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CAUSATION and s 82 of the TRADE PRACTICES ACT

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Introduction

1. The purpose of this paper is to discuss some issues concerning causation in the tort of negligence and causation under s 82 of the *Trade Practices Act* ("**the *TPA***"), particularly for contraventions of s 52 concerning negligent misstatement. No one would dispute that analogies are of use in considering both topics. There is an issue as to how closely analogies may be applied.

2. A lot of ink has been spilt on this subject. Causation has been described by one writer as a topic that draws torts professors like a flame draws moths.[1] Professor Wright wrote that in all of tort law "there is no concept which has been as pervasive and yet elusive as the causation requirements …".[2]

3. A very accessible and, with respect, lucid account of the history of the law of causation in the common law, and in academia, is found in Professor Stapleton's article "*Choosing What We Mean by 'Causation in the Law'*"[3].

4. A summary of my views is as follows:

   (a) The law as identified by common law courts has not kept pace with the rigour and complexity of the analysis that has occurred in academic commentary;

   (b) This lagging behind is partly due to the lingering effects of the common sense test, which has lost some of its original force in Australia, but which has been a convenient label which is sometimes inimical to careful articulation of why causation does or does not exist;

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1 Kelley, *"Causation and Justice: A Comment"*. Washington University Law Quarterly 4 (1998) 635.

2 Wright, *"Causation in Tort Law"* (1985) 73 California Law Review 1737l. The 2nd edition of the monograph by Hart & Honore was published in 1985.

3 (2008) 73 Missouri Law Review 433.

(c) The gap between academic debate and the law as identified in cases is probably also due in part to the inclination of courts to administer practical justice on a case by case basis. The judge, being the servant of rules, has an instinctive reticence about stating principles in absolute terms. Courts have been reluctant to fence in tests of causation by rules which might not work in a hard case. The common sense test, with its open texture, has been attractive to courts;

(d) It would be appropriate that the common sense test now be discarded;

(e) It would not be fair to criticise courts for proceeding without rigid tests, particularly in the case of a remedial statute such as the *TPA*, when interesting and sometimes difficult situations such as "indirect causation" may arise for consideration under it;

(f) Causation can be a very difficult subject and courts traditionally leave problems for resolution when they squarely arise in a clear adversarial context. By contrast, academic interest is more focussed on providing explanations of causation that will work in all cases, including conceivable situations not actually decided by courts.

5. In order to undertake an analysis that is not within a conceptual vacuum, it is necessary to examine the relationship between causation at common law, particularly in relation to the tort of negligence, and causation under s 82 of the *TPA*.

6. A principal contention of mine is that while courts often state that s 82 is a unique provision in a unique piece of legislation and references to the common law can at most be useful analogies, it is impossible to understand s 82 without reference to the common law. Further, with one possible exception, it is difficult to discern any real difference in the way in which causation has been treated for a case of contravention of s 52 that involves a careless statement causing economic harm, from the way in which the law of tort in a case of negligent misstatement would deal with causation. It would be surprising, in my view, if it were otherwise.

7. The one possible exception is the case of "indirect causation" that arises under s 82 of the TPA. For reasons developed below the "indirect causation" cases are examples of courts wrestling with what Professor Stapleton would term the "scope of liability" issues in relation to causation. Under s 52 and s 82 of the TPA the court lacks the filtering process which the duty of care provides at common law to guard against the risk of indeterminate liability. The work done by that filtering process under the general law is being done, at least partly, by courts shaping a principle of indirect causation that applies to s 82.

8. With that one possible exception the proportionate liability amendments to the TPA have made a real distinction in cases of negligent misstatement causing economic harm, which also involve a contravention of s 52, only more elusive. Of course, there are contraventions of s 52 that are not caught by the tort of negligence, eg fraudulent conduct, or innocent and non-careless conduct. In those cases it is obvious that s 82 has a unique role to play. Section 52 is a

unique normative provision. But many cases in practice that are pleaded as involving contraventions of s 52 are also pleaded as negligent misstatement cases, or could be pleaded as such.

Useful Guidance

9. As at 1992 the relationship between causation at common law and causation under s 82 of the *TPA* was a direct one. As stated by the High Court in *Wardley Australia* referring to the word "by" in s 82:

> "'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking the common law practical or common sense concept of causation recently discussed by this court in *March v Stramare (E & M.H.) Pty Ltd*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act." [4]

10. By 2001 in *Henville v Walker*[5] this direct equivalence was requoted by Gaudron J and McHugh J.

11. However, notes of caution were being sounded. In *Henville v Walker*[6], Gleeson CJ said:

> "Section 82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word "by". The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. <u>The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act</u>." [underlining added]

12. In *Henville v Walker*, McHugh J cautioned against applying common law concepts of causation rigidly without regard to the terms or objects of the Act:

> "Moreover, the objects of the Act indicate that a court should strive to apply s 82 in a way that promotes competition and fair trading and protects consumers. The width of the potential application of s82 and the objects of the Act tell against a narrow, inflexible construction of the section. No doubt in most cases, applying common law conceptions of causation will be sufficient to answer the issues posed by s 82 in its application to contraventions of the Act. But care must be taken to avoid

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[4] *Wardley Australia Limited v Western Australia* (1992) 175 CLR 514 at 525, per Mason CJ, Dawson, Gaudron and McHugh JJ.

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

[6] *Henville v Walker* (supra) at 470 [18].

> a mechanical application of those conceptions to issues arising under the section."[7]

13. Like other judicial statements qualifying the directness of the relationship between causation at common law and under s 82 the effect seems to be to prevent foreclosing principles that might be developed in relation to s 82 in difficult cases where the common law might not provide a remedy, but where the broad, remedial objects of the TPA may indicate that compensation should be available.

14. It is reasonable for judges to proceed cautiously in the context of the ambitious aims of the TPA. Section 2 provides:

> "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

15. And as courts have repeatedly emphasised, s 82 provides remedies for a much broader range of provisions than just s 52. It applies to contraventions of a provision of Part IV, IVA, IVB or V or section 51AC of the *TPA*.

16. That having been said, nothing about the principles of causation as applied to the facts of the case in *Henville v Walker* was substantially divergent from an analysis that would prevail in negligence. The principles applied to both the common law and to s 82 include the following:

    (a) For the necessary causal relationship to exist it is not essential that the contravention be the sole cause of the loss or damage; per Gleeson CJ.[8]

    (b) Gaudron J identified the test in negligence as being:

    > "… where two or more events combine to bring about the results in question, the issue of causation is resolved on the basis that an act is legally causative if it materially contributes to that result"[9]

    Her Honour then applied the same reasoning to causation under s 82.[10]

    (c) McHugh J, with whom Gummow J agreed, also identified the common law requirement for causation as being satisfied where the defendant's breach had made a "*material contribution*" to the loss or damage.[11]

    (d) Negligence on the part of the victim of a contravention of the Act is not a bar to an action under s 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage; per Gleeson CJ.[12] In discussion of the common law principles, McHugh J referred to the *novus actus interveniens* situation, saying that:

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[7] *Henville v Walker* (supra) at 489-490 [96].
[8] *Henville v Walker* (supra) at 469 [14].
[9] *Henville v Walker* (supra) at 480 [60].
[10] *Henville v Walker* (supra) at 480 [61] and [70].
[11] *Henville v Walker* (supra) at 493 [106].
[12] *Henville v Walker* (supra) at 468 [13].

> "In exceptional cases, where an abnormal event intervenes between the breach and the damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional." [underlining added]

(e) Gaudron J also recognised that a *novus actus interveniens* breaks the chain of causation at common law.[13]

17. Despite the apparent overlap in analysis, more recent cases in the High Court have retreated from emphasis on the direct relationship with the common law that *Wardley Australia* identified, in favour of an analysis that emphasises that causation under statute is to be understood in light of the purpose of the relevant legislation.

18. In 2005, in *Allianz Australia Insurance Limited v GSF Australia Pty Ltd*[14] the High Court was not considering the *TPA*, but rather the statutory meaning of causation under s 3 and s 69(1) of the *Motor Accidents Act* 1998 (NSW). In that statutory context McHugh J said[15]:

> "In the end, the outcome of this appeal turns on the construction of the words "caused" … by a defect in the vehicle". The language of the Act reflects the concept of causation at common law. This suggests that the inquiry into the question of causation under the Act does not differ materially from the "common sense" test for causation at common law. However, because the task before the Court is one of statutory construction, the question of causation must be determined in light of the subject, scope and objects of the Act. The common law concept of causation is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage. In the present case, however, common law conceptions of causation must be applied having regard to the terms or objects of the Act. Those terms and objects of the Act operate to modify the common law's practical or common sense concept of causation. The inquiry into the question of causality is therefore not based simply on notions of "common sense"." [Footnotes omitted]

19. In the same case, and with direct reference to s 82 of the *TPA*, Gummow, Hayne and Heydon JJ said[16]:

> "96 Santow JA also emphasised that this question of causality was not at large or to be answered by "common sense" alone; rather, the starting point is to identify the purpose to which the question is directed. Those propositions should be accepted. The following may be added:
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> 97 First, in *March v Stramare (E & M H) Pty Ltd*, McHugh J doubted whether there is any consistent "commonsense notion of what constitutes a 'cause'", and added:
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>> "Indeed, I suspect that what commonsense would not see as a cause in a non-litigious context will frequently be seen as a cause, according to commonsense notions, in a litigious

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13 *Henville v Walker* (supra) at 479 [58].

14 (2005) 221 CLR 568.

15 *Allianz Australia Insurance Limited v GSF Australia Pty Ltd* (supra) at [41].

16 *Allianz Australia Insurance Limited v GSF Australia Pty Ltd* (supra) at [96] – [99].

> context. This is particularly so in many cases where expert evidence is called to explain a connection between an act or omission and the occurrence of damage. In these cases, the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence."

> 98 Secondly, the significance at general law of the identification of purpose is illustrated by decisions influenced by the changing state of the principles of contributory negligence. In *March*, and more recently in *Andar Transport Pty Ltd v Brambles Ltd*, reference was made to the operation of a defence of contributory negligence as a complete answer to an action in negligence and to its significance for reliance upon notions of "sole" or "effective cause". Further, speaking of that defence in its unreformed operation, McHugh J said in *March*:

>> "It is understandable that, in the days when any contributory negligence on the part of a plaintiff was sufficient to deprive him or her of a verdict, judges should sanction tests for determining causation which in practice allowed juries to avoid the consequences of a strict application of the doctrine of contributory negligence. In that context, instructions to determine whether a particular act or omission was a cause of damage according to commonsense notions were appeals to extra-legal values to determine 'hard cases'."

> 99 Thirdly, the case law construing s 82 of the *Trade Practices Act* 1974 (Cth) … illustrates and emphasises that notions of "cause" as involved in a particular statutory regime are to be understood by reference to the statutory subject, scope and purpose. Section 2 of the TP Act states:

>> "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

> Section 82 entitles a person to recover the amount of the loss or damage suffered by conduct done in contravention of a large number and range of provisions designed to further the stated object in s 2."

20. In the same year in *Travel Compensation Fund v Tambree*[17] the High Court considered a case where it held unanimously that damages should be awarded under s 68 of the *Fair Trading Act* 1987 (NSW) for contravention of s 42 (those sections being the analogues of s 82 and s 52 of the *TPA*) and, by majority, found that liability in negligence was also established.

21. In *Travel Compensation Fund*, Gleeson CJ said:

> "29 To acknowledge that, in appropriate circumstances, normative considerations have a role to play in judgments about issues of causation is not to invite judges to engage in value judgments at large. The relevant norms must be derived from legal principle.

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[17] (2005) 224 CLR 627.

> In this case, the primary task of the Court is to apply the legislative norms to be found in the *Fair Trading Act*, although the outcome is not materially different to apply the common law of negligence.
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> 30 Section 68 of the *Fair Trading Act*, in its application to a contravention of s 42, gives rise to the same questions as does s 82 of the *Trade Practices Act 1974* (Cth) in its application to a contravention of s 52 of that Act. In recent cases, this Court has pointed out that, in deciding whether loss or damage is "by" misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found." [underlining added]

22. Gummow and Hayne JJ, referring to the quoted passage of the judgment of Gummow, Hayne and Heydon JJ in *Allianz Australia*, as set out above, said:

> "45 It is now clear that there are cases in which the answer to a question of causation will differ according to the purpose for which the question is asked. As was recently emphasised in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*, it is doubtful whether there is any "common sense" notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to a question of causation will require examination of the purpose of a particular cause of action, or the nature and scope of the defendant's obligation in the particular circumstances." [underlining added]

23. This harked back to the statement of Gummow J in *Marks v GIO Australia Holdings*:

> "The 'common sense' answer to the question of causation which arises under a provision such as s 82 cannot be given, as Lord Hoffman recently stated, 'without knowing the purpose and scope of the rule' enacted by s 82."[18]

24. Lord Hoffman said in *Environment Agency v Empress Car Co (Abertillery) Ltd*:

> "… one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule."[19]

25. None of this helps particularly in identifying for the practitioner what is the same as between s 82 (where it concerns a contravention of s 52) and the common law. One approaches s 82 with an instinct that it seems a lot like the common law but that one has to be on one's guard from ever assuming it is identical.[20]

26. We know, at the least, that the common law of negligence provides useful guidance as to how causation may be tested and divined for under s 82 of the

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18 (1998) 196 CLR 494 at 532 [109].

19 [1999] 2 AC 22 at 31E.

20 The usefulness of making analogies between the common law and s 82 in relation to causation was recently emphasised by the Western Australian Court of Appeal in *Grainger v Williams* [2009] WASCA 60 at [104] per Wheeler JA and [183] – [185] per McLure JA.

TPA for a contravention of s 52, particularly in a case where a representation has been made negligently.

Statutory intervention in the common law

27. I shall identify propositions relating to causation that come to us from the common law of negligence.

28. Before doing so it is salutary, in broader terms, to recognise that the *TPA* is not unique in being remedial legislation affecting issues of causation and damage. Some of the most important remedial principles operating in the common law of negligence are statutory in origin. And these all either directly affect causation or have a ripple effect on it.

29. The "common law" of negligence has been the subject of very important statutory adjustments, both procedural and substantive in the twentieth century. In particular these include:

    (a) That a judgment against one joint tortfeasor does not bar an action against another joint tortfeasor in respect of the same damage.[21] The pre-existing common law position which this rule abrogated was identified by Professor Fleming as preposterous.[22]

    (b) The statutory removal of the pernicious effect of the original common law position that contributory negligence was a complete defence.[23] The original rule led to distortions in the approach of the common law to the question of causation with the development of the last opportunity rule as an arbitrary means to avoid the rigours of the rule as it applied to plaintiffs. However, the last opportunity rule, insofar as it placed all responsibility on the defendant who had had the last opportunity to avoid the accident, operated just as harshly against a defendant where the plaintiff had failed to take reasonable care for his or her own interests; see *March v Stramare*[24]; *Davies v Mann*[25]; *Astley v Austrust Limited*[26]; Fleming *'The Law of Torts"*;[27]

    (c) The statutory reversal of the original common law position that prevented contribution among tortfeasors.[28]

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21 Section 6(a) of the *Law Reform Act* 1995 (Qld) relocated from s 5(a) of the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act* 1952 (Qld).

22 'The Law of Torts', 9th ed, Fleming, page 291.

23 Section 10(i) of the *Law Reform Act* 1995 (Qld) relocated from s 10 of the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act* 1952.

24 (1991) 171 CLR 506 at 511-512.

25 (1842) 10 M&W 546 at 548-549; 152 ER 588 at 589.

26 (1999) 197 CLR 1 at 33-35, [76]-[82], per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also, Keith Mason, "*Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice*", Causation in Law and Medicine, ed. Freckleton & Mendelson at pp.147-148.

27 'The Law of Torts', 9th ed at pages 302-305.

28 See section 6(c) of the *Law Reform Act* 1995 (Qld), relocated from s 5(c) of the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act* 1952 (Qld).

30. More recently very significant amendments to the common law of negligence were made by the proportionate liability reforms made in Australian States, Territories and the Commonwealth. In Queensland those reforms were introduced in 2004 by Chapter 2 Part 2 of the *Civil Liability Act* 2003. The amendments have been described as remedial and dramatic, designed to overcome perceived undesirable consequences of the joint and several liability rule: see *St George Bank Ltd v Quinerts Pty Ltd*[29]. Similar but not identical amendments were made to the *Trade Practices Act* 1974.[30]

31. In s 11 of the *Civil Liability Act* 2003 (Qld) the elements of "causation" are "unpackaged", in a way consistent with how Professor Stapleton has advocated, between a "causation in fact inquiry" and a "scope of liability inquiry"[31]. Thus, s 11(1) provides:

> "**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 carried (**scope of liability**)"

32. Section 11(2) is potentially important, referring to exceptional cases. It provides:

> "**11**
>
> (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." [underlining added]

33. There remains a real question as to whether the exceptional case provision would extend to a *Fairchild* type of case (discussed below). The words "*should be accepted as satisfying subsection (1)(a)*" are troubling. In an exceptional case causation is not "accepted" where it is not proved. It is more correct to say that the need for proving it is dispensed with. In those exceptional cases it is not appropriate to treat factual causation as established when it has not been. It would have been preferable if the legislature had made it clear that in some

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29 [2009] VSCA 245 at [57] – [68] per Nettle JA, at [101] per Mandie JA and [102] per Beach AJA.

30 The amendments to the *TPA* were made by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004, the amendments commencing on 26 July 2004.

31 Stapleton, "*Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*", (2001) 54 Vanderbilt Law Review 941 at 945.

exceptional cases factual causation need not be proved and then to identify more precisely what limits should apply to the exception.

34. Section 11 of the *Civil Liability Act* 2003 (Qld) does not have an analogue in the TPA. The proportionate liability amendments in the *Civil Liability Act* 2003 (Qld) and those made to the *Trade Practices Act* are otherwise generally similar in terms of text, but because one set of amendments changes the common law and the other changes the remedies that are consequential upon a contravention of a specific statutory norm, being s 52, leaving the sequel to contraventions of other normative provisions of the *TPA* unaffected, it is not possible to describe them as identical.

35. Yet they are very similar textually and in terms of statutory purpose. And this raises a real question as to how far a principle can be extended that seeks to emphasise any particularly unique role for negligent damages under s 82 for contravention of s 52, where such contravention involves careless misstatement, that is not intentional or fraudulent. It is difficult to discern an important justification for there being a difference from the test for causation for a common law negligent misstatement case.

The Proportionate Liability/Contributory Negligence Amendments to the TPA

36. Both *Henville v Walker*[32] and *I&L Securities*[33] were correctly decided on the law as it stood at the time. But each case led to harsh results because in each case the plaintiff, which suffered purely economic harm because of a contravention of s 52 that was careless (and not intentional or fraudulent) was able to claim damages caused by that contravention that quarantined it from the effect of its own carelessness. This occurred where the plaintiff was seeking to make a profit from a commercial transaction.[34] Those cases would be decided differently under the TPA as it now stands.

37. The proportionate liability amendments to the *TPA* introduced the provisions in ss 82(1B), 87CB, 87CC and 87CD.[35]

38. Section 82(1B) provides:

> "(**1B**) [**Reduction of damages**] Despite subsection (1), if:
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> (a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:
>
> (i) economic loss; or
>
> (ii) damage to property;

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32 (2001) 206 CLR 459.

33 (2002) 210 CLR 109.

34 The unfairness of the result in *I&L Securities* and the potential for the operation of s 82 as it then was to cause grave injustice in a case in which the defendant's conduct had played a relatively minor part in the cause of the loss but the plaintiff's own contributing conduct was a major contributing factor was referred to by Callinan J in *I&L Securities* (supra) at 175-176 [211].

35 These were introduced by Act No 103 of 2004.

caused by conduct of another person (the ***defendant***) that was done to contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

The damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage." [underlining added]

39. In *BMW Australia Finance Ltd v Miller & Associates* Robson AJA said that:

> "Section 82(1B) … now requires a court to reduce the damages if awarded if any of the loss suffered was a result of the claimant's own failure to act reasonably."[36]

40. Section 87CB provides:

"**87CB Application of Part**

(1) [**Claims under s 82**] This Part applies to a claim (an ***apportionable claim***) if the claim is a claim for damages

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 52.

(2) [**Single apportionable claim**] For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) [**Definition: concurrent wrongdoer**] In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

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[36] [2009] VSCA 117 at [144].

(4) [**Subsection (1) specifies apportionable claims**] For the purpose of this Part, apportionable claims are limited to those claims specified in subsection (1).

(5) [**Present condition of concurrent wrongdoer**] For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died."

41. Section 87CC provides:

"**87CC Certain concurrent wrongdoers not to have benefit of apportionment**

(1) [**Liability not excluded**] Nothing in this Part operates to exclude the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) [**Liability determined by legal rules**] The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Part) are relevant.

(3) [**Liability of other concurrent wrongdoer**] The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part."

42. Section 87CD provides

"**87CD Proportionate liability for apportionable claims**

(1) [**Amount to reflect proportion of damage**] In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for more than that amount.

(2) [**Where proceedings involve apportionable and non-apportionable claim**] If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) [**Apportioning responsibility**] In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) [**Not necessary for all wrongdoers to be parties**] This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) [**Reference to defendant**] A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise."

43. One feature of s 82(1B) is that it makes express causative concepts that were previously wrapped up in the use of the word "by" in s 82. So the comments of the High Court in *Wardley* about the curious use of the word "by" no longer have any force. There is no particular mystery about it. Section 82(1B) uses concepts that are readily recognisable from the general law and from other statutes.

44. Thus, s 82(1B) uses the expressions:

(a) "conduct <u>caused</u> by conduct of another person";

(b) "… the claimant suffered the loss and damage … <u>as a result partly of</u> …";

(c) "… to the extent to which the court thinks just and equitable having regard to the <u>claimant's share in the responsibility</u> for the loss and damage …" [underlining added]

45. Courts had formerly remarked on the wide causative implications of the word "by" in s 82 but these amendments are much more prescriptive.

46. It would be difficult to make an argument that for a negligent misstatement that also involved a contravention of s 52 of the *TPA* and fell within the meaning of s 82(1B) there should be any difference in approach to the interpretation of s 82(1B) as compared with the corresponding provisions of the *Civil Liability Act* 2003 (Qld). It would be odd if there were a difference. That is, it is difficult to see why the plaintiff's failure to take reasonable care should mean

something different in nature, extent, or degree from the same concept in the *Civil Liability Act* 2003 (Qld). And the similarity of the provisions takes away much force from reasoning based upon the uniqueness of s 82 in this particular context. Similar reasoning applies to Part VIA of the *TPA* and the corresponding provisions of the *Civil Liability Act* 2003 (Qld).[37]

47. Section 82(1B), in referring to the reduction of damages, uses the words "are to be reduced". The subsection gives the court a discretion as to deciding what is just and equitable but, having made that determination, the court must reduce the damages awarded by that amount. There is no provision that the defendant bears an onus of proof in relation to this. The reduction might arise as a matter of inference from the evidence, perhaps only the evidence of the plaintiff.

48. The proportionate liability amendments have arbitrary aspects to them. If one has a statement that contravenes s 52 and also s 53, then, provided the other qualifying conditions in s 82(1B) are satisfied, contributory negligence of the plaintiff will reduce the damages awarded under s 82 for contravention of s 52 but not s 53. This is anomalous. But it is better that arbitrary adjustments to the law be made by the legislature than by courts.

49. There are other anomalies about the amendments.

50. Take the example where P buys a medicine from a pharmacy. The medicine is newly released and has toxic side effects. P becomes ill from the side effects. P purchased the medicine after seeing a TV advertisement the day before spruiking the beneficial effects of the medicine.

51. After seeing the advertisement, and before making the purchase, P saw a news story on TV that informed P that this medicine should be recalled due to doubts over its safety. The news story is one based on the statement by a competitor, not by a government agency. P ignored it.

52. It is of no relevance to P's claim for damages for personal injuries (an illness caused by the toxic medicine) that she may have been careless in protecting her own interests unless the intervention of the news story can fall into that extreme category of case where the chain of causation is completely severed.

53. In contrast, if P sues to recover the money spent in buying the useless medicine on the basis that she was misled into doing so by a misleading advertisement, it becomes relevant as to whether there was a lack of reasonable care on her part in ignoring the news story. P is not, however, engaged in a commercial enterprise, seeking to make a profit. The outcome may be different and the net effect of the causal inquiries may be different, but without there being any obvious difference in the merits of each of the fact patterns.

54. Neither claim more obviously involves consumer protection. The legislation seems to have been motivated more by the law's historical conservatism

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37 See *Kestrel Holdings Pty Ltd v APF Properties Pty Ltd* (2009) 260 ALR 418 at [180]-[181] per Gray, Mansfield and Tracey JJ.

towards cases of pure economic loss than by the aim of seeking to preserve a coherent stance on consumer protection.

55. The amendments that were made to the *TPA* in 2004 create a dichotomy between some kinds of action (broadly speaking where one seeks damages under s 82 for economic loss for non-intentional and non-fraudulent contraventions of s 52) and other actions for damages under s 82 for contravention of s 52 (for example in a case of damages for personal injury or where there has been economic loss in a fraud case).

56. There is another, wider distinction, which is between s 52 and all the other contraventions of the Act that engage s 82.

57. It is difficult to see how the amendments maintain a coherent justification that the *TPA* is about consumer protection and is markedly different from the common law. Consumer protection, one would think, has a primary focus on the effect of proscribed conduct on the consumer. In that regard:

    (a) it is difficult to see why a consumer should have less protection in terms of compensation for economic loss if he or she has been misled by a negligent contravention of s 52 as compared with a situation where the person responsible for the misleading conduct has been fraudulent - this seems to focus on issues of culpability of the wrongdoer rather than protection of the consumer;

    (b) damages for personal injuries are not necessarily more important in the context of particular cases than damages for economic loss – by important, I mean in terms of the effect that the loss or damage has on the plaintiff's life – sometimes economic loss suffered by an individual can be catastrophic, so it is difficult to see why a distinction should be made other than:

        (i) as an essential policy decision by the legislature;

        (ii) an expression of an historical conservatism about damages for economic loss becoming ungovernable unless tightly constrained by rules that are clearly enunciated.

58. As to the latter point, that historical conservatism is grounded in the general law. Courts, in dealing with claims for economic loss, particularly those based upon statements, have historically been influenced by at least two important considerations:

    (a) The concern about indeterminate liabilities; see the reasoning of Gleeson CJ in *Perre v Apand Pty Ltd* in relation to claims for "pure economic loss" (so called) arising from the tort of negligence[38];

    (b) The appreciation that a capitalist market economy is competitive and permits the lawful destruction of wealth of participants in the market – the

[38] (1999) 198 CLR 180 at [3] to [11].

market does not compensate or protect those who make foolish decisions and often rewards those who make risky decisions.

Propositions about causation in negligence

59. We know that it is accepted that analogies with the common law approach to causation serve, at the least, as useful analogies when dealing with s 82 of the TPA. So the starting point is to work out what underpins the common law to make sure that any analogies are accurate and appropriate.

60. There are a number of things that can be said about causation, at least by reference to the use of the term in the law of negligence, that should be uncontroversial.

61. A starting proposition is that causation is a word that lawyers use to describe a relationship, not an event.[39]

62. Another proposition is that the *cause* in negligence does not have to be the sole or dominant cause. In *March v Stramare* Mason CJ described it as being the plaintiff's onus to establish that his or her injuries are caused or materially contributed to by the defendant's conduct.[40] The same reasoning applies to s 82 of the TPA[41]

63. An important, basic proposition is that every event of any interest to the law has more than one cause. In academic commentary this is described as the event being "overdetermined".[42]

64. There are a set of causes for any event which are too numerous for us to identify. If a man is carelessly shot by another and dies, his death may be caused by the damage the bullet does to his heart, the explosion that occurs within the barrel of the rifle, the speed of the bullet, the force of its impact, the effect of gravity and air resistance, the fact that the mother of each of the two men had a son, and so on. It is also caused by the negligence of the man holding the rifle when it was discharged.

65. Not all events are overdetermined in a way which is of any interest to the law. Absent another concurrent, relevant cause of death the law of negligence will only be interested in whether or not the carelessness of the man holding the rifle was the cause of death.

66. If I negligently give a man poison that will kill him in five hours and, after three hours, he is negligently run down and killed by a motorist, my act of poisoning him is not a cause of the actual death and is legally irrelevant to a negligence

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39 Kelley, *"Causation and Justice: A Comment"*, Washington University Law Quarterly 4 (1998) 643.

40 (1991) 171 CLR 506 at 514; see Deane J at 521-522. See also, in the context of a fraudulent representation the judgment of Wilson J in *Gould v Vaggelas* (1985) 157 CLR 215 at 236.

41 See *BMW Finance Australia Ltd v Miller & Associates Insurance Broking Ltd* [2009] VSCA 117 at [43] per Neave JA and at [169] per Robson AJA.

42 Overdetermination is explained by Professor Stapleton, *"Cause-In-Fact and the Scope of Liability for Consequences"* (2003) 119 LQR 388 at 392.

claim.[43] It may be of moral relevance in the ordinary language of causation as someone might say I am morally responsible for the death even though the poison did not kill him.[44] And I will have committed a crime.

67. If the poison, after three hours, causes the victim to stagger and lose control of his movements, so that he wanders onto a street and is killed by a motorist driving carelessly, my poisoning of him becomes causally relevant in the law of negligence and the death is overdetermined in a way that is now of interest to the law of negligence.

68. In many cases the "*but for*" test satisfies and exhausts the law's interest in causation. The 'but for' test will tell the lawyer that if she takes away the effect of the carelessness of the man holding the rifle then the victim would not have died.

69. The "but for" test of causation requires us to consider an hypothetical universe in which an event of interest to the law did not occur and then to rationalise what would have happened.[45] So even though the law is backward looking – it analyses an event that has already occurred in answering the hypothetical question - it requires a predictive exercise: what would have occurred if the negligence of X had not occurred? In making such a backward looking prediction we use rational thought based on our life experience.

70. A scientist or philosopher may have a completely different interest in causation from the lawyer. The pathologist who performs the post mortem on the dead man will find a scientific cause of death that will not necessarily say anything about negligence.

71. So, how does the law move from the unimaginably numerous range of possible causes to a cause or causes that it considers relevant or important? One answer might be that it is just plain common sense and that the law readily concentrates on what is of legal significance.

72. Another possible answer, and probably an even more prosaic one, is that in an adversarial system the law only concerns itself with allegations made in cases. The widow of the deceased man will narrow down the multiplicity of imaginable causes to the one of legal interest by alleging negligence by the man who held and fired the rifle. There is no possibility of obtaining compensation otherwise.

73. In *March v Stramare* Mason CJ said:

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43 See *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. A medical casualty officer negligently omitted to admit a man who had been poisoned by arsenic to the hospital. The man later died but it was held that the negligence of the hospital was not causative of death as the man would have died in any event.

44 See Wright's similar example where D shot and killed P just as P was about to drink a cup of tea poisoned by C: Wright, *"Causation in Tort Law"* (1985) 73 California Law Review 1737 at 1795.

45 See Stapleton, "*Choosing What We Mean By 'Causation' in the Law*", (2008) 73 Missouri Law Review 433 at 436-437

> "In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence."[46]

74. The historian AJP Taylor made a similar point about the law's pragmatism when he wrote about the causes of wars:

> "Wars are much like road accidents. They have a general cause and particular causes at the same time. Every road accident is caused, in the last resort, by the invention of the internal combustion engine and by men's desire to get from one place to another. In this sense, the 'cure' for road accidents is to forbid motor cars. But a motorist, charged with dangerous driving, would be ill-advised if he pleaded the existence of motor cars as his sole defence. The police and courts do not weigh profound causes. They seek a specific cause for each accident – error on the part of the driver; excessive speed; drunkenness; faulty brakes; bad road surface."[47] [underlining added]

75. A further proposition about causation is that the law recognises that there are some cases that are overdetermined in a manner which is significant to the law and which cannot be ignored. In a paradigm case identified by Professor Stapleton X and Y are hunting and each shoot carelessly in the direction of Z, each hitting him. Z is killed, with each bullet being sufficient to have killed him. In this case the law will have the dilemma, when Z's widow sues X and Y, of analysing whether the negligence of one or both of them was a cause of Z's death.

76. In this overdetermined situation, that is, an event that is overdetermined in a manner of interest to the law, the "but for" test does not work. It yields an anomalous outcome which exonerates each hunter from having caused the death.[48]

77. As Mason LJ said in *March v Stramare*:

> "The 'but for' test gives rise to a well known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test 'gives the result contrary to' common sense that neither is a cause?"[49]

78. This is because in the hypothetical universe from which X's conduct is subtracted the predictive result will be that X's negligence was not necessary for the death of Z, because Y's conduct would have killed him. As Professor Stapleton wrote:

> "It is notorious that the traditional but for test, if used as a complete test of cause-in-fact, gives false negatives: it says that neither hunter was

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46 See *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 509.

47 'The Origins of the Second World War', AJP Taylor, The Folio Society 1998 at pages 115-116.

48 Stapleton, "*Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*", (2001) 54 Vanderbilt Law Review 941 at 958-960.

49 (1991) 171 CLR 506 at 518.

> involved in the death of the walker because but for one hunter's tortious conduct the walker would still have died from the other shot."

79. So the plaintiff is worse off because he or she has been the victim of the negligence of two wrongdoers instead of one.

80. In *Chappel v Hart*, Hayne J said that the 'but for' test is of most use as a negative test. If it is not satisfied it is unlikely that there is any necessary causal connexion.[50] But in an overdetermined case the 'but for' test will yield a 'false negative' as Professor Stapleton has pointed out. So it cannot always be reliably used as a negative test.

81. Cases that are overdetermined in a way of interest to the law are common. Where a company collapses the liquidator might correctly allege negligence by the directors and the auditors. The liquidator, at least in cases in the latter part of the 20th century, and the early part of this century, has had a live interest in sheeting home liability for losses to auditors with the deepest pockets.

82. The proportionate liability legislative reforms are predicated upon the existence of such overdetermined cases and upon the legislature's judgment that it is unfair for a defendant with the deepest pockets, but who made only a minor contribution to the plaintiff's economic loss, to bear the cost of compensating the plaintiff for all of it.

83. Every case of contributory negligence is overdetermined in a sense of interest to the law. However, where there is only one defendant tortfeasor the "but for" test works in this type of case. The contribution of the plaintiff to her own loss becomes relevant to the scope of liability of the defendant but does not prevent the "but for" test being applied sensibly.

Common sense

84. Another important and pervasive proposition is that the concept of causation is used by people in ordinary, every day language to mean a variety of things. This linguistic variation has been identified by Professor Stapleton as a significant reason why there is great difficulty, ultimately, in the Hart & Honore thesis that the law's test for causation can be identified with the ordinary person's notion of causation. This is also called the common sense approach.

85. Professor Stapleton has made the valid point that ordinary causal language in daily life does not necessarily distinguish between the factual inquiry of historical involvement and the normative judgment as to which consequences fall within the appropriate scope of liability.[51] Linguistic confusion affects the application of a common sense test and tends to obscure rather than clarify what

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[50] (1998) 195 CLR 232 at [117]

[51] Stapleton, *"Cause-in-Fact and the scope of Liability for Consequences"* (2003) 119 LQR 388 at 392-393.

we are about. In ordinary language people merge normative and non-normative considerations in using causation.[52]

86. Some examples that come to mind include:

- The man's death was caused by shooting.
- The child's injury at school was caused by another child hitting him with a cricket bat.
- The failure of the marriage was caused by his infidelity.
- The government lost the election because of its industrial relations policy.
- The child's injury was caused by the school's not having an adequate system of supervision in the playground at lunchtime.
- A cause of World War Two was the failure by France or Britain or the League of Nations to take up arms against Germany when it re-occupied the Rhineland on 7 March 1936.
- Our team lost a rugby union game by two points because fifteen minutes from full time the referee failed to award a penalty in front of the posts which we would have kicked and then won by one point.

87. Some of those statements concern a factual conclusion, at least one concerns a moral judgment, and others may make a statement about responsibility that has a normative resonance in it. As Wright has emphasised, causation as a legal concept is <u>not</u> equivalent to responsibility.[53]

88. The last two comments, one concerning Hitler's re-occupation of the Rhineland, and the other concerning the rugby game, are interesting. In terms of causation they are not greatly different in principle although they concern matters of great difference in seriousness.

89. In each case the statement involves a "but for" test. However, the application of the test is much more complex and unpredictable than what courts generally make judgments about in negligence. For example, it is difficult to conceive that a court would ever be able to find that causation was established, if it in some way had to, in the example of the re-occupation of the Rhineland and whether the failure to react to it in a particular way was a cause of the second world war. This is because the events that might have unfolded from March 1936 onwards are so unpredictable and complex that one could not hope to satisfy any legal standard of proof about them in the practical sense in which a court has to administer justice. But people who have an interest in that part of history have regularly expressed views, one way or the other, in causative terms about this topic.

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[52] Stapleton, *"Choosing What We Mean by 'Causation' in the Law"* (2008) 73 Missouri Law Review 433 at 440-441, Stapleton, "*Unpacking Causation*", from <u>Relating to Responsibility</u> 2001 ed Cane & Gardner at pp 148-150.

[53] Wright, *"Causation in Tort Law"* (1985) 73 California Law Review at 1741.

90. This shows that people using ordinary, everyday language of causation will attempt to answer very complex questions which courts would not attempt to answer.

91. So we should not make the mistake of thinking that the ordinary person is not apt to make complex causal judgments.

92. The example of the rugby game is entirely commonplace in everyday language but in some ways is as uncertain and fraught a task as the exercise concerning the re-occupation of the Rhineland. The problem, in a legal sense, about assuming an hypothetical world where the referee awarded the penalty, is that one would have had a different, dynamic game with 15 minutes to go. One has to assume that everything else remains static when this is not possible because there are 15 minutes to go in a differently configured situation; or one has to rule out the possibility that the other side would have rallied and responded more strongly to the penalty than they played when it had not been awarded. Despite the impossibility of being sure about such statements ordinary people commonly express causative conclusions about these and other subjects where the law would not be able to find that it had been proved.

93. So a problem with relying upon the plain person's notions of causation is, apart from the lack of precise definition about fundamental linguistic issues, that the ordinary person makes causative judgments where courts would fear to tread. In ordinary parlance we make causative judgments which are more complex than a court would make. The ordinary person's common sense is hardly simplistic. Courts recognise that it is often extremely difficult to demonstrate what would have happened in the absence of the defendant's negligent conduct.[54]

94. Moving to another proposition, if applying common sense means not more than applying rational thought in a logical manner, based upon the evidence, it does not add much to what we would expect the law to do anyway. We do not expect the law to reach irrational conclusions, or to act illogically, and not act upon evidence.

95. But if common sense means something more than this it is difficult to know what it is, with any real sense of satisfaction.

96. For example, if a court applies rational thought, based on evidence, to the question of whether a school's negligence was a cause of a child being hit with a cricket bat in the playground at lunchtime, it may have to make a very difficult decision, not only on the causative question, but also on the question of breach; whether the precautions taken were reasonable in all of the relevant circumstances, including the nature and foreseeability of the risk: *Wyong Shire Council v Shirt*.[55] But it is difficult to know what real assistance is added to that task to say that a common sense approach should be taken.

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54 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 514 per Mason J.

55 (1980) 146 CLR 40 at 47-48 per Mason J.

97. In *Henville v Walker* Gaudron J said that the common sense approach required no more than that the act or event in question should have materially contributed to the loss or injury suffered.[56] But this is not a test of "common sense". It merely raises another question as to what degree of contribution is "material".

98. Notwithstanding these comments, the common sense approach to causation has long found favour in courts. The debate about the adequacy of such a test and debates about difficult aspects of causation theory have been raised in academic commentary and carried on there, rather than having emerged definitively in the case law.

99. The common sense test also has a distinguished history in terms of academic commentary. Hart & Honoré espoused the essential validity of a common sense test:

> . "Common sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on statable principles; though the ordinary man who uses them may not, without assistance, be able to make them explicit."[57]

100. One reason for the development of the common sense approach was the historical fact that questions of causation were formerly decided by juries and that, when the matter had to be decided by a judge, it did not make sense to make the question more complex than it had previously been.

101. The test of common sense for causation was expressed in this way by Lord Reid in *Stapley v Gypsum Mines Ltd*:[58]

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. 'A jury would not have profited by a direction couched in the language of logicians, and expanding theories of causation, with or without the aid of Latin maxims': Grant v Sun Shipping Co Ltd per Lord du Parcq. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally." [underlining added]

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[56] *Henville v Walker* (supra) at [61].

[57] "*Causation in the Law*", 2nd ed, 1985, Hart & Honoré at p 26. This can be criticised as being elusive, and impenetrable.

[58] [1953] AC 663 at 681.

102. This test has a distinguished lineage in the case law. It has for a long time been applied in the United Kingdom: *Leyland Shipping Co*[59]; *Admiralty Commissioners v S.S Volute*[60]; *Yorkshire Dale Steamship Co v Minister of War Transport*[61]; *Alphacell Ltd v Woodward*[62]; and *McGhee v National Coal Board*[63].

103. In *Yorkshire Dale Steamship Co.*, Lord Wright said:

> "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientists or metaphysician would understand it."[64] [underlining added]

104. The common sense test, whatever it meant, was used, amongst other purposes, as a filtering device to discard consequences that were too remote.

105. In *March v Stramare* the majority of the High Court clearly endorsed the common sense test. Mason CJ, with whom Toohey J agreed, said that:

> "The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case', in the words of Lord Reid: *Stapley*"[65]

106. Deane J also accepted the common sense test:

> "For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility whether an identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it."[66]

107. In his minority judgment in *March v Stramare*, McHugh J raised a powerful objection to the adoption of a common sense test, namely, that it enables the tribunal of fact, consciously or unconsciously, to give effect to value judgments concerning responsibility for damage and that it is doubtful whether there is any consistent common sense notion of what constitutes a "cause".[67]

108. One reason why McHugh J criticised the common sense test related to the role of expert evidence. His criticism was repeated by Gummow and Hayne JJ in *Travel Compensation Fund v Tambree*[68].

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59 [1918] AC at 363, 369-370.
60 [1922] 1 AC 129 at 144 (relating to contributory negligence).
61 [1942] AC at 691 at 706.
62 [1972] AC 824 at 847 per Lord Salmon.
63 [1973] 1 WLR 1 at 5 per Lord Reid at 11 per Lord Salmon.
64 *Yorkshire Dale Steamship Co* (supra) at 706.
65 (1991) 171 CLR 506 at 515 per Jason CJ, 524 per Toohey J, and 525 per Gaudron J.
66 *March v Stramare* (supra) at 522.
67 *March v Stramare* (supra) at 532.
68 (2005) 224 CLR 627 at 642 [45].

109. In my view the reference to the role of expert evidence is not a convincing reason for rejecting the common sense test, although there are other convincing reasons for doing so.

110. McHugh J, referring to cases where expert evidence was called to explain a connexion between an act or omission and the occurrence of damage said:

> "In these cases, the educative effect of the expert evidence makes an appeal to commonsense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence."[69]

111. It is true that in many cases a question of causation may be difficult, and require adjudication upon expert opinion, often conflicting expert opinion.

112. But if the common sense test is to be rejected each basis for its rejection should be persuasive. The fact that an issue can only be decided by reference to expert opinion is not a basis to say that a common sense test cannot apply – this would assume that for common sense to be able to apply a factual issue must be something that commonly occurs, or is within the direct knowledge or experience of the tribunal of fact. But many questions which can only be answered with the assistance of expert evidence are not difficult once such assistance is available and do not cause any problem in the application of rational and logical thought, if that is what common sense means.

113. Take the example of a woman who has particular sterilisation devices inserted in an operation to prevent her becoming pregnant. She later becomes pregnant and sues the manufacturer of the devices on the basis that the devices did not work. When the devices are surgically removed modern technology enables the removal procedure, as it occurs inside the body, to be filmed. No one who is not a medical expert could make sense of the film. But an expert gynaecologist can make sense of it. She explains that two devices were found inside the woman. To work properly each of them must be attached to, and occlude, each of the two fallopian tubes. One is found attached to a fallopian tube. The other is found attached to another structure which is somewhat similar in appearance to a fallopian tube but which is called the broad ligament. An ordinary person may not have any direct experience of this but the factual issue is a simple one, once explained by an expert. The conclusion that the pregnancy was probably caused by the fact that there was a fully functioning fallopian tube and not by a defect with the sterilisation devices is hardly too complex or abstract to involve what ordinarily passes for common sense – or what might be called logical or rational thought based upon evidence.

114. Juries in criminal cases routinely hear expert evidence upon all manner of subjects and we would be surprised if it were said that this prevented common sense being applied.

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[69] *March v Stramare* (supra) at 533.

115. Professor Stapleton has advocated that expressions such as "common sense causation" should be avoided, and that more precise language is needed with the application of tests.[70]

116. Professor Stapleton has written that:

> "In short, it is the traditional mixing of factual and evaluative issues under the legal issue of 'causation' that is at the root of doctrinal confusion and unarticulated judgments in the area of Commonwealth jurisdictions."[71]

117. Stapleton has commented that most disputes about causation centre, not on a dispute about the facts, but on competing perspectives about agreed facts. The difficulty that she identified was the lack of clarity that results from using the term "causation" to cover two distinct kinds of inquiry; first, the question of fact as to "how things came about?"; secondly, the question as to "what made a difference?", which involves issues as to whether responsibility ought be attributed to a defendant for his or her factual involvement in the occurrence of the loss and damage.[72]

118. With respect, these statements are entirely correct.

119. An unintended consequence of the common sense test is to make it seem that causation should be an issue that is easy to decide, or which can be decided instinctively, without a need for rational or logical explanation. This operates as a deterrent from looking for nuances or analytical complexities.

120. Common sense causation can operate on the practical level to obscure the need to articulate why a factor is causative, and can operate to conceal value judgments.

121. Probably the most important factor, and one identified by Professor Stapleton, is the need for linguistic certainty about the subject matter of discussion before we proceed to determine what is, or is not, causally relevant. This precision and discipline with linguistics is not adverted to much in practice and the invocation of common sense does not train us in practice to be careful about what we are discussing.

122. The courts in Australia have qualified their attraction to the common sense test but it would be better to give up on this test completely. Ultimately it does not assist the law in developing a coherent set of principles about causation. This is further developed below.

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[70] Stapleton, *"Cause-in-Fact and the Scope of Liability for Consequences"* (2003) 119 LQR 388 at 389.

[71] Stapleton, *"Unpacking Causation"* in *"Relating to Responsibility"*, ed by Cane & Gardner, 2001 at page 160.

[72] Stapleton, *"Perspectives on Causation"*, *Oxford Essays in Jurisprudence*, 4th Series ed Horder, at pages 61-66.

Hard cases

123. We can really see the lack of utility in a common sense test when we are confronted with a hard case. When we come to hard cases the common sense test seems particularly inapt to explain how they are decided.

124. In hard cases courts tend to decide issues of causation on policy grounds, and rules become subject to incremental adjustments, based on a kind of rough justice.

125. Professor Stapleton wrote:

> "In some cases, we simply do not know critical facts, or we do not know them for certain."[73]

126. Professor Stapleton also identified the significant concern with the common sense test. It is that the resort to this test can become a "substitute for the careful enunciation of relevant concerns governing the responsibility dispute that had arisen from the agreed facts".[74]

127. In some hard cases courts have opted to find that causation exists, or more accurately, that something which is a proxy for it exists, to avoid what appears to be an unjust result. These types of decisions are decided on the basis that they are exceptions to the ordinary rules of proof. An appeal to common sense does not take us far in justifying these decisions. Common sense could differ between reasonable people about whether such exceptions should apply and, if so, how broadly the exceptions should operate.

128. An example of a hard case was *Cook v Lewis*[75]. In that case a man was wounded by one or both of two hunters. Each of them had been in the vicinity of the victim and each had discharged their shotguns at the same time. The victim was wounded immediately after this. The jury found that one of the two hunters had injured the plaintiff but they could not say which one.

129. In *Cook v Lewis* the Supreme Court of Canada (Cartwright J, with whom Estey and Fauteux JJ agreed) said in *obiter* (the appeal determined that a new trial ought be held):

> "… if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable."

130. In 2007 the Supreme Court of Canada reconsidered *Cook v Lewis* in *Hanke v Resurfice Corp*[76]. In *Hanke* the court recognised that there are exceptional cases where a plaintiff can overcome an evidentiary deficit in relation to

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73 Stapleton, "*Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*", (2001) 54 Vanderbilt Law Review 941 at 962.

74 Stapleton, "*Unpacking Causation*" in "*Relating to Responsibility*", ed by Cane & Gardner, 2001 at page 160.

75 [1952] 1 DLR 1.

76 [2007] 1 SCR 333.

causation. The court described the basic test for determining causation as being the "but for" test and stated that the 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 went on to say that in special circumstances the law recognises exceptions to the basic "but for" test and applies a "material contribution" test. The court did not discuss the particular deficiency of the but for test in cases in which there is more than one cause and the test yields a false negative.

131. The "material contribution" test is not happily named. The naming of the test has a tendency to cause, rather than alleviate, confusion. The words "material contribution" have previously been used by courts to describe situations where causation is actually established using the 'but for' test. In *Hanke* it is used to describe the exceptional case where a cause cannot be proved. The "but for" test, to which it is an exception, is defined with a similar sounding phrase: "substantial connection". And, as is clear from *Hanke*, the "material contribution" test is intended to apply where the plaintiff finds it impossible to prove causation on a "but for" basis, for reasons beyond the plaintiff's control but which may include "the current limits of scientific knowledge".

132. The Supreme Court of Canada identified two requirements for the application of the material contribution test:

> "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."[77] [underlining added]

133. The Court went on to identify one situation where the material contribution test would apply:

> "One situation requiring an exception to the 'but for' test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim but it is impossible to say which shot injured him: *Lewis v Cook*. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury the plaintiff in fact suffered (ie carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied."[78]

134. The way the test is stated, and the way the example is explained, makes the expression "material contribution test" seem inapt. The test would be more

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77 *Hanke v Resurfice Corp* (supra) at [25].

78 *Hanke v Resurfice Corp* (supra) at [26].

appropriately described as "deemed causation", as it applies where a plaintiff cannot prove that the defendant's conduct in fact caused the loss.

135. This category of hard cases has recently been considered by the House of Lords and the High Court.

136. In *Barker v Corus UK Ltd*[79] the House of Lords applied its previous decisions in *Fairchild v Glenhaven Funeral Services Ltd*[80] and *McGhee v National Coal Board*[81]. In *Barker* the House considered, as one of three cases before it, the claim by the wife of a man who had died of mesothelioma. The man had been exposed to asbestos during three separate periods in his working life.

137. In respect of one period the employer had become insolvent. In respect of a second period, the employer was the defendant company, which was solvent. In respect of the third period, the man had been self-employed.

138. Mesothelioma is not a disease that one contracts necessarily because of prolonged or accumulated exposure to asbestos. It only takes one fibre to lead to the fatal disease. The disease typically manifests itself thirty to forty years after the inhalation which causes it and death follows quickly, within one to two years, after diagnosis. As Lord Walker of Gestingthorpe said:

> "Prolonged exposure to asbestos does indeed increase the risk of mesothelioma, but only in a statistical sense. The disease may be caused by inhalation of a single fibre of asbestos which operates (in a way that medical science does not fully understand) in the transformation of a normal mesothelial cell into a malignant tumour …"[82]

In this way mesothelioma is quite different from asbestosis which is a disease which is aggravated by accumulated exposure to respirable asbestos fibres.

139. So with the victim's death in *Barker* it was impossible for it to be established scientifically during which of the three periods of exposure the victim's eventual death from mesothelioma had been set in train.

140. The first two periods of exposure to asbestos were caused by breaches of duty by his respective employers at the time. The last involved a failure by Mr Barker to take reasonable care for his own safety.

141. This case was in some ways a harder one factually than had had to be confronted in the earlier decision of the House of Lords in *Fairchild*. In *Fairchild* the factual situation was not complicated by the insolvency of a previous employer nor by the contributory negligence of the victim.

142. In *Fairchild* the House decided that a worker who had contracted meosthelioma after being wrongfully exposed to significant quantities of asbestos dust at different times, by more than one employer or occupier of premises, could sue any of them, notwithstanding that he could not prove which exposure had

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79 [2006] 2 AC 572.
80 [2003] 1 AC 32.
81 [1973] 1 WLR 1.
82 *Barker v Corus UK Ltd* (supra) at 613 [112].

caused the disease.[83] In *Barker* Lord Hoffman described the *Fairchild* rule in these terms:

> "All members of the House emphasised the exceptional nature of the liability. The standard rule is that it is not enough to show that the defendant's conduct increased the likelihood of damage being suffered and may have caused it. It must be proved on the balance of probability that the defendant's conduct did cause the damage in the sense that it would not otherwise have happened. In *Fairchild*, the state of scientific knowledge about the mechanism by which asbestos fibres cause mesothelioma did not enable any claimant who had been exposed to more than one significant source of asbestos to satisfy this test. A claim against any person responsible for any such exposure would therefore not satisfy the standard causal requirements for liability in tort. But the House considered that, in all the circumstances of the case, that would be an unjust result. It therefore applied an exception and less demanding test for the causal link between the defendant's conduct and the damage.".[84] [underlining added]

143. The various judgments in *Fairchild* show differing degrees of prescription and definition of when the exceptional test can apply.[85] Two principles that emerged were:

(a) That in exceptional cases the law would excuse the plaintiff's inability to prove that the defendant's wrong had actually caused the injury complained of – Lord Hutton put it succinctly:

> "Cases such as the present ones where the claimant can prove that the employer's breach of duty materially increased the risk of him contracting a particular disease and the disease occurred, but where in the state of existing medical knowledge he is unable to prove by medical evidence that the breach was a cause of the disease."[86]

(b) That the exception must be kept under tight constraints and that, as Lord Nicholls of Birkenhead said, it was "emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him."

144. Lord Bingham of Cornhill echoed the traditional preference of common law courts not to fence themselves in by rigidly defining principles in hard cases:

> "It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development. Cases seeking to develop the principle must be decided when and as they arise."[87]

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83 The ruling in *Fairchild* was described by Lord Hoffmann in *Barker v Corus UK Ltd* [2006] 2 AC 572 at 579 [1].

84 *Barker v Corus UK Ltd* (supra) at 580 [1] per Lord Hoffmann.

85 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 40 [2] per Lord Bingham of Cornhill; at 70 [43] per Lord Nicholls of Birkenhead; at 74 [61] per Lord Hoffmann; at 91 [108] per Lord Hutton; and at 118-119 [169-170] per Lord Rodger of Earlsferry.

86 *Fairchild* (supra) at 91 [108].

87 *Fairchild* (supra) 68 at [34].

145. Not long after this, in *Barker v Corus UK Ltd* the House had to consider the exceptional type case again and the development of the principle took an interesting and arbitrary twist. Confronted with the situation where one former employer was insolvent and where Mr Barker had, in one of the three episodes of asbestos exposure, been self-employed, and not exercised reasonable care for his own safety, the House decided, by majority, to smooth out the rough edges in what could be viewed as rough justice for the single solvent defendant by making an equally rough adjustment in its favour.

146. The House of Lords decided that, in the *Fairchild* situation, where liability was imposed on the basis that the defendants plural had materially increased the risk that the employee would contract mesothelioma, fairness required that liability should be attributed according to each defendant's relative degree of contribution to the risk, measured by the duration and intensity of the exposure involved. Each defendant's liability was several only.

147. Thus, where a solvent defendant had contributed 10% of the exposure and the insolvent defendant contributed 90%, the solvent defendant would only be liable severally for 10% of the loss, this being the contrary result which would traditionally apply at common law, where causation of the same or an indivisible loss was established against each defendant. In that latter case the common law holds the solvent defendant 100% liable, leaving it to shift for itself to claim contribution from the other defendant.

148. Lord Hoffmann explained the majority position in these terms:

> "In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm."[88] [underlining added]

149. So, to an arbitrary rule there was an arbitrary adjustment, in the interests of "fairness". If this had been an ordinary case of negligence where causation could be established against each defendant, then the common law would say that the victim should not be worse off because two employers caused his or her harm instead of one.

150. It is my view that the dissenting judgment of Lord Rodger of Earlsferry is more satisfactory. His Lordship said:

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[88] *Barker v Corus UK* (supra) at 592 [43].

> "Of course, it may seem hard if a defendant is held liable in solidum even though all that can be shown is that he made a material contribution to the risk that the victim would develop mesothelioma. But it is also hard – and settled law – that a defendant is held liable in solidum even though all that can be shown is that he made a material, say 5% contribution to the claimant's indivisible injury. That is a form of rough justice which the law has not hitherto sought to smooth, preferring instead, as a matter of policy, to place the risk of the insolvency of a wrongdoer or his insurer on the other wrongdoers and their insurers. Now the House is deciding that, in this particular enclave of the law, the risk of the insolvency of a wrongdoer or his insurer is to bypass the other wrongdoers and their insurers and to be shouldered entirely by the innocent claimant. As a result, claimants will often end up with only a small proportion of the damages which would normally be payable for their loss. The desirability of Courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me."[89] [underlining added]

151. The High Court considered a difficult case recently in *Amaca Pty Ltd v Ellis*[90]. In that case the issue was whether the deceased's estate had established that the lung cancer which caused the death of the deceased had been caused by exposure to respirable asbestos fibre. The deceased was a smoker and it is scientifically well-established that smoking can cause lung cancer just as science also has established that breathing in asbestos fibres can cause lung cancer. The scientific evidence could not say why the deceased had developed lung cancer.

152. In the High Court the deceased's estate had run the case on the basis that causation was to be decided by applying a "but for" test.[91] In taking this approach the deceased's estate expressly disavowed any argument to the effect that it was sufficient to establish causation to demonstrate only that exposure to asbestos had increased the risk of contracting lung cancer. Because of the way in which the case was conducted the High Court found it neither necessary nor appropriate to consider issues of the kind decided by the House of Lords in *McGhee v National Coal Board*[92], *Fairchild v Glenhaven Funeral Services Pty Ltd*[93], and *Barker v Corus UK Ltd*[94], or by the Supreme Court of Canada in *Resurfice Corp v Hanke*[95].

153. In its unanimous judgment the High Court in *Amaca Pty Ltd*[96] said:

> "The courts' response to uncertainty arising from the absence of knowledge must be different from that of the medical practitioner or the scientist. The courts cannot respond to a claim that is made by saying that, because science and medicine are not now able to say what caused Mr Cotton's cancer, the claim is neither allowed nor rejected. The courts must decide the claim and either dismiss it or hold the defendant responsible in damages …"

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89 *Barker v Corus UK Ltd* (supra) at 607-608 [90].
90 [2010] HCA 5.
91 [2010] HCA 5 at [11].
92 [1973] 1 WLR 1.
93 [2003] 1 AC 32.
94 [2006] 2 AC 572.
95 [2007] 1 SCR 572.
96 [2010] HCA 5 at [6].

154. None of the hard cases sit well with the common sense test. The High Court referred to the medical practitioner and the scientist. We could also add to that list the ordinary person. In everyday life when we are called upon to administer "justice" we have an armoury of options which a court does not have, and we may be influenced by considerations which a court could not properly consider. We may say that someone who acts fairly in a difficult situation in ordinary life acts with common sense. But that person may not decide the rights and wrongs of a dispute (as a court has to) and may take into account that fact that the disputants are people with whom she must live or work in the future. We can think of situations in life where, being called upon to decide who won a competition between children we have chosen a child who had not won other prizes to "square the ledger". What happens in ordinary life can be more complex than judgments about justice made in courts and it points again to the incorrectness of assuming that common sense, or common fairness, should necessarily refer to a simple process.

155. Incidentally, if Lord Hoffman's reasoning in *Barker v Corus UK Ltd*[97] was applied to the facts of *Amaca* then the deceased's estate in *Amaca* would also have failed in its claim. Lord Hoffman said:

> "… In my opinion it is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect, as in Lord Rodger's example of the different kinds of dust, but the mechanism by which it caused the damage, whatever it was, must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent." [underlining added]

156. His Lordship spoke with remarkable prescience in relation to a case such as *Amaca*.

The NESS Test

157. As discussed above, there are cases where the "but for" test does not work as, to use Professor Stapleton's words, it yields a false negative in an overdetermined case. This is not because science cannot prove a cause but because there is more than one cause which science can prove.

158. Professor Wright drew upon the original thinking of Hart and Honore to develop what he called the "NESS" test (Necessary Element of a Sufficient Set).[98]

159. Wright commented that the NESS test was first suggested by Hart and Honore but that their "brief exposition of it was overshadowed and distorted by their primary emphasis on proximate-cause issues".[99]

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[97] (supra).

[98] Wright, *"Causation in Tort Law"* (1985) 73 California Law Review 1735 at 1788.

160. Wright went on to state that:

> "The NESS test captures the essential meaning of the concept of causation."[100]

161. While Professor Stapleton describes the NESS test as a very useful algorithm to identify factors which might qualify as a causally relevant condition, she takes issue with Wright in describing it as elucidating the meaning of causation. Stapleton makes the point that the NESS test does not tell us what causation means. It is an algorithm to enable us to identify involvement once we identify that as the relevant question.[101]

162. The extended statement of the NESS test is: that a particular condition was a cause of (condition contributing to) 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.[102]

163. The test can be simply applied by focussing on the words "a set of antecedent actual conditions". It permits us, in an overdetermined case (that is overdetermined in a way that is of interest to the law) to subtract from a series of events a particular event (X) in order to decide whether another event (Y) was a cause of an ultimate event (Z).

164. So, in the two hunters example, when we look at the hypothetical universe we want to know whether X, one of the hunters, caused the death of Z, when Z was killed by bullets hitting him simultaneously from the rifles of X and Y. The "but for" test exonerates X because Z would still have died if we subtract X's conduct from the hypothetical case.[103] But the NESS test allows us to subtract also the conduct of Y; that is, to look at a subset of the antecedent conditions. When we subtract Y's conduct, in addition to that of X, X is not exonerated, as Z would have lived, in this scenario. X's carelessness was necessary for the sufficiency of this subset of conditions in causing Z's death. Professor Stapleton's thesis is that we should use the NESS test, and the word causation free of the taint of any normative judgments which have so confused the use of the concept of causation in the past.[104]

165. Professor Stapleton advocated that the question of causation should be limited to choosing a means of interrogation which captures involvement; that is, all ways in which a factor might be involved in an occurrence under examination.[105] The normative inquiries as to whether that involvement should sound in legal responsibility should be left to another and distinct inquiry as to the "scope of liability". This would remove the confusion that has previously

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99 Wright (supra) at 1788.

100 Wright (supra) at 1789.

101 Stapleton, *"Choosing What We Mean by 'Causation' in the Law"* (2008) 73 Missouri Law Review 433 at 471-474.

102 Wright, *Causation in Tort Law"* (1985) 73 California Law Review 1735 at 1790.

103 Stapleton, "*Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*", (2001) 54 Vanderbilt Law Review 941 at 958-960.

104 Stapleton, *"Choosing What We Mean by 'Causation' in the Law"*, supra at 474.

105 Stapleton, supra, at 441.

occurred by use of terms such as "proximate cause" which mix factual and normative inquiries together.[106]

166. Stapleton uses two examples of the NESS test to illustrate how to interrogate as to "involvement". The first example is easier than the second.[107]

167. In the first there is a bridge that can hold 25 units of weight. A train that is to pass over it weighs on 10 units. So if 16 units of weight are added to the bridge beforehand then it will collapse when the train comes.

168. At 9am a terrorist, X, adds two units of weight to the bridge. Between 9am and when the train arrives, 8 separate terrorists each add two units of weight to the bridge. When the train comes the load is 28 units and the bridge collapses.

169. The NESS test clearly identifies the involvement of X in the collapse of the bridge. If we subtract from the set of antecedent conditions the conduct of one other terrorist then we find that X's 2 units of weight were necessary to make the bridge collapse. So X's conduct was causative in an involvement sense.

170. The second case is more difficult. X puts his 2 units of weight on at 9am. However, there is only one other terrorist, not eight. That one other terrorist, Y, hangs 16 units of weight on the bridge between 9am and when the train passes. Was X's conduct involved in the collapse of the bridge?

171. Professor Stapleton opines that the NESS test should be cast wide enough to capture X's involvement in the event, leaving it for legal analysis as to what normative considerations should apply to his conduct.

172. As Stapleton contends, the 2 units hung by X were just as much a part of the total weight that pulled the bridge down.

173. If we apply the NESS test, and subtract the conduct of Y, from the hypothetical universe, then it will tell us that X's conduct was not a cause because 2 units of weight plus the weight of the train were not enough to bring the bridge down.

174. Professor Stapleton contends that we should apply the NESS test by disaggregating the 16 units of solid weight placed by Y. If we can disaggregate it into 14 units and 2 unit weights then we can subtract the latter 2 units and find that X's conduct was a cause.

175. My difficulty with this approach is that the NESS test as stated by Wright referred to a "set of antecedent actual conditions that were sufficient for the occurrence of the consequence". The actual condition could be said to be the placing of a solid unit of 16 units of weight by Y. Y did not actually place a unit of 14 and then a unit of 2.

176. I acknowledge that it would be anomalous if X was not found to have been a contributory cause to the bridge's collapse in the second example. But

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[106] Stapleton, supra, at 458.

[107] See the discussion in Stapleton, *"Choosing What We Mean by 'Causation' in the Law"* (2008) 73 Missouri Law Review 433 at 475-476.

disaggregating what Y did leads us to a point where we are not just subtracting things that actually happened, but refashioning, or perhaps internally reallocating, things that happened. I can think of no other sensible alternative but the second case is not a simple as the first, and it raises a question as to whether the use of the expression "actual conditions" in the NESS test as framed by Wright, is appropriate.

Indirect Causation and the *TPA*

177. I will now address the "indirect causation" cases under the TPA, which, at face value, seem to be an exception to the view which I have stated, that it is difficult to discern any real difference between the manner in which causation is applied at common law in negligence and under s 82 for negligent misstatements causing economic loss. While at face value these cases are exceptional, it is my view that they are concerned with the "scope of liability" question aspect of the causative inquiry as identified by Professor Stapleton. This is not, however, obvious from the cases which are developing a strand of reasoning based upon causation which is direct and that which is indirect for the purposes of s 82.

178. It is clear, as discussed above, in day to day commercial transactions, that many examples of negligent misstatement causing economic loss will also involve contraventions of s 52 of the *TPA,* making available a claim for damages under s 82.

179. Normally the paradigm case is of a plaintiff who relies upon the negligent misstatement and, in the law of negligence, is a person specially foreseeable as being likely to rely upon the statement, or foreseeable as a person vulnerable to carelessness in the making of the statement.

180. Above I have made a contention that it is difficult to discern any difference, in terms of causation, in the way in which s 82 works and the way in which the common law works, where what is being considered is a negligent misstatement causing economic loss.

181. Some cases under the *TPA* have introduced a notion of <u>indirect causation</u>. This refers to a plaintiff who has suffered economic harm because of a statement which constitutes misleading and deceptive conduct, but who has not in fact relied on the statement, only suffering the harm indirectly.

182. It becomes necessary to rethink whether the common law and s 82 operate in the same way in these cases. There is a difference. Traditionally, the common law has sought to keep floodgates under control for damages for negligence causing economic loss by the way in which the duty of care is defined. The common law recognises that many losses may have been caused by a negligent statement but that there may not be a duty of care to prevent all of them occurring. In the law of negligence something more than foreseeability of economic harm being suffered by the plaintiff because of the defendant's negligent misstatement is required. As Brennan CJ stated in *Esanda Finance Corporation Limited v Pent Marwick Hungerfords*[108]:

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[108] (1997) 188 CLR 41 at 252

> "The uniform course of authority shows that mere foreseeability of the possibility that a statement made or advice given by A to B might be communicated to a class of which C is a member and that C might enter into some transaction as the result thereof and suffer financial loss in that transaction is not sufficient to improve on A a duty of care owed to C in the making of the statement or the giving of the advice. In some situations, a plaintiff who has suffered pure economic loss by entering into a transaction in reliance on a statement made or advice given by a defendant may be entitled to recover without proving that the plaintiff sought the information and advice. But, in every case, it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound."[109]

183. As Gleeson CJ said in *Perre v Apand Pty Ltd*[110]:

> "7. If there once was a bright line rule which absolutely prevented recognition of a duty of care in any case where the negligent conduct of one person caused financial loss to another, not associated with injury to the other's person or property, and which assigned claims to recover such loss to the field of contract rather than tort, the line gave way in an area where there is a clear potential for carelessness to cause financial harm: negligent misstatements made to a person who, to the knowledge of the maker of the statement, relies upon the advice or information provided. However, there is no convincing reason why conveying advice or information should be treated as the solitary exception to an otherwise absolute exclusionary rule.
>
> 8. Once the exclusionary rule ceased to be a bright line rule, it lost one of its principal justifications. Nevertheless, the considerations underlying the rule remain cogent, even if they are no longer seen as absolutely compelling. Courts have found difficulty in proposing an alternative general rule which makes better sense and which, at the same time, pays due regard to the problems earlier mentioned."

184. Similar issues relating to the imposition of a duty of care in relation to careless misstatements were discussed by Gleeson CJ, Gummow and Hayne JJ in *Tepko Pty Ltd v Water Board*[111].

185. Under s 52 and s 82 of the TPA the concept of a duty of care has no statutory relevance. Almost imperceptibly it is in the area of causation where courts have to decide what limits apply to the principle of recovery.

186. It is my view that in the cases discussed below, courts, in discussing the notion of "indirect causation" are really wrestling with what Professor Stapleton would classify as a "scope of liability" question. The causative requirement of

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[109] Quoted by Robson AJA in *BMW Australia Finance Ltd v Miller & Associates Insurance Broking Pty Ltd* [2009] VSCA 117 at [182]

[110] (1999) 198 CLR 180 at 193, [7] – [8]

[111] (2001) 206 CLR 1 at 16-18 [45] – [51]. See also *Kestrel Holdings Pty Ltd v APF Properties Ltd* (2009) 260 ALR 418 per Gray, Mansfield and Tracy JJ at 441-442, [108] – [114]

"involvement" is satisfied and courts then face the difficulty of working out how far the right to recover damages should extend.

187. Cases decided under the *TPA* have recognised that a claim for damages under s 82 for contravention of s 52 may be available to a plaintiff where the plaintiff has not relied on a misleading and deceptive statement but a third party has.

Janssen - Cilag

188. In a celebrated passage by Lockhart J in *Janssen-Gilag Pty Limited v Pfizer Pty Limited*[112] his Honour said:

> "Section 82 is the vehicle for the recovery of loss or damage for multifarious forms of contravention of the provision of Pts IV and V of the Act. It is important that rules laid down by the Courts to govern entitlement to damages under s 82 are not unduly rigid, since the ambit of activities that may cause contraventions of the diverse provisions of Pts IV and V is large and the circumstances in which damage therefrom may arise will vary considerably from case to case.
>
> What emerges from an analysis of the cases (and there are many of them) is that they do not impose some general requirement that damage can be recovered only where the applicant himself relies upon the conduct of the respondent constituting the contravention of the relevant provision.
>
> Also, a perusal of the provisions of Pts IV and V, the contravention of which gives rise to an entitlement to an application for compensation for loss or damage, points to the conclusion that applicants may claim compensation when the contravenor's conduct caused other persons to act in a way that led to loss or damage to the applicant."[113] [underlining added]

189. This passage was quoted with approval by Gummow J in *Marks v GIO Australia Holdings*.[114]

190. Lockhart J went on to say:

> "Whilst the applicant's loss or damage must be caused by the respondent's misleading or deceptive conduct, I see nothing in the language of the Act or its purpose to warrant the suggestion that the right of an applicant for damages under s 82 is confined to the case where he has relied upon or personally been influenced by the conduct of the respondent which contravenes the relevant provision of Pt IV or Pt V of the Act."[115]

191. Lockhart J also went on to say:

> "I can conceive of no reason why the Act, which is designed to foster and promote competition and, by Pt V, to prevent misleading or deceptive conduct, should be given a restrictive interpretation in s 82 such that only persons who relied upon the representation are entitled to

112 (1992) 37 FCR 526
113 (1992) 37 FCR 526 at 529
114 (1998) 196 CLR 494 at 528 [101]
115 (1992) 37 FCR 526 at 530

> recover loss or damage from the respondent. The evident purpose of the Act leads in my opinion plainly to a different conclusion."[116]

192. His Honour further went on to say:

> "Section 82(1) should not be given a restricted meaning to be available only to the person who suffers loss or damage by reason of his own reliance upon the representations which constituted the relevant contravention of Pt IV or V; nor for that matter should it be given an extended meaning which strains the language used by the legislature. But a person who suffers damage by reason of or as a result of the conduct of the contravenor (albeit that that person does not himself rely upon the representations) is not to strain the language of the subsection, but to interpret it according to its ordinary and natural meaning. For a person to recover under the section he must suffer loss or damage by reason of or as a result of the contravention. There is nothing unduly wide about that."[117]

Hampic

193. In *Hampic Pty Ltd v Adams*,[118] Mason P and Davies AJA said, at [35]:

> "Section 82 of the Trade Practices Act gives a cause of action for damages to 'a person who suffers loss or damage by the conduct of another person' that was done in contravention of s 52 and certain other provisions of the Act. The section does not stipulate any particular manner in which the loss or damage must be suffered. The requirement of causation is not a stringent one ...".

194. In that case causation was established where an employed cleaner suffered dermatitis after using cleaning fluid provided to her by her employer in a container with no warning label. The manufacturer had provided the cleaning fluid to the employer in a larger container with a warning label which was found to be misleading and deceptive. The manufacturer sought to avoid liability on the basis that the employed cleaner had not seen or relied upon the inadequate label. The argument was rejected. The Court found that but for the misleading warning the employer would probably have acted differently and, in consequence, so too would the injured employee. The Court in those circumstances could readily and properly infer the necessary causal link.[119]

Stockland

195. In an unanimous decision, the New South Wales Court of Appeal in *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd*[120] followed *Janssen-Gilag Pty Ltd v Pfizer Pty Ltd.*[121] Hodgson JA, with whom Steller JA and Davies AJA agreed, said:

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116 (1992) 37 FCR 526 at 531
117 (1992) 37 FCR 526 at 531
118 (2000) ATPR 40,545
119 (2000) ATPR 40,545 at [37]
120 (2003) NSWCA 84 at 27
121 Supra

> "A plaintiff may be able to recover damages for loss suffered by the plaintiff because others are misled by a defendant's misleading conduct …"

Ford

196. In *Ford Motor Company of Australia Ltd v Arrowcrest Group Ltd*[122]. The Full Court of the Federal Court (Hill, Jacobson and Lander JJ) considering *Janssen-Gilag* said:

> "That case is not authority for the proposition that causation can be established without proof of reliance. It is authority for the proposition that the applicant need not establish that it relied upon the respondent's conduct, but can establish liability by proof that others did, as a result of which the applicant suffered loss.[123]

197. The Court also commented on *Hampic* in the following terms:

> "Again, this was not a case of no reliance but a case of reliance on the conduct by a person apart from the applicant in circumstances where that reliance caused the applicant damage. The applicant only succeeded because there was reliance, albeit by someone apart from the applicant."[124]

198. At [123] Lander J (with whom Hill and Jacobson JJ agreed) went on to say:

> "None of the cases relied upon support Ford's contention that causation can be established in a misrepresentation case without proof that the misrepresentations were relied upon. They support a different (but irrelevant proposition for the purpose of this case) that an applicant may establish causation in such a case by proving that a third party relied upon the misrepresentations and that party's reliance caused the applicant's damage."[125]

199. Thus there are two classes of case:

   (a) where the claimant as representee claims to have relied upon the misrepresentation; and

   (b) where the claimant is not a representee, and does not claim to be, but claims that another person relied upon the misleading and deceptive conduct and that this caused loss to the claimant.

Digi-Tech

200. In *Digi-Tech (Australia) v Brand*[126] the New South Wales Court of Appeal dealt with an argument raised by the appellants as to the "indirect theory of causation". The argument is summarised at paragraph [149] of the reasons.

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122 (2003) 134 FCR 522
123 Supra at [115]
124 Supra at [118]
125 Supra at [123]
126 (2004) ATPR 46-248

201. The argument could not succeed because it had not been pleaded and raised appropriately at the trial.

202. The principles discussed as applying to the indirect theory of causation are properly characterised as *obiter*. The court distinguished between cases where a claimant claims to have suffered loss by reliance upon a misrepresentation inducing a transaction, and other cases where misleading conduct caused a third party to act to the direct prejudice of the plaintiff. The Court developed this reasoning at [155] to [157]:

> "[155] *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd* followed the approach of *Janssen-Cilag*. *Stockland*, like *Janssen-Cilag* was not a case where the plaintiff claimed damage caused by entering into a transaction induced by misleading conduct. In both cases the misleading conduct had caused others to act to the direct prejudice of the plaintiff. That is to say, the chain of causation was as follows: first, misleading conduct by the defendant; second, an innocent party is induced by the misleading conduct to act in some way; third, the innocent party's act, by its very nature, causes the plaintiff loss. On this basis, no act of the plaintiff contributes to the loss. The chain of causation is complete without there needing to be any act or omission on the part of the plaintiff.
>
> [156] The *Janssen-Cilag* and *Stockland* category of claim is materially different to that which occurs when plaintiffs suffer loss because they, themselves, are induced by misleading representations to perform some act or omission by which they are prejudiced. The difference lies in the fact that in the first category of case no conduct on the part of the plaintiff forms a link in the causation chain. In the second category, the inducement of the plaintiff and his or her act or omission causing loss is an essential part of the chain. Without such inducement and a consequential act or omission on the part of the plaintiff there is indeed no linking chain between the misleading conduct and the plaintiff's loss.
>
> [157] This analysis demonstrates the fallacy of applying the so-called indirect theory of causation to this case.

Ingot

203. In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*[127] McDougall J applied *Digi-Tech* to hold that it was not open to the plaintiffs to contend that but for the allegedly misleading or deceptive conduct of Macquarie, relating to various representations made by it to the due diligence committee, NCRH (NewCap Reinsurance Holdings Ltd -a Bermudan reinsurance company listed on the ASX) would not have issued the prospectus and the plaintiffs would not have agreed to sub-underwrite the issue of a prospectus by NCRH or acquire rights or other securities, and the board of NCRH would not have agreed to issue the notes as those contentions confused a necessary precondition with an effective cause.

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[127] (2007) 63 ACSR 1

204. His Honour dealt with this at 132-8 [494]-[511]. The plaintiffs claimed to have suffered loss or damage by having entered into certain transactions involving the sub-underwriting of the issue of the prospectus and the acquisition of securities. As such the case involved actual conduct on the part of the plaintiffs as part of any chain of causation and was within the first category of causation case discussed in Digi-Tech, not the second. His Honour's approach to the claims made by the plaintiffs can be seen at [496] where he said: "… the conduct complained of … provided the opportunity for the losses to occur, but it did not relevantly cause them to be incurred".

205. On appeal, the NSW Court of Appeal upheld McDougall J's decision. [128] In obiter, Ipp and Giles JJA endorsed the reasoning in *Digi-Tech.*[129] Hodgson JA outlined his own view and expressly refrained from commenting as to whether or not it was consistent with *Digi-Tech.*[130]

206. At [617] – [618], Ipp JA stated:

> "[617] The approach adopted in *Digi-Tech* is to be distinguished from cases such as *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; 109 ALR 638; [1992] FCA 437 (*Janssen-Cilag*) where a person, by misleading conduct, induces another to act to the prejudice of the plaintiff. In the *Janssen-Cilag* category of case the plaintiff is <u>a passive victim of misleading conduct. No action or omission by the plaintiff affects the loss it suffers. By contrast, in the *Digi-Tech* category of case, the plaintiff acts or refrains from acting to his or her prejudice by reason of conduct of a third party brought about by the defendant's misleading conduct; the plaintiff's conduct is a necessary link in the chain of causation</u>.
>
> [618] The rationale of *Digi-Tech* is that loss incurred by plaintiffs in acting (or refraining from acting) to their prejudice can only be loss "by" conduct contravening s 52 if the plaintiffs are misled by that conduct. Likewise, in my view, such plaintiffs can only succeed in cases based on a contravention of s 995 if, in fact, they are misled. I stress that by "such plaintiffs" I mean plaintiffs who claim to have suffered loss brought about by their own actions or omissions coupled with misleading conduct by the defendants. As was noted in *Digi-Tech*, were it otherwise, such plaintiffs could succeed on the ground that, by making false representations, the defendants engaged in misleading conduct, even though the plaintiffs well knew the truth of the representations or were indifferent to them. As I have noted, different considerations apply to the *Janssen-Cilag* category of case." [underlining added]

207. Like Ipp JA, Giles JA also considered that *Digi-Tech* was correctly decided. At [12] – [13] he stated:

> "[12] … The distinction drawn in *Digi-Tech* is between cases where <u>conduct on the part of the plaintiff "forms a link in the causation chain" (at [156]) and where it does not. Where it</u>

128 [2008] NSWCA 206; (2008) 73 NSWLR 653.
129 Supra at [619] and [22].
130 Supra at [83].

> does, there must be reliance on the misleading conduct in the manner next explained. Where it does not, there may be recovery if the act of the innocent party induced by the misleading conduct "by its very nature, causes the plaintiff's loss" (at [155]), but that is where the plaintiff passively suffers loss from another's act (as in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-30; 109 ALR 638 at 641-2 (*Janssen-Cilag*), where consumers were led by the misleading conduct to buy less of the plaintiff's product).
>
> [13] In saying that in a case of "misrepresentation inducing a transaction" reliance on the misrepresentation was required for proof of causation (at [159]), from the facts before them and their Honour's discussion they meant a case where a plaintiff was not a passive sufferer from another's act, but was someone who made a decision to enter into the transaction to which the representation was material. Their Honours did not mean direct inducement, but that the decision and the materiality to it of the representation was a link in the causal chain." [underlining added]

208. Like McDougall J at first instance, Giles JA also drew a distinction between conduct which provides the opportunity for losses to occur and the cause of those losses. However, he left it open as to whether conduct which merely gives rise to an opportunity for loss was actionable in some circumstances. He stated "Perhaps in some circumstances a plaintiff enters a transaction simply because the opportunity to do so is available, when it would not have been available had there not been the misleading conduct, and that plaintiff can be regarded as in like position to the passive sufferer from another's act. That will not be so as a matter of course, and was not so in the present case".[131]

209. By contrast, Hodgson JA was willing to allow recovery where the opportunity to invest would not have come about at all in the absence of the misleading conduct. He stated:

> "[80] I am inclined to think that investors may be able to claim damages on the basis of misleading conduct where:
>
> (1) Because of misleading conduct that misleads people involved in putting together an investment opportunity, an investment opportunity is made available to investors which would not have been made available at all but for the misleading conduct;
>
> (2) Investors invest in it; and
>
> (3) The investors lose money because the investments are, by reason of matters concealed by the misleading conduct, worth less than the investors paid for them.
>
> [81] I accept that, if the investors actually know the truth concealed by the misleading conduct, it would be difficult if not impossible to characterise their loss as being loss or damage suffered "by" the misleading conduct, within the meaning of provisions such as s 1005

[131] Supra at [21].

of the Corporations Law or s 82 of the Trade Practices Act. However, I do not think the investors would need to prove that they themselves relied on and were misled by the misleading conduct, except possibly to the extent of showing they did not know the truth concealed by the misleading conduct. …

[82] To require investors to prove also that they actually relied on the misleading conduct, or even that if they had known the truth they would not have invested, seems to me possibly superfluous. But for the misleading conduct, there would have been nothing to invest in; and in my opinion it is plainly foreseeable by the persons responsible for the misleading conduct that, if the misleading conduct results in the offering of investments that are worth less than their price by reason of the matters concealed by the misleading conduct, people not knowing the truth may invest in them and suffer loss by reason of the matters concealed by the misleading conduct. On that basis, it does seem to me arguable that loss of that kind would be loss suffered "by" the misleading conduct, at least so long as the investors did not know the truth." [underlining added]

210. It should also be noted that Hodgson JA expressly stated that he was not expressing a final view on the matter, nor was he commenting on whether his view was consistent with *Digi-Tech*.[132] With respect, the reasoning of Hodgson JA raises very valid concerns. The question is really a scope of liability one, or to use the language of the proportionate liability amendments, to what extent is it just to make the defendant liable having regard to the extent of the defendant's responsibility for the plaintiff's loss?

Unit 11

211. In *Unit 11 Pty Ltd v Sharpe Partners Pty Ltd*[133] the appellant had lost money as a result of investing on the advice of a Mr Flood, a solicitor, who was one of its own officers. The appellant claimed that its auditors (the respondents) were in breach of duty because of their failure to ascertain and report false representations which Mr Flood had made to the effect that litigation had been commenced when it had not. The primary judge struck out the statement of claim as disclosing no reasonable cause of action as the causative link between the auditor's conduct and the appellant's loss was mere "speculation or conjecture". The Full Court of the Federal (by majority) allowed the appeal.

212. At 413-4 [37]-[38] Lee J said:

"[37] Put at its lowest the appellant's case is that by reason of a breach of contract; or contravention of the FTA by the second respondent, the appellant was deprived of an opportunity, or of a chance, as trustee to assess the risk posed by the appellant's due administration of the Trust by allowing Flood to direct and manage the Trust funds, and was deprived of the opportunity, or chance, to take steps to manage that risk and prevent loss.

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132 Supra at [83].

133 (2006) 150 FCR 405

> [38] The opportunity, or chance, described was capable of being assessed as to its worth in monetary terms, and the loss of that opportunity, or chance, was able to be shown to be connected to the conduct of the second respondent."

213. At 437 [126] Dowsett J, after discussing in some detail the High Court's approach to causation under the TPA and similar legislation in *Henville v Walker*,[134] *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[135] and *Travel Compensation Fund v Tambree*,[136] said:

> "In my view, the causal link is anything but speculative or conjectural. It is true that there are difficulties in the case. In particular, it might be difficult to prove such a high degree of reliance upon Flood. Further, the nature of his relevant conduct, although capable of causing concern, was also capable of innocent explanation. There may be questions about alternative high risk investments and how the applicant would have invested the relevant funds had it not relied on Flood. These matters are all factually relevant to causation of loss, but it cannot be assumed at this stage that they will be resolved in ways which are unfavourable to the applicant."

214. On the appellants' case the conduct of its auditors deprived it of the "opportunity to guard against misappropriation"[137] and "to avoid investment losses by not allowing Flood to put the applicant's money into high risk investments in which he had personal involvement."[138]

The Distinction Made in Indirect Causation Losses

215. It is my view that the distinction between a plaintiff who has been caused loss in a passive sense and a plaintiff who has been caused loss by engaging in some conduct does not provide a satisfactory dividing line between those who should recover damages and those who should not under s 82. Obviously the person who knows that a misrepresentation is untrue ought not to be able to recover damages because of it, if claiming loss allegedly caused by it, whether, directly or indirectly. But if loss has been caused to a plaintiff because a third party relied upon the truth of a misleading statement and the plaintiff relied upon the third party's consequential conduct and suffered a loss then the "involvement" issue of causation is established. The difficulty here is one of the scope of liability.

Conclusion

216. Much of the above has drawn upon the learned writings of Professor Stapleton and learned judgments. My conclusions are heavily influenced by these sources so that it is difficult to dress them up as being original. From my review of the materials the summary of developments and the principal contentions that I would make, are as follows:

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[134] (2001) 206 CLR 459
[135] (2002) 210 CLR 109
[136] (2005) 224 CLR 627
[137] At [122] per Dowsett J
[138] At [123] per Dowsett J; see also the judgment of Einstein J in *HIH Insurance Ltd (in liquidation) v Adler* [2007] NSWSC 633 at [70] et seq

(a) *Wardley* drew upon the common law test of causation as applying to s 82 of the TPA;

(b) Subsequent decisions of the High Court emphasised that s 82 is a unique provision in a unique statute, which is concerned with consumer protection, and specific statutory objectives, that may in some cases require a different approach from the common law. The common law may provide a useful analogy but analogies are a servant and not a master when it comes to s 82;

(c) My contention is that it is difficult to make a compelling case that there is any difference of substance between how causation is treated under s 82 for a contravention of s 52, and how causation is treated at common law for a paradigm case involving negligent misstatement causing economic harm;

(d) In my view the proportionate liability amendments to the TPA only made the drawing of such a distinction more difficult – those amendments are expressed in terms that are drawn from the general law or other statutes concerning liability for torts. The amendments interfere with our ability to interpret the TPA as coherently about consumer protection in the case of s 82 where there is a contravention of s 52;

(e) An exception to my contention may be the cases which are developing under s 82 of the TPA concerning "indirect causation". It is my view that in these cases the principle of causation is being made to do work which the duty of care performs at common law in restricting the claims that may be brought for damage for economic harm. It is my view that courts are in fact wrestling in these cases with the "scope of liability" inquiry which Professor Stapleton has identified in relation to causation although this is being masked by the use of terms such as "direct" and "indirect" causation;

(f) When we look to the common law for assistance, even if only by analogy, the common sense test is of no real assistance (either at common law or under s 82)s. The test should be discarded for reasons addressed by Professor Stapleton. In addition, my reasons for criticising the test include the following:

    (i) It is difficult to know what it adds to our expectation that a court will act rationally based upon proved evidence;

    (ii) It is particularly unhelpful if the test is confused with a notion that the ordinary person makes simple causative judgments; the contrary is the case. Courts would shy away from making some of the complex causal judgments which are made by all of us in everyday life and which are often described as involving common sense;

    (iii) The test is also shown as particularly unhelpful in hard cases and does not explain them;

(g) The common law also gave us the "but for" test. The limitations of the test have been well documented in academic writing and in the authorities. The case law, however, has not caught up with the clarity of analysis developed by Professor Stapleton as to how this problems with the use of the test should be overcome.

Liam Kelly

19 May 2010