



Unnecessary Causation

by

The Honourable James Edelman
Justice of the Supreme Court
of Western Australia

A paper presented to the
Association of Anglo-Australian Lawyers
and the
Australian National University

Canberra
25 June 2014

Unnecessary causation

James Edelman*

Paper presented at the Association of Anglo-Australian lawyers and the Australian National University (25 June 2014)

Contents

Introduction: a note on legal reasoning	1
The causation question and the suggested answer.....	3
Separating issues that are anterior or subsequent to the causal enquiry.....	4
Two separate anterior legal issues	4
A separate subsequent legal issue.....	7
The thesis: 'but for' causation	8
The 'common sense' approach to causation	10
Support for the common sense approach in Australia.....	10
Answers to the concerns raised by Mason CJ	12
Assertions of a linguistic basis for the common sense approach	14
Signs of a decline in common sense causation.....	15
The subsequent legal issue: where causation is unnecessary	17
Torts.....	17
Causation of loss arising from breach of trust or director's duties	21
Estoppel.....	22
Breach of contract.....	23
Conclusion.....	25
Appendix: Causation in the Civil Liability Acts	28

Introduction: a note on legal reasoning

In 1919, Albert Einstein received a telegram informing him that one of the important predictions made by his general theory of relativity had been validated. Astronomers had observed that the sun's gravity caused light to bend. A student of Einstein's read the telegram and asked, provocatively, what he would have thought if the observations of astronomers had been inconsistent with his general theory. 'Then', Einstein said, 'I would have been sorry for the dear Lord because the theory is correct.'

Contrary to Einstein's view, much of science today involves the claim that theories must be tested against the cold, hard reality of experiment. It is not

* Justice of the Supreme Court of Western Australia. Adjunct Professor, University of Western Australia and University of Queensland; Conjoint Professor, University of New South Wales.

the other way around. There is a common belief that the same is true of the social science that is law: legal theories, it is said, should be tested against the cases not the other way around. Judge Posner famously illustrated this idea by reference to concepts of top down and bottom up reasoning. Top down reasoning describes the process by which the legal scholar or judge develops a theory and then uses it to organise, criticise, accept or reject decided cases. In contrast, a scholar or judge using 'bottom up' reasoning starts with the cases and moves from there (usually not very far).¹ In the jurisprudence of constitutional law, 'top down reasoning' has become a term of derision.²

There is a dominant view that it is illegitimate for a judge to reason in a purely top down fashion. Judges in the Anglo-Australian tradition will rarely reason in a fashion popular in the United States: 'that doctrine is inconsistent with an economic theory of wealth maximisation so all cases based on that doctrine should be overruled'. As Gummow J extra-judicially expressed the point, '[t]o proceed on the footing that the law ought to be X, and that the law is therefore X, and any decision of an ultimate appellate court to the contrary is therefore in error, and to teach students accordingly, is unsatisfactory'.³

Despite the power of this approach, and its important role in confining judicial development of the law by reference to some preferred social theory, there are two qualifications to it.

The first qualification is that the development of the common law always requires some departure from pure 'bottom up' reasoning. This is not to endorse reasoning to a result by reference to some preferred social policy. Instead, it is to accept, as Posner explains, that the difficulty with pure bottom up reasoning is that it begs the question of how a legal scholar is able to reason from one case to

¹ R Posner 'Legal Reasoning from the Top Down and the Bottom Up: The Question of Unenumerated Constitutional rights' (1992) 59 *Uni Chicago Law Rev* 433.

² See the cases discussed in K Mason 'What is wrong with top-down legal reasoning' (2004) 78 *ALJ* 574.

³ W Gummow 'Conclusion' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (2005) 515.

another without some conception of theory, system, or principle independent of the particular cases.⁴

The second qualification is that there may be rare instances where it is legitimate for an ultimate appellate court to overturn an established pattern of decisions and reasoning, even one which is well established at that level, and to say that 'the law ought to be X and therefore all the decisions of ultimate appellate courts to the contrary are wrong' not because they are inconsistent with the pattern of other decisions but because they are inconsistent with some fundamental principle. Such a fundamental principle should not be some preferred social policy or theory. But one example of such a fundamental principle is the metaphysics of causation.

The causation question and the suggested answer

At common law the question of causation is fundamental. But, as is often acknowledged, the basic question of causation is not a question of law: it is commonly described, in a misleading expression, as 'causation in fact'. The true causal question is not actually one of fact. It is one of metaphysics. It involves asking when an outcome (O) is caused by an event (E).

In many cases, the approach of the judiciary has been to avoid answering this metaphysical question. In *Timbu Kolian v The Queen*,⁵ Windeyer J quoted from Sir Frederick Pollock to say that 'the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause'. This notion is one of the reasons for the rise of an approach to causation in Australia described as the 'common sense approach'. As I will explain, this is not a test of causation at all. Without further elaboration it is an invitation to the judge or jury to reason by reference to

⁴ R Posner 'Legal Reasoning from the Top Down and the Bottom Up: The Question of Unenumerated Constitutional rights' (1992) 59 *Uni Chicago Law Rev* 433, 436.

⁵ *Timbu Kolian v The Queen* (1968) 119 CLR 47, 68 - 69.

unstated premises and to assert as 'common' a conclusion that is often highly contested.

As I will explain, my basic thesis is that the answer to this question is that causation requires necessity. An event will only cause an outcome if the event is necessary for the outcome. In other words, if the outcome would have occurred even without the event then the event made no difference to the outcome. It did not cause the outcome. This is commonly known as the 'but for' test. The thesis is not new. For a time it was the dominant approach. But perceived difficulties with its application led to it being abandoned in Australia. The signs are that the 'but for' test may yet be re-adopted, as it should.

Separating issues that are anterior or subsequent to the causal enquiry

Two separate anterior legal issues

It is necessary to separate two anterior legal questions from the causation enquiry.

The first anterior question legal question involves characterisation of the event (E) and the outcome (O). For instance, to use a variation of an example considered later in this paper, suppose a heroin dealer provides a user with heroin. The user suffers an overdose of drugs. The expert evidence is that the user had already overdosed on other non-opioid prescription drugs administered before the heroin. One question might be 'did the provision of the heroin (E) cause the overdose (O)?' The answer to this question is 'no'. The overdose had already occurred. But the context might require a different question to be asked: 'did the provision of the heroin (E) cause the overdose that included illegal opioid drugs (O)?' In that case the answer would be "yes".

This paper is not concerned with the questions of characterisation of event and outcome. Instead, it focuses upon what it means to prove causation between event and outcome. This question of causation is a question of metaphysics, independent of legal principle. The ultimate answer to whether E

has 'caused' O depends on a theory of causation which, in the language of John Mackie, is the 'cement of the universe'.⁶ Causation rules might change at a quantum level, but in the Newtonian world in which we live they cannot change from case to case. No number of judges, and no quantity of judicial decisions, can stop the nature of causation moving forwards between event and outcome and the manner of that movement: *eppur si muove*. The question of causation is pure or 'top down' theory. It appears to suggest that no matter how many consistent ultimate appellate court decisions there might be on a point of common law causation, the correctness of those decisions as a matter of causation does not depend on precedent or fit. It depends on an understanding of the cement of the universe.

The second anterior legal question is clearly expressed in the work of Professor Robert Stevens. In *Torts and Rights*,⁷ Stevens takes the important step of separating two enquiries at common law. The first is the enquiry into whether an action is wrongful; that is, whether the action violates the rights of another. A violation of another's rights can occur intentionally or unintentionally. Where the violation occurs unintentionally but carelessly, then it is generally only actionable upon proof of loss. But this does not mean that no violation has occurred.

An example is *Performance Cars Ltd v Abraham*.⁸ In that case, Mr Abraham was found to have carelessly driven into the Rolls Royce owned by Performance Cars, he infringed the rights of Performance Cars. Mr Abraham was lucky. The same panel of the Rolls Royce had been previously damaged by another wrongdoer who was liable to pay for the repairs. The Court of Appeal rightly said that Mr Abraham was a wrongdoer. But he had not caused any loss. But for his negligence the Rolls Royce's panel still had to be repaired. Mr

⁶ J L Mackie *The Cement of the Universe: A study of causation* (1980).

⁷ R Stevens *Torts and Rights* (2007).

⁸ *Performance Cars Ltd v Abraham* [1962] 1 QB 33.

Abraham was not liable to pay damages for a car that had previously been damaged.

Separate from the enquiry into whether a person is a wrongdoer is the enquiry into whether the event which violated another's rights caused loss. Or, if an account and disgorgement of profits are sought, whether the wrongdoing caused profits about which disgorgement is sought.

My focus in this paper is only upon the second enquiry. The causal question in relation to whether loss is caused (or profits are made) cannot be clearly understood until it is separated from the enquiry into whether a wrong has been committed.

By separating the question of whether a wrong has been committed from the question of whether loss (O) was caused by the event (E) which constituted the wrong, this paper is not concerned with difficult cases such as *Cook v Lewis*.⁹ In that case, two hunters carelessly shot at grouses flying out of a bush. Cook was in the bush. A bullet struck him in the eye. But Cook could not prove which hunter fired the shot that struck him. A majority of the Supreme Court of Canada held that both hunters were liable. The issue in that case was the preliminary question of whether a wrong was committed, not the question of whether the event which constituted the wrong (E: the shooting of the bullet) caused loss. The tort of negligence would not have been committed by the hunter who carelessly, but unintentionally, fired his gun but missed. The situation is the same as if a person drives their car carelessly but has no accident. At common law there is no tortious liability for negligence 'in thin air'.¹⁰

The difficult issue in *Cook* was whether the defendants were liable for commission of a wrong when neither of them could individually be proved to have done so but it could be proved that one of them must have done so. This

⁹ *Cook v Lewis* [1951] SCR 830. See also *Summers v Tice* 33 Cal 2d 80 (1948).

¹⁰ *Bourhill v Young* [1943] AC 42; *Palsgraf v. Long Island Railroad Co* 248 NY 339, 162 NE 99, 99 (NY 1928) Cardozo J ('there can be no duty [owed by the guard] towards that person').

has been described as a 'pure question ... of fact' (which bullet struck Cook).¹¹ This is not the question with which this paper is concerned. The question in this paper is whether an event which involves proved wrongdoing causes loss.

A separate subsequent legal issue

The question of causation whether E *caused* O is only a starting point in the process of determining whether the *legal link* between E and O is satisfied. This will often be the more important question. The question of the requisite legal link asks whether, even if causation is not satisfied, causation should be replaced with a non-causal legal link, or whether no link at all should be required.

It is not mere semantics to insist upon separating rules of causation from a non-causal legal link that might be required between event and outcome. There are three reasons why it is important to separate causal rules from non-causal legal links that are sometimes sufficient to impose liability.

The first reason is that causal rules provide a simple, and justifiable starting point for the imposition of responsibility. The clarity of causation is sacrificed if the single concept is used to describe multiple phenomena. For this reason, I dispute the approach taken in many of the leading English cases, as well as extra-judicially, by one of the most brilliant English judges, Lord Hoffmann. The contribution of Lord Hoffmann to our understanding of causation has been immense. But the extensive bundling of different rules within the nomenclature of causation is one aspect of his Lordship's discussion that, respectfully, is certain to cause difficulty. As part of his Lordship's discussion of causation in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)*,¹² he said this: '[t]here is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending

¹¹ *R v Franklin* [2001] 3 VR 9, 28 [54] (Brooking JA).

¹² *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883, 1106 [128].

upon the basis and purpose of liability'. With the greatest of respect, something would have gone badly wrong in English law if the cement of causation varies from situation to situation. But despite the difficulty in the rhetoric, I do not think that much has gone wrong in English law. Lord Hoffmann's point could be better expressed as saying that in different circumstances the single rule of causation can be replaced with a non-causal rule, or replaced altogether.

The second reason why a single causal rule is preferable is because the focus on a single, justifiable causal phenomenon is far more transparent. It means that departure from a rule of necessity must be justified, not concealed with language of 'common sense' or bundled into a complex causal enquiry.

The third reason is perhaps the most fundamental. As I will explain, 'but for' causation, or necessity, is the approach that most naturally fits a conception of causation.

The thesis: 'but for' causation

The question, then, reduces to what should be the default rule for the required link between Event and Outcome. That answer is necessity. The most natural, and most common, description of cause is that E is a cause of O if E was necessary for the occurrence of O. Or, in more colloquial language, the causal inquiry is always whether 'but for' the existence of E, the outcome O would not have happened.

The reasoning in this paper is not a new thesis. For a time, it was the dominant academic view of causation in Australia and England. As McHugh J observed in his decision in *March v E & MH Stramare Pty Ltd*,¹³ a case that arguably changed the manner of Australian thinking on the subject, prior to that decision 'many, probably most, academic legal writers on the subject assert[ed] that, once the "but for" or causa sine qua non test is satisfied, the issue of causation is spent'.

¹³ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 531.

In the United States, the 'but for' test has recently asserted its place as the default rule. In *Burrage v United States*,¹⁴ the United States Supreme Court considered the role of causation in the context of a provision in a criminal statute which contained the phrase 'death . . . resulted from the use of th[at] substance'. In that case, Mr Burrage provided the heroin used by Mr Banka, a long time drug user. Mr Banka died from a drug overdose after an extended drug binge including the heroin. The expert evidence was that Mr Banka may have died even if he had not taken the heroin. Giving the opinion of the Court, Scalia J explained that the expression 'results from' should bear the ordinary causal meaning of 'but for' causation. On that approach, Mr Banka's death had not been caused by the use of the heroin. There is one aspect of the discussion of but for causation which is, however, erroneous. Justice Scalia drew a distinction between two circumstances.

(1) An event (E) which combines with other events to cause an outcome where the event is necessary for the outcome - the 'straw that broke the camel's back'. The example given is poison administered to a man debilitated by numerous diseases.

(2) An event which by itself is sufficient (giving the example of shooting a person with a gun).

These circumstances are not materially different. There is never an event which is independently sufficient to cause any outcome. For example, shooting a person with a gun is only sufficient to cause death (or, more accurately, death at a point in time earlier than would otherwise occur) when combined with other factors (the wind direction, the weather conditions, the effective operation of the mechanisms of the gun, the failure of the victim to duck at the crucial moment, the absence of a bullet proof vest on the victim and so on, and so on).

¹⁴ *Burrage v United States* (2014) 571 US (forthcoming, 27 January 2014).

The 'common sense' approach to causation

Support for the common sense approach in Australia

The 'common sense' approach has been well known in Australia since *March v E & MH Stramare Pty Ltd*.¹⁵ In that case, an intoxicated and speeding driver collided with a truck which was parked at night, with hazard lights, in the centre lane of a six lane road. The High Court unanimously held that the truck driver and his employer were liable.

On an application of the 'but for' test, the answer to the causal enquiry was simple. The truck driver's carelessness was necessary for the speeding driver's injury, and but for the truck driver's negligence the speeding driver would not have suffered the losses that stemmed from his injury. As McHugh J explained¹⁶

when the damage suffered by a plaintiff would not have occurred but for negligence on the part of both the plaintiff and the defendant, a conclusion that the defendant's negligence was not a cause of the damage cannot be based on logic or be the product of the application of a scientific or philosophical theory of causation. It has to be based upon a rule that enables the tribunal of fact to make a value judgment that in the circumstances legal responsibility did not attach to the defendant even though his or her act or omission was a necessary precondition of the occurrence of the damage.

This approach by McHugh J did not command the support of the other members of the High Court. The leading decision was given by Mason CJ, with whom Toohey and Gaudron JJ agreed. Although their Honours all agreed with McHugh J that the truck driver was liable, Mason CJ in *March* preferred a 'common sense' approach to the issue of causation in preference to the 'but for' test.¹⁷

The 'common sense' approach to causation has been applied by the High Court of Australia in criminal law as well as civil law. In *Royall v The Queen*,¹⁸

¹⁵ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506.

¹⁶ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 530.

¹⁷ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515.

¹⁸ *Royall v The Queen* [1991] HCA 27; (1991) 172 CLR 378.

a majority of the High Court considered the meaning of causation in the context of s 18(1)(a) of the *Crimes Act 1900* (NSW). That statute described an act of an accused person 'causing the death charged' committed in particular circumstances. A majority of the court, adopting the approach from Burt CJ in Western Australia,¹⁹ held that it was sufficient if a jury were told that the question of causation was not a philosophical or scientific question, but that it was 'a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter'.²⁰

In *March*, Mason CJ gave a number of examples of situations in which he considered that causal questions were affected by factors other than the 'but for' test:²¹

(i) Where a factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured but the risk of the accident occurring at that time was no greater.²² An example of this is a taxi driver who is dangerously speeding in breach of conditions of contract with the customer and, had he not been speeding, the taxi would not have been in the position where it was hit by a falling tree.²³

(ii) Where a superseding cause, sometimes described as a *novus actus interveniens*, is said to 'break the chain of causation' which would otherwise have resulted from an earlier wrongful act.²⁴ So, for instance, in *M'Kew v Holland*²⁵ a defendant's negligence injured the plaintiff's leg but the plaintiff's subsequent action in attempting to descend a steep staircase without assistance

¹⁹ *Campbell v The Queen* (1981) WAR 286, 290.

²⁰ *Royall v The Queen* [1991] HCA 27; (1991) 172 CLR 378, 387 (Mason CJ) 411 - 412 (Deane & Dawson JJ) 441 (Toohey & Gaudron JJ).

²¹ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 516 - 519.

²² *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 516.

²³ An example given by Lord Walker of Gestingthorpe in *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134, 164 [94]; H L A Hart and A M Honoré *Causation in the Law* (2nd edn, 1985) 109.

²⁴ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 517 - 518.

²⁵ *M'Kew v Holland* [1969] UKHL 9; [1970] SC (HL) 20.

or a handrail was held to 'break the chain of causation'. Professors Hart and Honoré also argued that *novus actus interveniens* is an example where a necessary event is not a cause. They give an example of a person who provides arsenic to another who uses it to poison a victim. They suggested that 'the causal explanation of the particular occurrence is brought to a stop when the death has been explained by the deliberate act'.²⁶

(iii) Where there are two or more acts or events each of which would be sufficient to bring about the plaintiff's injury.²⁷

Answers to the concerns raised by Mason CJ

There is a simple and clear answer for why (i) and (ii) do not present problems for the 'but for' test. The answer is also the reason why I have the greatest pleasure in presenting this paper here today. The answer was given by an ANU academic, Professor Stapleton, whose work on causation, more than anyone else in the world, has imposed rational theory upon the cases and, in turn, has affected and shaped the development of the law relating to causation. The writings of Professor Stapleton, have been a dominant and powerful influence upon courts across Australia, Canada, England, and the United States. In this country, her work is so well known that when, in 2005, on one of the many occasions when her work on causation was cited in the High Court, one judge realised instantly that she had, in his words, been 'verballed'.²⁸

For many years, Professor Stapleton has argued that the law must distinguish between questions that are concerned with causation and questions that are concerned with the scope of liability for consequences.²⁹ As Professor Stapleton explains, footnoting *March*, courts unfortunately conflate questions

²⁶ H L A Hart and A M Honoré *Causation in the Law* (2nd edn, 1985) 42.

²⁷ *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 516.

²⁸ *Travel Compensation Fund v Tambree* [2005] HCATrans 474 (2 August 2005) (Gummow J).

²⁹ See, for instance, J Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 *LQR* 388.

that are concerned with the scope of liability for consequences with questions of causation.³⁰

Where I differ from Professor Stapleton is in relation to (iii). Unlike Professor Stapleton, I do not consider that the third example is an example of causation. My disagreement is therefore with a premise of Professor Stapleton's influential 2013 article *Unnecessary Causes*.³¹ Although I agree with, and have been greatly assisted by, many of the ideas in that article, I do not consider that an 'unnecessary cause' is ever a cause. If the relevant outcome would have been exactly the same without the event then the event should not be treated as a cause of the outcome. Nevertheless, as I explain below, causation can be replaced with another rule. Or it can be disregarded altogether. It is replaced or disregarded far more often than is commonly appreciated, as Professor Stapleton is aware. But my fundamental point is that it is better if courts were explicit that causation in these cases is not required. This then requires justification for why causation is unnecessary and with what, if anything, it should be replaced.

Despite the existence of possible answers to the objections to the 'but for' test, its adoption by the High Court means that it endures in Australia. A more recent example is the decision of the Western Australian Court of Appeal in *Lyle v Soc*.³² In that case, Mr Lyle's negligence caused Ms Soc to be injured in a car accident. Ms Soc was prescribed medication. She later accidentally took a large overdose of prescription drugs. She died. The trial judge found Mr Lyle liable for Ms Soc's death. The Court of Appeal overturned this decision. In the leading judgment in the Court of Appeal, Steytler P, with whom the other judges agreed, applied a joint judgment in the High Court in *Medlin v The State*

³⁰ J Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, 411. See also J Stapleton 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 LQR 426, 439 - 440.

³¹ J Stapleton 'Unnecessary causes' (2013) 129 LQR 39.

³² *Lyle v Soc* [2009] WASCA 3. I am grateful to Mr Ian Weldon for drawing this example to my attention.

*Government Insurance Commission*³³ which required 'the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage [to be] essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience'. The Court of Appeal held that as a matter of common sense and experience, Mr Lyle was not liable for Ms Soc's death. However, Mr Lyle's carelessness was a necessary event in the outcome of Ms Soc's death. In other words, 'but for' Mr Lyle's negligence, Ms Soc would not have died from the overdose. As I explain later, the same conclusion can be reached by saying that Mr Lyle's carelessness was a cause of Ms Soc's death but her death was not within the scope of consequences for which Mr Lyle was liable.

Assertions of a linguistic basis for the common sense approach

The concept of 'common sense' causation arguably would not have survived without the powerful support of Professors Hart and Honoré. In a widely read work, they argued that a common sense approach to causation could be deconstructed, although conceding that there would be a penumbra of uncertainty.

Professors Hart and Honoré asserted that 'cause' in everyday speech means more than a 'but for' or necessary condition.³⁴ I doubt whether this is correct. An example they gave is where a fire has broken out. They say that the lawyer, the historian, and the 'plain man would refuse to say that the cause of the fire was the presence of oxygen'.³⁵ But it is misleading to speak of *the* cause of the fire. There were multiple (necessary) causes. Each of the lawyer, the historian, and the 'plain man', aiming for some precision, would surely have no

³³ *Medlin v The State Government Insurance Commission* (1995) 182 CLR 1, 6 - 7 (Deane, Dawson, Toohey and Gaudron JJ).

³⁴ H L A Hart and A M Honoré *Causation in the Law* (2nd edn, 1985).

³⁵ H L A Hart and A M Honoré *Causation in the Law* (2nd edn, 1985) 11.

difficult in saying that the causes of the fire were holding a lit match to paper in the presence of oxygen.

The same linguistic difficulty is faced by one of the main competitors to but for causation. This is the so-called NESS test. For many people it is a misnomer to use this test as a description of causation. A common application of this test describes a situation in which E was a necessary element in a set of conditions jointly sufficient to produce the outcome O. Two weeks ago I watched Chile beat Australia in the World Cup. Chile scored three goals. They were scored by Beausejour, Sanchez and Valdivia. Each of these three goal scorers was a necessary element of a sufficient set that led to Chile's victory. Professors Hart and Honoré would have thought that it was 'perfectly intelligible' to describe the goal by each of Beausejour, Sanchez and Valdivia as the cause of Chile's victory.³⁶ I do not share that intuition. I would prefer to say that, none of those players, individually, caused Chile to win. They all, respectively, *contributed* to Chile's victory. On the other hand, if Sanchez had scored two or even three goals then I would have no difficulty in saying that his goalscoring caused Chile's victory.

Signs of a decline in common sense causation

Although the test of necessity, as a sole test for causation, is not currently fashionable in Australia and England there are some signs that judicial opinion is shifting.

One sign is the growing criticism of the dominant Australian approach which uses the language of 'common sense causation'. As Dixon J of the Victorian Supreme Court recently observed with great cogency, the 'common sense' approach is not a legal test.³⁷ In difficult cases the 'sense' of an answer is rarely common amongst judges. Indeed, in the leading exposition of the

³⁶ H L A Hart and A M Honoré *Causation in the Law* (2nd edn, 1985).

³⁷ *Gunnensen v Henwood* [2011] VSC 440 [379].

common sense test in *March*,³⁸ the 'sense' of the result was not 'common' between, on the one hand, the five judges of the High Court of Australia (who allowed the appeal) and, on the other hand, the majority of the Full Court of the Supreme Court of South Australia.

As the common sense approach declines, the 'but for' rule is becoming the dominant approach to causation. In Australia it has been held that at common law the 'but for' test has an important role to play as a negative criterion.³⁹ It has been said to be a necessary, but not always sufficient,⁴⁰ requirement of causation for the plaintiff to prove that the plaintiff's loss would not have been suffered but for the defendant's breach of duty.

A second sign is the language used in a number of recent cases in the High Court of Australia where judges have spoken of liability based on circumstances that have 'caused *or materially contributed*' to a loss. This appears to acknowledge that liability based upon material contribution is separate from liability based on causation. As Gummow, Hayne and Crennan JJ said in *Amaca Pty Ltd v Booth*⁴¹

The 'but for' criterion of causation proved to be troublesome in various situations in which multiple acts or events led to the plaintiff's injury,⁴² for example, where the development of a particular medical condition was the result of multiple conjunctive causal factors. In such cases what may be unclear is the extent to which one of these conjunctive causal factors contributed to that state of affairs. These situations have been addressed by the proposition stated by Lord Watson in *Wakelin v London & South Western Railway Co*⁴³ that it is sufficient that the plaintiff prove that the negligence of the defendant 'caused or materially contributed to the injury'.

A third sign is the language of the *Civil Liability Acts* in Australia. Although this paper focuses only on the common law, the broad scope of that

³⁸ *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506.

³⁹ *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515 - 516 (Mason CJ, Toohey & Gaudron JJ agreeing); *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 413 (Mason CJ, Deane & Toohey JJ); *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232, 281 [111] (Hayne J); *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537, 578 [112] (Kiefel J).

⁴⁰ *Amaca Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36, 91 [149] (Heydon J).

⁴¹ *Amaca Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36, 62 [70].

⁴² *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 516-517.

⁴³ *Wakelin v London & South Western Railway Co* (1886) 12 App Cas 41, 47.

legislation, and its existence in every Australian State, may provide a basis for the future development of the common law. As the appendix to this paper shows, in every State in Australia the causation requirement for liability is one of 'necessity' or 'but for' causation. Although the legislation also includes 'scope of liability for consequences' under the rubric of causation, it is clear that this is a separate enquiry from the necessity enquiry. The various legislation also recognises that there can be possible exceptions to causation. As I will explain, this is a very desirable approach. By identifying the single but-for causal rule, courts are forced to confront the reasons for imposition of liability for an event even if the event was not necessary for the outcome. As it turns out, there are numerous such instances in the law. All of them need to be justified.

The subsequent legal issue: where causation is unnecessary

Torts

As will be seen in the examples that follow, many of the instances where causation is not required share in common the feature that the relevant event makes a significant, albeit unnecessary, contribution to the loss. In these cases, as Professor Stapleton explains, 'the law may be normatively interested in factors that contributed to the mechanism by which an indivisible injury occurred but which were unnecessary for that occurrence'.⁴⁴

Professor Stapleton poses an example where 4 people push a car off a mountain. Any two would be strong enough to push the car off the mountain.⁴⁵ In such a circumstance, should each of the tortfeasors be able to avoid liability for consequential loss caused to the car's owner by arguing that but for his or her actions the car would still have been damaged? Professor Stapleton argues that the answer is 'no'. Each tortfeasor is liable, in her opinion, because the wrongdoing of each 'resulted in some positive contribution (even if unnecessary)

⁴⁴ J Stapleton 'Unnecessary causes' (2013) 129 *LQR* 39, 45.

⁴⁵ J Stapleton 'Unnecessary causes' (2013) 129 *LQR* 39, 43.

to the relevant threshold step in the mechanism by which the indivisible injury came about'.⁴⁶

An example of this is *Kuwait Airways Corporation*.⁴⁷ Iraqi Airways committed the tort of conversion by taking possession of planes belonging to Kuwait Airways. The Kuwaiti planes had been brought to Iraq by Iraqi armed forces after the 1990 invasion of Kuwait. The Kuwaiti planes were later destroyed by the coalition bombing of Mosul. Kuwait Airways sued Iraqi Airways for damages for conversion. Iraqi Airways argued that the planes would have been lost to Kuwait Airways even if they had not been converted by Iraqi Airways. Hence, it was argued, Iraqi Airways should not be liable to pay damages. The argument failed. The House of Lords held that Iraqi Airways was liable to pay damages. The manner in which the causal test was posed was essential. Lord Nicholls (with whom Lords Steyn, Hoffmann and Hope agreed) said⁴⁸

Where, then, does this leave the simple 'but for' test in cases of successive conversion? I suggest that, if the test is to be applied at all, the answer lies in keeping in mind, as I have said, that each person in a series of conversions wrongfully excludes the owner from possession of his goods. The exclusionary threshold test is to be applied on this footing. Thus the test calls for consideration of whether the plaintiff would have suffered the loss in question had he retained his goods and not been unlawfully deprived of them by the defendant. The test calls for a comparison between the owner's position had he retained his goods and his position having been deprived of his goods by the defendant. Loss which the owner would have suffered even if he had retained the goods is not loss 'caused' by the conversion. The defendant is not liable for such loss.

Although Lord Nicholls' remarks were ambiguous about whether he was applying the but for test ('if the test is to be applied at all') I would respectfully suggest that the test for causation was not applied. 'But for' the wrongdoing of

⁴⁶ J Stapleton 'Unnecessary causes' (2013) 129 *LQR* 39, 65.

⁴⁷ *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883.

⁴⁸ *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883, 1094 [83].

Iraqi Airways, the loss of the planes would still have occurred as a result of the prior wrongful act of conversion by Iraq.⁴⁹

Lord Hoffmann was subsequently more explicit in extra-judicial writing. He described the decision of the House of Lords as being that 'it was not necessary that the conversion should have caused the loss. If you convert someone's property you have to pay for it or give it back'.⁵⁰

The difficult question then is *why* causation of loss is *unnecessary* for intentional wrongdoing that deprives a person of possession. This question is further complicated by the need to explain why causation is *necessary* in cases such as *Performance Cars* where the wrongdoer carelessly damages a person's chattel and does not deprive the person of possession.⁵¹

One possible answer is provided by Dr Douglas.⁵² He argues that by abandoning the requirement of causation (but for) in cases of strict liability torts prevents strict liability from becoming meaningless. Otherwise, Douglas suggests, the focus would shift from the intentional nature of the conduct, however honest and reasonable, to questions of blameworthiness.

Another example is the tort of deceit. A wrong has occurred but it is not necessary for the plaintiff to prove that the misrepresentation caused the loss that was suffered. The classic statement of this position in relation to deceit is *Edgington v Fitzmaurice*.⁵³ In that case, the plaintiff lent money to a company due to his mistaken belief that the loan was secured by a charge. He also relied on statements in a prospectus that were fraudulently made by the directors. The Court of Appeal was not concerned with whether the plaintiff would nevertheless have lent the money but for the deceit. As Bowen LJ explained, '[t]he real question is, what was the state of the [p]laintiff's mind, and if his mind

⁴⁹ Cf J Stapleton 'Unnecessary causes' (2013) 129 *LQR* 39, 58-61.

⁵⁰ L Hoffmann 'Causation' in R Goldberg (ed) *Perspectives on Causation* (2011) 6 - 7.

⁵¹ See also *The Haversham Grange* [1905] P 307 (Court of Appeal).

⁵² S Douglas *Liability for Wrongful Interferences with Chattels* (2011) 203 – 205.

⁵³ *Edgington v Fitzmaurice* (1885) 29 Ch 459.

was disturbed by the misstatement of the [d]efendants, and such disturbance was in part the cause of what he did'.⁵⁴ This approach has been applied on many occasions. For instance, in *Gould v Vaggelas*,⁵⁵ Brennan CJ spoke of the need for a misrepresentation to be 'one of the real inducements to the plaintiff to do whatever caused his loss'.

In *Standard Chartered Bank v Pakistan Shipping Corporation (Nos 2 & 4)*,⁵⁶ Lord Hoffmann offered an explanation for why causal rules appear not to be applied in cases of misrepresentation. He said that the law 'takes no account' of reasons that influence a person to act other than the material misrepresentation because it 'would not seem just that a fraudulent defendant's liability should be reduced on the grounds that, for whatever [other] reason, the victim should not have made the payment which the defendant successfully induced him to make'.⁵⁷

An appeal to 'sound policy' and 'justice' as an explanation for the absence of a causal rule is not wholly satisfying. A better answer might be to say that the law's concern with individual autonomy is such that a fraudster will be liable for losses that he or she has caused, *or* losses to which he or she has contributed. The need to protect autonomy must be the factor that justifies the latter extension. The earliest cases that justified the absence of a causal rule did so on the basis that it was impossible to enquire into contributions to a person's mind: '[w]ho can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?';⁵⁸ "How is it possible to say in what manner the disclosure would have operated on Kay's mind";⁵⁹ 'You cannot weigh the elements by ounces'.⁶⁰ It may be that this rule is

⁵⁴ *Edgington v Fitzmaurice* (1885) 29 Ch 459, 483.

⁵⁵ *Gould v Vaggelas* [1985] HCA 75; (1985) 157 CLR 215, 251.

⁵⁶ *Standard Chartered Bank v Pakistan Shipping Corporation (Nos 2 & 4)* [2003] 1 AC 959.

⁵⁷ *Standard Chartered Bank v Pakistan Shipping Corporation* [2003] 1 AC 959, 967 [16].

⁵⁸ *Reynell v Sprye* (1852) 1 De GM & G 660, 708-709; (1852) 42 ER 710, 728 - 729.

⁵⁹ *Smith v Kay* (1859) 7 HLC 750, 759; (1859) 11 ER 299, 303.

⁶⁰ *Arnison v Smith* (1875) 41 Ch D 348, 369 (Lord Halsbury LC).

now too well established to be disturbed. But the premise might be questioned. Are people always incapable of weighing relative contributions to their decisions? Suppose the plaintiff in *Edgington* had given evidence that although the fraudulent statements by the defendants were a part of his decision making process, he would have lent the money in any event because of his belief that it was secured by a charge'. If a person is capable of giving that evidence, and making that assessment, then some other rationale might need to be found for the replacement of causation in this context with a rule of material contribution.

Causation of loss arising from breach of trust or director's duties

Another circumstance in which rules of causation do not apply is where a type of equitable compensation is sought for breach of trust or breach of duty by a director. I considered these principles in some detail in *Agricultural Land Management Ltd v Jackson [No 2]*.⁶¹ As I explained in that case, one type of what is today described as 'equitable compensation' was historically described as an account in common form.

When the common form account was taken against a trustee, any unauthorised disbursement was falsified in the account. It did not matter whether the dissipation of the asset would have occurred even without the unauthorised act. Upon the taking of the account the trustee was obliged to make good any deficiency. In other words, the orders following an account in common form operated like an order for specific performance or a common law action in debt. The trustee was required to perform his or her duty to maintain the trust account by replenishing the funds to the extent that they were not established on the accounting. In *Ex parte Adamson*,⁶² James and Bagallay LJJ described the rights arising from an account in common form as 'an equitable

⁶¹ *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102.

⁶² *Ex parte Adamson* (1878) 8 Ch D 807, 819.

debt or liability in the nature of debt ... a suit for the restitution of the actual money or thing, or value of the thing'.

The same was, and is, true in relation to unauthorised disbursements by company directors. The effect of this type of equitable compensation was explained by Rimer LJ, with whom Lords Walker and Clarke agreed on appeal in *Revenue and Customs Commissioners v Holland*,⁶³ that⁶⁴

the established remedy against a director liable in respect of the payment of an unlawful dividend is to require the director to reinstate the amount of the payment. The court does not in such a case embark upon an inquiry as to the loss said to be suffered by the company as a result of such breach of duty.

The reason why causation of loss is ignored when a breach of duty by a trustee or company director is established in these cases is simple. The order that is sought is not compensation for loss. The 'compensation' is an order for specific performance, or the money equivalent of specific performance (where a non-money asset was dissipated without authority). Loss is not relevant to an order that a duty should be performed. Hence causation of loss is irrelevant.

Estoppel

Another recent example is the decision of the High Court of Australia in *Sidhu v Van Dyke*.⁶⁵ In that case, Ms Van Dyke lived in a cottage on a property owned by Mr Sidhu and his wife. Mr Sidhu and his wife lived in a different house on the property. Mr Sidhu told Ms Van Dyke that he loved her and that he was planning to subdivide the property and put the cottage (and that part of the land) into her name. This promise was a factor in Ms Van Dyke's decisions (i) not to seek full-time work, (ii) not to obtain legal representation in relation to a property settlement upon her divorce, and (iii) to spend time and effort in the maintenance and improvement of the cottage and assisting on the property. A

⁶³ *Revenue and Customs Commissioners v Holland* [2010] UKSC 51; [2010] 1 WLR 2793, 2835 [124] (Lord Walker), 2839 [146] (Lord Clarke).

⁶⁴ *Revenue and Customs Commissioners v Holland* [2009] EWCA Civ 625 [98].

⁶⁵ *Sidhu v Van Dyke* [2014] HCA 19.

joint judgment of four members of the High Court accepted that it was necessary for Ms Van Dyke to prove that she had detrimentally relied upon the promise made by Mr Sidhu. But their Honours did not impose a test that the promise or representation *caused* the detrimental reliance although causation would have been satisfied.⁶⁶ They did not say that Ms Van Dyke was required to prove that but for Mr Sidhu's promises, she would not have acted as she did in (i) to (iii) above. Instead (and similar to the misrepresentation cases discussed above) their Honours referred to Ms Van Dyke's need to show that the representation was an 'influence', 'a significant factor', 'a contributing cause', or had 'sufficient connection' with the detriment suffered.⁶⁷

Breach of contract

There are numerous other examples at common law where the causal requirement of necessity is replaced with a different rule or abolished. Statute is no different. One very large potential example can be mentioned. That example is breach of contract.

Consider the case of *Joyner v Weeks*.⁶⁸ In that case, the lessor sued the lessee for breach of a covenant to leave the demised premises in good repair. The lessor claimed damages representing the full cost of repair. The lessee argued that no loss was suffered, pointing out that the lessor had agreed with a third party to grant a new lease to pull down part of the premises at the conclusion of the lease. The lessee argued that he should not be required to pay damages for a failure to repair the part of the premises which was to be pulled down. In other words, but for his failure to repair, the lessor would have demolished the premises anyway.

The English Court of Appeal awarded the full measure of damages although different reasons were given for why causation of loss was disregarded.

⁶⁶ *Sidhu v Van Dyke* [2014] HCA 19 [77] (French CJ, Kiefel, Bell and Keane JJ) [95] (Gageler J).

⁶⁷ *Sidhu v Van Dyke* [2014] HCA 19 [72] - [73] (French CJ, Kiefel, Bell and Keane JJ) cf [95] (Gageler J).

⁶⁸ *Joyner v Weeks* [1891] 2 QB 31.

Lord Esher MR was 'strongly inclined' to think that an award of the cost of repair for breach of a covenant to repair was 'an absolute rule applicable under all circumstances'.⁶⁹ In contrast, Fry LJ relied on 'a general rule ... that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence'.⁷⁰

The effect of the decision in *Joyner* was ameliorated in England and Wales by s 18 of the *Law of Property Act 1925* (UK), and, in New South Wales, by s 133A of the *Conveyancing Act 1919-1939* (NSW). But it reflected an older line of authority,⁷¹ and remained a common law rule. It is a powerful illustration of a case where the award of damages at common law for breach of a contract or covenant is not limited to the financial loss which is caused by the breach.

Joyner v Weeks was approved by the High Court of Australia in *Graham v The Markets Hotel Pty Ltd*.⁷² The decision in *Graham* involved a different situation in which the state of repair had rendered the premises unlettable at the end of the lease because they were disqualified from a liquor licence. But the High Court rejected the submission of Barwick KC that *Joyner v Weeks* should be confined to its 'special facts'.⁷³ Latham CJ described *Joyner v Weeks* as creating a 'general rule',⁷⁴ and Starke J described it as the 'true measure'.⁷⁵

Joyner v Weeks is not an isolated example where compensation for loss has been awarded for a breach of contract in circumstances in which the breach caused no actual loss. On one view, this was also the effect of the recent decision of the High Court of Australia in *Clark v Macourt*.⁷⁶ In that case the High Court held that the purchaser of defective straws of sperm could recover

⁶⁹ *Joyner v Weeks* [1891] 2 QB 31, 43.

⁷⁰ *Joyner v Weeks* [1891] 2 QB 31, 48.

⁷¹ *Inderwick v Leech* (1885) 1 TLR 484, 484 (Cave J); *Rawlings v Morgan* (1865) 18 CB (NS) 776.

⁷² *Graham v The Markets Hotel Pty Ltd* [1943] HCA 8; (1943) 67 CLR 567.

⁷³ *Graham v The Markets Hotel Pty Ltd* [1943] HCA 8; (1943) 67 CLR 567, 576.

⁷⁴ *Graham v The Markets Hotel Pty Ltd* [1943] HCA 8; (1943) 67 CLR 567, 582.

⁷⁵ *Graham v The Markets Hotel Pty Ltd* [1943] HCA 8; (1943) 67 CLR 567, 588.

⁷⁶ *Clark v Macourt* [2013] HCA 56; (2013) 88 ALJR 190.

the value that the straws would have had if the contract had been performed, even though the purchaser had acquired new straws and defrayed much of that cost by sale to patients using the new straws.

It may be that the ultimate rationale for why causation is not required in these cases is the same as the rationale in cases of breach of duty by a director or a trustee. Quite separately from a claim for loss, the party in breach of contract is required to pay the money equivalent of performance. If the claim were for payment of a debt then causation of *loss* would be irrelevant. So too, it may be that causation of loss is also irrelevant if it is an obligation in the nature of a substitute for performance. As Hayne J said in *Clark*,⁷⁷ the compensation 'reflects a normative order in which contracts must be performed'. And, as Keane J said,⁷⁸ quoting from the Privy Council in *Wertheim v Chicoutimi Pulp Co*:⁷⁹

... it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed ...

Conclusion

In 2002, a case came before the House of Lords which involved a situation where multiple employers had exposed an employee to asbestos.⁸⁰ No employment could be proved to have been necessary for the employee's subsequent mesothelioma. The House of Lords was asked if any employer 'caused' the mesothelioma. When the appeal books were received, Lord Hoffmann went in to Lord Rodger's chambers to speak with him about the Roman debate on this question. The brilliant Alan Rodger instantly recalled Digest 9.2.11.2 where Ulpian, quoting Julian, recounts the solution to such a

⁷⁷ *Clark v Macourt* [2013] HCA 56; (2013) 88 ALJR 190, 194 [11].

⁷⁸ *Clark v Macourt* [2013] HCA 56; (2013) 88 ALJR 190, 211 [130].

⁷⁹ *Wertheim v Chicoutimi Pulp Co* [1910] UKPC 1; [1911] AC 301, 307 - 308.

⁸⁰ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32.

scenario under chapter 1 of the *Lex Aquilia*: if several people strike a slave and one cannot tell whose blow killed him, all are liable.⁸¹

When the House of Lords heard the case in 2002, it was generally (perhaps incorrectly) assumed that all the employers had committed a wrong, much like all the persons who struck the slave. The focus of the enquiry was on whether the employers should all be liable for the full loss caused by the mesothelioma where the evidence accepted was that the mesothelioma had been caused by a single 'guilty' fibre. The House of Lords reached the same conclusion as the Romans and held all employers fully liable *in solidum*.

Lord Hoffmann, later said that the decision he, and the others, had reached failed the test for acceptable law: a rational and justifiable basis to depart from normally applied principles of law.⁸² I do not venture a conclusion here to the difficult question of causation that arose because that question has not yet been finally resolved in Australia. In 2012, I was listed to sit on an appeal where this question had been raised. The appeal settled. Rather than attempt to offer an answer to the question in *Fairchild*, I make two observations. The first observation is that the analogy with D 9.2.11.2 was apt but Julian was not necessarily asking the same questions as the House of Lords in *Fairchild*.

One difference is that under Roman law, the striking of the slave infringed the rights of the slave owner or, as the Romans would have expressed it, gave rise to an action. But it is not immediately obvious that a wrong was committed in *Fairchild*. The mere exposure of an employee to the possibility of harm (such as from inhaled asbestosis fibres) might not be wrongful. Suppose that one of the employee plaintiffs in *Fairchild* had not yet contracted mesothelioma. Could he still have sued his employer for exposing him to the possibility of mesothelioma? If not, then *Fairchild* was more like the problem

⁸¹ Recounted in L Hoffmann 'Fairchild and after' in A Burrows, D Johnston, and R Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013) 63.

⁸² L Hoffmann 'Fairchild and after' in A Burrows, D Johnston, and R Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013) 65.

of the two hunters in *Cook v Lewis* and less like the case of multiple people striking the slave.

A second difference between D 9.2.11.2 and *Fairchild* is that in *Fairchild* the House of Lords was asked whether each defendant was liable for *all* losses arising from mesothelioma. In D 9.2.11.2, Julian asked only if the person striking the slave was *liable*. The discussion of the quantum of liability was different.⁸³ Subsequent to *Fairchild*, the question of liability was put differently before the House of Lords: was the employer liable for increasing the *chance* that the employee would suffer loss.⁸⁴

The second observation is to reiterate Lord Hoffmann's most powerful point: if a common law claim is brought for loss suffered that was caused by wrongdoing, then before a court departs from the requirement that the wrongdoing was necessary for the loss (and hence abolishes or replaces the rules of causation) there should be a rational and justifiable basis in principle for doing so.

⁸³ H Scott 'Killing and causing death in Roman law' (2013) 129 LQR 101, 120 -122.

⁸⁴ *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572.

Appendix: Causation in the Civil Liability Acts

Civil Liability Act 2002 (WA)

5C . General principles

- (1) A determination that the fault of a person (the *tortfeasor*) caused particular harm comprises the following elements —
 - (a) that the fault was a necessary condition of the occurrence of the harm (*factual causation*); and
 - (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) —
 - (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and
 - (b) whether and why the harm should be left to lie where it fell.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the *injured person*) would have done if the tortfeasor had not been at fault —
 - (a) subject to paragraph (b), the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault; and
 - (b) evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

Civil Liability Act 2002 (NSW)

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.

- (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.

Civil Liability Act 2003 (Qld)

11 General principles

- (1) A decision that a breach of duty caused particular harm comprises the following elements—
 - (a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);
 - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***).
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
 - (a) the matter is to be decided 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 deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

Civil Liability Act 1936 (SA)

34—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) Where, however, a person (the ***plaintiff***) has been negligently exposed to a similar risk of harm by a number of different persons (the ***defendants***) and it is not possible to assign responsibility for causing the harm to any one or more of them—
 - (a) the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm¹; but
 - (b) the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) 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.

Wrongs Act 1958 (Vic)

51 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 appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish 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.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the injured person) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
- (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.

Civil Liability Act 2002 (Tas)

13. General principles

- (1) Prerequisites for a decision that a breach of duty caused particular harm are as follows:
 - (a) the breach of duty was a necessary element of the occurrence of the harm ("factual causation");
 - (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ("scope of liability").
- (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty, being a breach of duty that is established but which can not be established as satisfying subsection (1)(a), should be taken as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
- (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach –
 - (a) the matter is to be decided 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 deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

Civil Law (Wrongs) Act 2002 (ACT)

s. 45 General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the *scope of liability*).
- (2) However, if a person (the *plaintiff*) has been negligently exposed to a similar risk of harm by a number of different people (the *defendants*) and it is not possible to assign responsibility for causing the harm to any 1 or more of them—
 - (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party.

