

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

Jane Stapleton, ANU College of Law  
for Current Legal Issues, Bar Association of Queensland, 10 June 2010

## Part 1: The Common Law

- The Glib Submission of Common Sense Causation
- Factual Cause
- Proof of Factual Cause
- Special Rules Concerning Proof of Factual Causation
- Scope of Liability

## Part 2: The Statutory Context

- Factual Cause
- Special Rules Concerning Proof of Factual Causation
- Scope of Liability for Consequences of Contravention
- *Digi-Tech (Australia) Ltd v Brand & Ors* (2004)

## 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