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## Factual Causation and Scope of Liability: Common Law and s.82 of the TPA

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The paper by Liam Kelly S.C. deals with ‘some issues concerning causation in the tort of negligence and causation under s 82 of the *Trade Practices Act*, particularly for contraventions of s 52 concerning negligent misstatement’. It is rich with ideas and comment, much of which I agree with. I think the most fruitful way I can contribute to the dialogue is to write a parallel comment on these topics dividing my remarks into 2 Parts. In Part 1 I give an overview of the problem of causation in Australian common law case law and make some points about the Kelly Paper’s exposition of this area. In Part 2 I turn to the issue of statutory language, in particular the interpretation of s.82 of the TPA and the points made in the Kelly Paper.

### Part 1: The Common Law

#### The Glib Submission of Common Sense Causation

The orthodox starting point for common law analysis is to read the cases and deduce therefrom the meaning courts ascribe to relevant terms such as ‘duty’ or ‘breach’. This most basic of analytical techniques fails utterly in the area of causal terms.

Clarity of exposition requires that causal terminology be confined to a single idea. I have argued that this should be the objective idea of historical connection, conveniently captured by the term ‘factual causation’. It is crucial that this question of fact (and the special rules of law relating to its proof) be recognized as completely distinct from the issue of where and why responsibility for the infinite chain of consequences of conduct should be truncated. This truncation issue, sometimes known as ‘remoteness’, rests entirely on the *normative* analysis of the facts and so it should be described in the completely non-causal terms of ‘the scope of liability for the consequences of breach’: 54 *Vanderbilt Law Review* 941. These reforms were adopted by the American Law Institute in the *Restatement Third, Torts: Liability for Physical and Emotional Harm* (2009).

Whereas US courts had long accepted that there were two separate issues at stake, the historical connection issue and the truncation issue, Commonwealth courts have struggled to express this separation in a consistent and coherent manner. One major source of difficulty in Australian courts has been the frequent and lamentable recourse to the meaningless slogan of ‘common sense’ causation. Para [18] of the Kelly Paper cites a typical example from Justice McHugh’s judgment in *Allianz Australia Ins. Ltd v GSF Australia Pty Ltd* (2005). Appeal to the idea of ‘common sense’ causation is extremely rare in the US and is widely deprecated in the UK.

Of course in some cases what the court means by this slippery term is simply the permission to infer facts from common experience. Even here, however, appeals to

'common sense' can mislead. For example in *Naxakis v Western General Hospital* (1999) Justice Gaudron stated that:

For the purpose of assigning legal responsibility, philosophical and scientific notions are put aside...in favour of a common sense approach which allows that 'breach of duty coupled with an [event] of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the [event] did occur owing to the act or omission amounting to the breach' [citing *Betts v Whittingslowe* (1945) per Dixon J]

Recent judgments in the High Court such as *RTA v Royal* (2008) helpfully highlight the danger in such 'common sense': namely that a court will elide proof of breach (which increased the risk of a certain outcome) and foreseeable result (of the same type of outcome) with proof that the breach was a factual cause of that result in the specific case at hand, and fail adequately to consider whether there was, on the evidence, 'any sufficient reason to the contrary'. The Kelly Paper discusses such cases at para 113.

But much more often Australian courts have used the term 'common sense causation' in an attempt to navigate the analytical morass that results from a failure clearly to distinguish historical involvement and truncation. For decades the result has been that across swathes of Australian case law the deployment of causal terminology has been muddled and often incomprehensible, obscuring the underlying reasoning of the court. It brings the law into disrepute if, when confronted with a hotly disputed complex dispute about the appropriate point at which legal liability should be truncated, a court accepts, what Keith Mason aptly described as, the 'glib submission' that its resolution rests on nothing much more than 'common sense'.

Resort to this problematic device of 'common sense causation' to express a determination about the truncation of responsibility for the consequences of wrongful conduct was greatly fuelled by the publication in 1959 of *Causation in the Law* in which Herbert Hart and Tony Honoré asserted that both the question of historical contribution and the question of truncation of responsibility were 'causal' questions (that causation in the law was 'bifurcated'). From selected data of causal usage, they extracted what they called 'common sense principles of causation'. This is not the place to rehearse all the grave difficulties in their complex approach. But it is worth looking at one of their elaborate and ultimately unhelpful 'principles' because it illustrates the sort of textual obfuscation that runs through key Australian decisions.

In looking at cases which turned on the truncation issue they found that it was often the case that liability was denied when, after the defendant's breach of obligation, a third party or an abnormal event (such as lightning) had intervened. Australian courts often communicated this result by stating that the intervention 'broke the chain of causation'. Since Hart and Honoré were committed to the project of mapping causal usage they concluded that:

courts have often applied, in their determinations of causal questions, a central concept in which great emphasis is laid on voluntary action or abnormal and coincidental events as negating causal connection

But the fact remained that there were myriad situations where the law imposed liability in the presence of just such an intervention. For example, liability may well be imposed against the manufacturer of a defective lightning rod even though the damage arose after the intervention of lightning. While the fact of intervention of a third party or abnormal event certainly *may* be relevant to our enquiry about where liability should be

truncated, it is not clear from Hart and Honoré *when and why* the intervention might be relevant: what they produced was merely a topology of causal usage not a geology of the normative reasoning lying beneath that usage.

This absence of normative rationale exposes a judge to the temptation of merely asserting a conclusion on the truncation issue without providing reasons, while reciting some version of Hart and Honoré's 'central concept' of causal connection. Justice McHugh fell victim to this temptation on a number of occasions, e.g. *Bennett v Minister of Community Welfare* (1993) at para 13; *Nominal Defendant v Gardikiotis* (1996) at para 8. This is hardly an advance on what Hart and Honoré rightly called the 'obscure metaphor' of the intervention 'breaking the chain of causation'. What, if anything, is severed in the truncation step in legal analysis is the chain of legal responsibility (contrast the obscure notions: that plaintiff conduct might 'destroy the causal connection', Kelly Paper at para 16(d); or that 'the chain of causation is completely severed' by the intervention of a news story, Kelly Paper at para 52.)

Moreover, so long as both the factual issue of historical involvement and the normative issue of the truncation of liability are framed as 'causal' questions, a trial judge may not easily recognize whether statements in previous appellate cases concerning 'causation' relate to historical involvement or truncation. Judges would better communicate their reasons if the historical contribution question was kept absolutely separate from the truncation question and if causal terminology was confined to the former.

My argument for such clarification of terminology (119 LQR 388) was approved by the Ipp Panel, which recommended the clear separation of factual causation and the scope of liability. Bizarrely, however, the Ipp Report chose to retain the umbrella term of 'causation' to signify the amalgam of both issues. So it was that, at the very time the American Law Institute was stripping the truncation issue of its misleading causal label throughout the law of torts and beyond, the Ipp Report was entrenching that barrier to clarity of legal analysis in Australia. In their post-Ipp civil liability statutes all Australian States (e.g. Queensland Civil Liability Act 2003, s11) adopted the 'causation' umbrella term albeit only in the limited field covered by the Ipp Report, namely where the focus is on a 'breach of duty', s.11(1). To compound the disarray, neither the Northern Territory nor the Commonwealth implemented any provision relating directly to 'causation'.

So long as the 'causation' term is used as such an umbrella concept, it renders incoherent the many judicial statements that 'causation is essentially a question of fact': see e.g. *Bennett v Minister of Community Welfare* (1993) and *RTA v Royal* (2008). Nothing would be lost and much would be gained if Australian courts quietly ignored the umbrella term both under these civil liability statutes (where it does no substantive work) and elsewhere, resisted the temptation to refer to 'common sense causation' and proceeded directly to the analysis of the separate issues of factual cause and scope of liability. This substantial improvement in the clarity of exposition of judicial reasoning would, it is to be hoped, then work its way into legislative drafting which has been so bedevilled by cryptic terms aimed at capturing some amalgam of factual cause and scope of liability: see Part 2.

### Factual Cause

Courts throughout the world are agreed that the relation of necessity (i.e. 'but for') between the breach and outcome is one that the law should designate as causal. On this basis the breach in *March v Stramare (E &MH) Pty Ltd* (1991) was clearly a factual cause: had the defendant not carelessly parked his truck in the mid-line of the street, the

intoxicated plaintiff would not have hit it. The controversial issue in *March* concerned the normative truncation question: should this outcome of the breach be regarded as within the appropriate scope of the defendant's liability? This is not a question of fact or 'common sense' but of normative judgment on which reasonable minds might differ.

Though the but-for test of factual causation is notoriously inadequate, the Ipp Report made no recommendation on the issue of which relations besides this one of necessity should be designated as causal by the law. The grounds given for this omission were unconvincing. First it was said that the problem lay in cases of 'overdetermination' by multiple-sufficient (i.e. duplicative) factors. [Contrast the unorthodox use of this term in the Kelly Paper at paras 63, 65, 67, 81-3 where it refers to all cases of multiple causes.] An example of this is what I call the 'double hit hunters' case':

*where two hunters carelessly shoot and a mountain walker is hit by both bullets each of which would have been sufficient to kill instantly.*

In fact the problem for the law is much more extensive than these special cases. The second argument for inaction, namely that 'the law has devised rules for resolving such cases in ways that are generally considered satisfactory and fair', is wishful thinking: judicial treatment of these cases is confused, a state of affairs that is understandable given the relative neglect of causal analysis by legal scholars.

Though a regime of tort law might confine its interest to necessary (i.e. but-for) factors, clearly none does this. In other words, the law is interested in the possibility of imposing liability on non-necessary factors and in order to do so must recognize them as qualifying as 'causal'. The most often-cited examples of non-necessary relations that the law chooses to designate as causal are multiple *sufficient* (i.e. duplicative) factors that are independent of one another. In such cases each tortious factor is designated as causal even though not necessary - *March v. Stramare* at [516]; *Chappel v Hart* at [116] - so, in the example in the previous paragraph, each hunter is recognized as a cause.

But the law is also concerned with factors that contribute to an outcome but which are neither necessary *nor sufficient* for it to exist. Consider the following:

*5 members of a club's governing committee unanimously, but independently and in breach of duty, vote in favour of a motion to expel Member X from the club, where a majority of only 3 was needed under the club's rules. The vote of Committee Member No.1 is neither necessary nor sufficient for the motion to pass. This is true of the vote of each member, yet the motion passed. Where there is a liability rule requiring proof that the vote of the individual voter was a factual 'cause' of a motion passing, the law must recognize this relation of one vote to the passage of the motion as 'causal'.*

[The concept of a causal contribution must be carefully distinguished from the notion of 'damage'. Suppose 3 votes had not been in breach of a duty: then a defendant's vote in a breach of duty would be a factual cause of the expulsion; but would not have caused 'damage' to X (i.e. to the prospects to which X was legally entitled) because had X suffered no breaches of duty he would still have been expelled. ]

An appreciation that contribution is the fundamental form of causal relation is especially important in the context of decision-making where, as Justice McHugh emphasised in *Henville v Walker* (2001):

...the long-standing recognition of the possibility that two or more causes may jointly influence a person to undertake a course of conduct...a representation need

not be the sole inducement in sustaining the loss. If 'it plays some part even if only a minor part', in contributing to the course of action taken - in that case the formation of a contract - a causal connection will exist.

In short, a non-necessary non-sufficient factor may contribute to the existence of a phenomenon by forming part of an undifferentiated whole that operates to bring about the existence of the phenomenon: a single vote formed part of the unanimous resolution; and a representation formed part of the total information that induced the representee. This is why the 'but for' test of factual cause is under-inclusive and why courts grasp at vague undefined labels such as 'substantial factor' and 'material contribution' to their attempt to recognize a non-necessary non-sufficient factor as a 'cause'.

The seductive simplicity of the 'but for' test distracts courts from enunciating an appropriately wide statement of the relation of 'factual cause': namely, that a factor is a factual cause if it contributes *in any way* to the existence of the phenomenon in issue. Courts should no longer allow the fact that in most cases the contribution in issue will have been one of necessity (but-for), to mislead them into regarding necessity as the fundamental form of causal relation recognised by the law: courts should grasp that it is the relation of contribution. The Ipp Report has not helped in this respect. Its recommendations with respect to factual causation read as follows:

- (c) The basic test of 'factual causation' (the 'but for' test) is whether the negligence was a necessary condition of the harm.
- (d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.
- (e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.
- (f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:
  - (i) whether (and why) responsibility for the harm should be imposed on the negligent party, and
  - (ii) whether (and why) the harm should be left to lie where it fell.

One lamentable effect of these recommendations is to entrench the status of the inadequately narrow but-for test at the expense of recognizing the indisputable factual involvement of non-necessary contributions (such as the individual hunter in the double-hit hunters' case or the individual vote in the club case) in the existence of the relevant phenomenon. Thus we will have a dead mountain walker and an expelled club member but the causal contribution of, respectively, any individual hunter and any voter will not be unequivocally and coherently acknowledged, as it needs to be, because they do not fall within para (c). Instead courts are advised that non-necessary contributions to harm *may* be treated as a cause [para (d)] but that this should be seen as if a normative choice in the individual case [para (e)]. Once again factual issues have been falsely characterised as normative issues.

#### Proof of Factual Cause

The formulation of breach fixes what needs to be proved in the factual cause step of legal analysis. This is sometimes forgotten. For example, in *Roads and Traffic Authority v Royal* (2008) the alleged breach by the defendant, a road authority, was that it had allowed an intersection design in which one moving car could obscure or mask the

presence of another moving car from the view of a car stationary at the intersection. Yet, as the High Court (Gummow, Hayne and Heydon JJ) found, in this particular case the stationary driver had been able to see the relevant vehicle so the breach *as formulated* could not have contributed to the accident at all.

Next: the orthodox rule is that on the issue of factual causation the plaintiff bears the burden of proof on the balance of probabilities. The Ipp Report confirmed the wisdom of this and disapproved the recognition of special proof rules that shift the burden of persuasion to the defendant.

Sometimes proof involves a number of steps. For example in a failure-to-warn claim against a pharmaceutical manufacturer the plaintiff typically has to establish that the drug is capable of contributing to the relevant outcome (i.e. that it has ‘generic capacity’) and that it did so in this individual case (which we might call ‘individual agency’) before the critical factual cause question can be asked about whether the failure-to-warn contributed to the outcome.

Even in the typical case where the plaintiff’s claim of factual cause rests on the claim that the breach was necessary for the outcome, proof of factual causation clearly involves establishing both facts about the actual past and speculation about what would have happened in the past in some hypothetical world where (*inter alia*) the breach had not occurred. Orthodoxy requires both to be established on the balance of probabilities. [These issues must be distinguished from the ‘contingency’ that another factor which did not operate might have done so and caused such as a loss: see *Malec v JC Hutton Pty Ltd* (1990)]. These issues are often hotly contested requiring the decision-maker to make careful evaluations of complex evidence.

So, for example, where hypothetical conduct is in issue the relation of interest to the law is what the particular individual would probably have done. The Ipp Report correctly emphasised that the relation of interest is what the relevant individual would have done, not what some normative creation, such as a ‘reasonable person’, would have done: thus, in *Commissioner of Main Roads v Jones* (2005) the issue was what this driver would probably have done had there been relevant warning and speed signs, not what a reasonable driver would have done. In their post-Ipp civil liability reform legislation five States explicitly re-iterated this rule in relation to the hypothetical conduct of the injured person: Queensland Civil Liability Act 2003, s11(3)(a).

But the Ipp Report and the responding legislation are significantly incomplete: the appropriate subjectivity rule is a general one and applies to the hypothetical conduct, not only of the injured person, but also of the defendant and third parties. Fortunately the High Court has been alive to the need to supplement the post-Ipp civil liability legislation with common law principles. Thus in *Adeels Palace Pty Ltd v Moubarak* (2009) when two patrons who had been shot by another patron sued a restaurant for providing inadequate security, the High Court correctly inquired into whether the evidence of the specific assailant, ‘a determined person armed with a gun and irrationally bent on revenge’, supported the plaintiff’s claim that additional security staff would have succeeded in deterring him.

#### Special Rules Concerning Proof of Factual Causation

Plaintiffs can face insuperable evidentiary gaps when trying to establish either the relevant past facts or what would have happened in a hypothetical past situation. Of course usually such a plaintiff fails but on occasion courts or legislatures have, in response to a particular policy concern, crafted a special rule allowing the plaintiff to leap the evidentiary gap and establish factual cause. While these are prompted by particular

normative concerns, they also do not alter the factual nature of the underlying relation in issue. Examples of such rules include:

- \* Heeding Presumption in US.
- \* Market Share Doctrine: known mechanism; indivisible injury: e.g. *Sindell v Abbott Labs*, (1980).
- \* Alternative Liability: known mechanism; indivisible injury: e.g. *Cook v Lewis* (1952).
- \* The 'indivisibility-of-injury' Rule: known mechanism; cumulative injury: 74 Brooklyn L Rev 1011.
- \* The Material Contribution/Exposure to Risk Doctrine: unknown mechanism; indivisible injury: e.g. *Fairchild v Glenhaven Funeral Services Ltd* (2003). In this relation note that the High Court must address the incoherence that bedevils the case law on asbestos cancers in Australia which currently proceeds on the basis of unacknowledged and conflicting fictions about aetiology: (2010) 126 LQR forthcoming note on *Amaca Pty Ltd v Ellis* (2010).

In relation to proof of factual causation the Ipp Panel recommended that 'in appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation' so long as the normative nature of such a special rule of proof is acknowledged and openly analysed. This highlights that the factual question of whether a factor is a cause is distinct from the normative issue of whether this particular class of plaintiff should be afforded a special rule of proof on this factual issue.

#### Scope of Liability

If Australian courts abandon reference to 'common sense causation' and distinguish clearly between factual causation and the truncation (i.e. the scope) issue by stripping casual terminology out of the latter this would encourage exposure of the nature, variety and complexity of concerns in play at the truncation stage. What might we find under the scope enquiry?

It is obvious that, just as with the issue of what 'reasonableness' requires on the facts of a case, the scope issue cannot be reduced to some formula. On the other hand, just as with 'reasonableness', the scope issue does contain some internal structure which we can begin to enunciate. For example, we can say that a consequence will fall outside the appropriate scope of liability for negligence unless it *at least*:

- can plausibly be said to fall within the 'perimeter rule' of 'foreseeability of the type of harm' (*Wagon Mound 1* (1961); *Hughes v Lord Advocate* (1963));
- is 'damage' relative to the normal expectancies of the plaintiff absent torts (119 LQR 388 at 401, 412-417);
- is not a coincidental consequence (122 LQR 426 at 438ff);
- and is the result of one of the risks that made the conduct careless (44 Wake-Forest L Rev 1309 at 1324-5).

Moreover, in judging where the chain of responsibility should be truncated a court may take account of a range of other factors such as:

- a concern with disproportion and attenuation,
- or a concern to shield a particular class of defendant (119 LQR 388 at 420-1).

## Part 2: The Statutory Context

When the claim relates to contravention of a statutory provision what, if anything, is special in relation to: factual causation; proof of factual causation; and scope of liability for consequences of contravention of the statutory provision?

The finite nature of statutory texts means that drafters (and thereby legislators) build legislative provisions on common law concepts whenever feasible. They know that, unless they and the context make the contrary clear, the deployment of a concept such as ‘intent’ in a statutory provision will import the concept as fleshed out in detail in common law cases: this is simply the real world way in which legislative texts can efficiently exploit the sophistication of common law conceptual frameworks in a well-understood shorthand. In this sense I agree with the Kelly Paper that ‘it is impossible to understand s 82 without reference to the common law’ [para 6].

Concepts are of two types: those whose nature suggest they are not plausibly affected by context or purpose (e.g. ‘intent’), and I argue factual cause is of this type; and those that are plausibly open to influence from purpose values, and I argue that scope rules are an example of this type.

### Factual Cause

In my opinion the meaning of what is a factual cause (in the sense described above) is, or should be, independent of context, specifically independent of statutory purpose. There seems no reason to suppose that the relation of being a factual cause should be any narrower under the Trade Practices Act statute than at common law. What would this mean for the meaning of factual cause under the TPA? I have already suggested that in the common law a factor is a factual cause if it contributes *in any way* to the existence of the phenomenon in issue. Indeed, that a non-necessary non-sufficient contribution is recognized as a factual cause under the TPA is well established.

### Special Rules of Proof of Factual Cause

What about special rules of proof of factual causation under statute? If one of the special proof rules had been recognised after the TPA had been enacted, could a court apply that rule to a TPA claim? This complex issue, though important, is beyond the reach of these comments.

### Scope of Liability for Consequences of Contravention

All liabilities, including those arising under statute, are limited. A statutory provision may expressly limit the type of consequence that comes within the scope of liability for its contravention: see e.g. *Allianz Aust v GSF Aust* (2005). Or such limits may be generated implicitly by the absolutely clear purpose of the statute: e.g. *Gorris v Scott* (1874). More often these limits must be divined by the court from more general interpretations of the purpose of the rule in the light of the general law.

In s.82(1) of the Trade Practices Act, these three analytical issues – factual cause, special proof rules of factual cause and scope of liability – are flagged by a single word, ‘by’. The subsection reads:

A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.



Clearly, the drafters/legislature left the courts to flesh out the appropriate scope of liability for a TPA contravention in the light of the purpose of the legislation.

Section 82 provides remedies for a broad range of contraventions. It is highly likely, therefore, that the statutory purpose is best vindicated by courts fleshing out the scope analysis in a way that was sensitive to the nature of the specific provision of the TPA had allegedly been contravened. But there is also the question of whether, in the light of the statutory purpose, the scope analysis in relation to a single provision, say s.52, should be different according to whether the contravention was intentional, negligent or neither. The scope of liability for the tort of negligence is clearly affected by the degree of wrongfulness of the relevant actor: for example, the merely careless medical treatment of a tortfeasor's victim does not truncate the chain of responsibility of the tortfeasor but murderous medical treatment would do so.

There is, therefore, a strong argument that the legislature would have intended (i.e. should be taken to have intended) that the scope of liability for an intentional contravention of s.52 should be more extensive than that of a merely negligent contravention. This would parallel the common law torts where, for example, a consequence of tortious conduct that is a coincidental consequence (i.e. that sort of conduct does not generally increase the rate of those sorts of consequence) is judged to be outside the appropriate scope of liability for the tort of negligence, but inside the scope of liability for the tort of deceit. A comparable scale of concern should plausibly be recognized as appropriate in relation to contraventions of s.52: liability for a merely careless contravention not extending to coincidental consequences, but liability for an intentional/fraudulent contravention potentially extending to such consequences.

#### Digi-Tech (Australia) Ltd v Brand & Ors (2004)

Courts adopt a coherent approach to one class of s.82 cases, namely those where: though a third party was induced by the contravention to change its position; and the plaintiff would not have been injured but-for the contravention; the plaintiff was not induced by it (for example, because the plaintiff was ignorant of the contravention). Cases in this class include: *Jansen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) (consumer-third parties were induced by the misleading conduct to buy less of the plaintiff's product) and *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd* (2003).

It is inaccurate to describe this class of case as 'passive plaintiff' cases (contrast *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* (2008) at [12]-[13] and [617]) because the plaintiff may well have been active and it may well be that the plaintiff would not have been injured but-for that activity: a clear example is the unproblematic case of the victim's use of the cleaning fluid in *Hampic Pty Ltd v Adams* (1999). In *Hampic* (see paras 36-7):

- a third party (the victim's employer) relied/was induced by the contravention to change its position
- the plaintiff would not have been injured but-for the contravention (inducing reliance by some party)
- the plaintiff was ignorant of the contravention (and therefore was not and could not be induced by it)
- the plaintiff was active and
- the plaintiff would not have been injured but-for her activity

In *Digi-Tech* the appellants correctly cited these cases for the proposition that it was not necessary for a party seeking to establish factual causation between the

contravention and the loss to show direct reliance by the plaintiff upon misleading conduct by the representor [148]. Their argument, infelicitously called the ‘indirect causation theory’, was that: but-for Digi-Tech producing misleading and deceptive forecasts, Deloitte would not have produced a valuation to support the price of \$72.5m; and but-for that valuation the investment scheme would not have gone ahead and Mr. Urwin would not have proposed the scheme to any of the investors. In a bizarrely conclusionary *obiter* analysis the NSWCA rejected this sound factual causation argument at para 156:

[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.

[158] On the assumption that Digi-Tech’s forecasts as to the revenue and gross margin of the products were misleading and deceptive, that misleading and deceptive conduct resulted in Deloitte producing, in essence, a misleading and deceptive valuation to support the price of \$72.5m. That valuation enabled the investment scheme to be put together and proposed by Urwin to the appellants. *But to complete the chain of causation, there must be something linking the appellants’ loss to their entry into the investment scheme. That link is the inducement of the appellants and their consequential act of entering into the transaction to their prejudice. Without that link, there is no proof that the misleading conduct caused the loss.*

[159] ...in cases of this kind (misrepresentation inducing a transaction) the courts have required reliance by or on behalf of the plaintiff on the misrepresentation as being essential to the proof of causation as required by s 82(1) of the *Trade Practices Act* 1974. Persons who claim damages under s 82(1) *on the ground that they entered into transactions induced by the misrepresentations of other persons* must prove that they relied on such misrepresentations and, therefore, ‘by’ that conduct, they suffered loss or damage. ...were it otherwise, representees could succeed even though they knew the truth, or were indifferent to the subject matter of the representation. [Emphasis added]

The italicised words reveal the court’s crude and unconvincing device: the plaintiffs are portrayed as claiming damages under s.82 ‘on the ground that they entered into transactions induced by the misrepresentations of other persons’, it therefore seems to follow that the plaintiffs must prove they were induced. But the *Digi-Tech* plaintiffs did not need to claim they were induced by the misleading conduct anymore than the plaintiff in *Hampic* needed to claim she was induced to use the cleaning fluid by the defendant’s contravention. In both cases the chain of factual causation was established regardless of whether the conduct of the plaintiffs had been induced by the contravention. Even though

Mrs. Donoghue was unaware of and therefore not induced by Stevenson's conduct, she could establish factual causation.

In *Hampic* an essential link in the way the worker was injured was her own conduct in 'entering the transaction' of working with the fluid which in turn had only been supplied to her by her employer because the latter had been misled by the contravening conduct. The fact that the plaintiff was not misled/induced by the contravention (indeed, she was ignorant of the contravention) was not fatal to her claim; the causal chain was complete and the inducement of the plaintiff was not an essential part of that chain.

In *Digi-Tech* an essential link in the way the investors were injured was their own conduct in entering the relevant transaction which in turn had only been supplied to them by a third party (in the form that it was) because the third party had been misled by the contravening conduct of Digi-Tech. Yet here the fact that the plaintiffs were not misled/induced by the contravention (because they were ignorant of the contravention) was judged fatal to their claim; the assertion that the 'causal chain' was incomplete without proof that the plaintiffs' conduct was induced by the contravention is a bald stipulation that is untenable in the light of *Hampic*.

One characterization of the *Digi-Tech* approach, the one adopted in the Kelly paper, is that the court attempted to create the functional equivalent of a scope requirement. Of course, a completely defensible *narrow* scope rule could have been enunciated: that the scope of liability does not extend to losses flowing from the contravention which did not constitute 'damage' to the plaintiffs.

Consider the important difference between: a case where a plaintiff acted (and thereby formed part of the completed causal chain) in reliance on the contravention; and a case where the plaintiff acted (and thereby formed part of the completed causal chain) but not in reliance. In the latter non-reliance case, the further issue arises: had the plaintiff known of the contravention would he have acted differently? If not, the contravention has not made the plaintiff worse off and he cannot recover. It is not enough to show that the contravention was a factual cause of loss to the plaintiff, he must show that this loss was 'damage' relative to the prospects to which the law says he is normatively entitled. But it is critical to grasp that the claim does not fail because there was no reliance (this is irrelevant) or because there was no factual causation (because there was), but because of what the person's 'normal expectancies' would have been absent the contravention: 113 LQR 257.

It is as if, a person strikes another from behind breaking his arm: there is no doubt that the assailant was a factual cause of the broken arm but the injured person cannot recover if, had he known of the impending assault he would have done nothing differently. The assault was a factual cause of injury to the person but that injury does not represent 'damage' to where the law says he is entitled to be. He has not been made worse-off relative to what I have dubbed his 'normal expectancies'. This benchmark of 'normal expectancies' (and the derivative notion of 'damage') is a normative construct and as such is appropriately seen as a rule truncating the scope of liability for losses flowing from the contravention.

But in *Digi-Tech* the NSWCA framed a rule which is the functional equivalent of a very much broader scope rule: namely, that where recovery for pure economic loss is sought under s.82 for a s.52 contravention committed negligently, a consequence will fall outside the appropriate scope of liability unless the plaintiff can show, not only a completed chain of factual causation but that it involved a link in which the plaintiff changed his position in reliance on the contravention.

Even characterized in this way the rule requiring reliance by the plaintiff will be unstable and may well need the sort of tweaking that the ‘reliance’ reading of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964, HL) needed in *Spring v Guardian Assurance Plc.* (1994, HL). For example, suppose a person is offered a lucrative position with a company subject to the company receiving a satisfactory personal reference. The person selects his former employer as his referee; in contravention of s.52 TPA the former employer writes a misleading and deceptive confidential (sealed) reference which he gives to its former employee who lodges it with the company. The company is induced by the misleading and deceptive statements in the reference (e.g. that the person is dishonest and violent) to withdraw its offer of the job. Like *Hampic*:

- a third party (the victim’s prospective employer) relied/was induced by the contravention to change its position
- the plaintiff would not have been injured but-for the fact that the contravention had induced reliance by some party
- the plaintiff was ignorant of the contravention (and therefore was not and could not be induced by it)
- the plaintiff was active and
- the plaintiff would not have been injured but-for his own activity

Moreover, even though this is a pure economic loss case there is no potential for floodgates. Because of the incoherence of *Digi-Tech* it is not clear if that case or *Hampic* applies to this case.

In other words, *Digi-Tech* turns out to be a splendid example of my argument that manipulation of causal language masks the real issues guiding judicial reasoning and statutory interpretation. It may well be true that in investment cases the courts, to promote the purpose of the TPA, need to interpret the Act as incorporating the sort of controls for indeterminate liability that the common law achieves by duty requirements but this cannot be coherently and transparently achieved under the mask of causal language.

A final point. One elephant in the room is the obscurity of statutory language, notoriously in s.82. To mix my animals: this is not a chicken and egg problem; the responsibility is on courts to clarify their terminology. The hope must be that once courts have been required by the civil liability legislation to separate out the factual cause issue from the truncation of scope issue, legislative drafters will respond with more accommodating statutory language that replicates that separation. Until then practitioners and academics must assist the judiciary in suggesting forms of expression which reveal rather than mask the concerns and reasons on which decisions are based. Only then will judgments provide the guidance needed.

## Summary

- The common sense test of causation is an empty slogan, neither a test nor anything to do with common sense.
- For clarity of legal analysis the separation of the issue of historical involvement and the issue of truncation of responsibility should be vigilantly observed.
- Expressing the truncation issue as a causal issue is obfuscating and should be abandoned.
- Though statutory language must be interpreted in terms of the statutory purpose, it can only be fully understood against the background of the common law.

- The promotion of the purposes of the TPA may well support interpretations of s.82 that yield different scope of liability according to which section of the TPA has been contravened and the degree of wrongfulness of the contravenor.
- In s.82 TPA cases, the *Digi-Tech* rejection of the ‘indirect causation’ argument is, at best, merely stipulated, and, at worst, based on incorrect understanding of what the law recognizes as a causal chain.

## Appendix

- Jane Stapleton, ‘Factual Causation and Asbestos Cancers’ (2010) 126 LQR forthcoming a note on *Amaca Pty Ltd v Ellis* [2010] HCA 5
- Jane Stapleton, ‘The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims’ (2009) 74 Brooklyn L Rev 1011
- Jane Stapleton, ‘The Risk Architecture of the Third Restatement of Torts’ (2009) 44 Wake-Forest L Rev 1309
- Jane Stapleton, ‘Choosing what we mean by ‘Causation’ in the Law’ (2008) 73 Missouri L Rev 433
- Jane Stapleton, ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 LQR 426
- Jane Stapleton, ‘Loss of the Chance of Cure from Cancer’ (2005) 68 Modern L.R. 997
- Jane Stapleton, ‘Cause-in-Fact and the Scope of Liability for Consequences’ (2003) 119 LQR 388
- Jane Stapleton ‘Lords a’leaping Evidentiary Gaps’ (2002) 10 Torts Law J 276
- Jane Stapleton, ‘Comparative Economic Loss’ (2002) 50 UCLA 531
- Jane Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 Vanderbilt Law Review 941
- Jane Stapleton, ‘*Platform Home Loans: Risk-taking by Commercial Lenders*’ (1999) 115 LQR
- Jane Stapleton, ‘Negligent Valuers and Falls in the Property Market’ (1997) 113 LQR 1
- Jane Stapleton, ‘The Normal Expectancies Measure in Tort Damages’ (1997) 113 L.Q.R. 257