory and the development of the law in respect of the attribution of responsibility. Whether this approach remains limited to the creation of exceptional rules when seen to be absolutely necessary by an ultimate appeal court (as in *Fairchild* and *Barker v Corus*) or whether it comes to inform habitually broader and more evaluatively “just” conclusions by judges lower in the judicial hierarchy remains to be seen. That the issue arises on a day-to-day basis can be seen by the facts of *McGhee*. The structural framework calling for assessment as to what is “appropriate” (*Civil Liability Act*, s 5D(1)(b) and cf s 5D(2) and (4)) may require broad normative considerations at a working trial level.

The debates as to causation and the changes made to approaching causal questions have tended to emphasise a change to the structure of analysis. I am not sure, however, that as long as one recognises (as Mason CJ did in *March v Stramare*) the importance of asking the correct question based on the relevant rule of responsibility, an approach based on common sense, on a case by case basis, using approaches to well known problems revealed by past authorities is not all that one can sensibly expect. One can of course structure the approach as in *Civil Liability Act*, s 5D. That, however, simply bundles all considerations beyond factual involvement into one enquiry (s 5D(1)(b) or s 5D(2)), rather than two enquiries (causation and remoteness). Why, as a matter of logic will this result in otherwise busy (or lazy) trial judges

⁴¹⁶ Friedmann, above n 414, 320.

becoming more transparently fulsome in their reasons? Why do we necessarily want them to be, given the usual right of appeal by way of rehearing? Rightly, much is expected of a judge's reasoning, but there must be opportunity for those reasons simply to take account of, and express, the fact that the decision may be finely balanced and the answer intrinsically contestable after careful assessment of the circumstances at hand. The cases I have outlined in relation to marine insurance exhibit that. Is it to be said any alternative to *March v Stramare* would yield a result not conforming with common sense? One would hope not, unless the rule of responsibility called for it. That is because common sense will always play a central role in any evaluative analysis of a human or physical relationship where the aim is a just conclusion as to personal responsibility. Further, care should be taken not to make legal structures more complex than they need to be. Central to Hart and Honoré's concept of causation is that law must be understood by ordinary people. If I may respectfully say so, this underpinning is both correct and fundamentally important as a matter of legal theory.⁴¹⁷ It is an essential characteristic of the rule of law. As Maitland said in 1892:⁴¹⁸

"Englishmen do not love lawyers, and the law they love they do not think of as lawyers' law."

The importance of simplicity of legal structure (where possible) is something not to be lost sight of in debates about structure and approach to the causation enquiry. When people lose a court case, the reasons for their loss and the potentially catastrophic consequences therefrom need to be readily explicable. I venture to suggest that sophisticated and deeply experienced judges such as Haldane, Birkenhead, Shaw, Sumner, Simon, Wright, Reid, Wilberforce, Pearson, Dixon, Fullagar, Kitto, Windeyer, Mason, Deane, Toohey and Gaudron had this basal requirement for simplicity in mind in their emphasis on common sense in *Thom (or Simpson) v Sinclair*,⁴¹⁹ *Leyland Shipping*,⁴²⁰ *Admiralty Commissioners v SS Volute*,⁴²¹ *Yorkshire Dale*

⁴¹⁷ Raoul C Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (1987, Cambridge University Press), 160.

⁴¹⁸ H A L Fisher (Ed), *The Collected Papers of Federic William Maitland, Vol. 1* (1911), printed as *Historical Writings in Law and Jurisprudence*, Vol 28 (1981, William S Hein & Co Inc).
⁴¹⁹ [1917] AC 127.

⁴²⁰ *Leyland Shipping* [1918] AC 350.

⁴²¹ *Admiralty Commissioners v SS Volute* [1922] 1 AC 129.

Steamship,⁴²² *The Dredge Liesbosch*,⁴²³ *Monarch Steamship*,⁴²⁴ *Stapley v Gypsum*,⁴²⁵ *Alphacell*,⁴²⁶ *National Insurance v Espagne*,⁴²⁷ *Fitzgerald v Penn*,⁴²⁸ and *March v Stramare*.⁴²⁹ Only one of these cases was a jury case. Simplicity of approach was required for a jury; but it is also wise to maintain it for judges and the law they administer.

Ultimately, basal questions of legal responsibility will only be answered by a process that includes a sufficient causal connection that admits of a just and fair conclusion in the light of the relevant rules of responsibility and compensation. Common sense, understood as the sound practical intuitive response of the community or milieu in which the question is being asked, properly contextualised and supportable by reasoned (even if contestable) explanation is central to that process. To the extent that such a proposition has a foundation that would be refuted by some philosophers but accepted by others, so be it. The practice of law and the articulation of reasons for responsibility require a degree of linguistic and analytical simplicity. The task, as Lord Hoffmann has said, is not to allow simplicity of expression to obfuscate analysis and thereby confuse or distort the explication of reasons.

⁴²² *Yorkshire Dale Steamship* [1942] AC 691.

⁴²³ *Liesbosch, Dredger v Edison, SS (Owners)* [1933] AC 449.

⁴²⁴ [1949] AC 196.

⁴²⁵ *Stapley v Gypsum Mines Ltd* [1953] AC 663.

⁴²⁶ *Alphacell* [1972] AC 824.

⁴²⁷ *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569.

⁴²⁸ *Fitzgerald v Penn* (1954) 91 CLR 268.

⁴²⁹ *March v Stramare* (1991) 171 CLR 506.