

Some Thoughts on Causation and Loss of a Valuable Commercial Opportunity

by

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Introduction

1. The lawyer's answer to the question whether a wrongdoer is liable will in many cases involve a causal sub-question: did the defendant's act or omission cause the harm which is the basis of the liability?
2. Given that sub-questions about causation pervade legal liability, it is not surprising that in legal discourse there has been a great deal of thought and writing on the topic of causation.
3. But causation is not a lawyer's construct. It is an unseen part of our physical world. From first perceptions, all infants appreciate and operate by reference to the idea that one thing may cause another. Causation is not just a feature of the physical world. It is an important concept in philosophical and scientific analysis. Some very skilled academic lawyers have worked this ground. They can tie the lawyer's sub-questions about causation back to great philosophers. Most of us would recognise the names of Hume and Mills in this field. There are many more that could be mentioned. But it wouldn't assist for the purpose of this lecture. It is enough to recognise that causation operates across our realm of experience and thought as human beings.
4. Legal discourse upon causation has been influenced by both philosophical and scientific expositions upon the topic. But in our lawyers' world, the two principal resources are the texts and articles written by members of the academy and the legion of cases of high authority that have dealt with the topic.

Basic causal analysis

5. Before I get into deeper water, there are some basic points about causation to notice. Every law student learns the difference between the conditions that occasion an outcome and the things that might in law be a cause of that outcome. If A shoots B in the head with a gun and B dies, it is a common understanding that A caused B's death. In a Griffith code state, like Queensland or Western Australia, it will be a killing¹ that is an unlawful killing² unless the shooting was authorised, justified or excused by law. There might be an offence of murder or manslaughter, according to the circumstances.³
6. In causal language, that A was alive at the time he shot B is treated as a condition of the event of legal significance, the killing. But that was not a cause for the purpose of answering the question as to A's legal liability for the killing.

¹ *The Criminal Code* (Qld), s 293.

² *The Criminal Code* (Qld), s 291.

³ *The Criminal Code* (Qld), s 300.

There are many other necessary conditions that are not treated in law as causally relevant to the questions of A's liability for the unlawful killing. For example, that B was in range. Or even that A was motivated by dislike of B to shoot him.

7. Notice also that the cause of the death may be expressed at higher and lower levels of abstraction. The death was brought about by the damage done by the bullet striking B in the head. It is not necessary to break down the medical details although at a homicide trial that is done. The striking was brought about by shooting the bullet. The shooting of the bullet was brought about by firing the gun. The firing was brought about by pulling the trigger. The direction that the gun was pointed played a role (unless the bullet deflected). Aiming the gun probably had a role (unless it was fired without being aimed but while pointing at B). Notice that at each of these levels of abstraction, there is a possible counterfactual scenario where the killing would not have occurred.
8. None of this everyday analysis generates controversy. And at an appealing level, it can be said that but for each of the nominated causal steps the killing would not have occurred.

Compensation and causation

9. The motivation for this lecture is that for over two decades there has been a degree of inconsistency between decisions of appellate courts in this country and elsewhere over the role of causation in the liability of a professional person for a negligent act or omission in the tort of negligence. There are other points of interest, but this where I would like to wade in.
10. For most private law wrongs, it is accepted as a matter of principle that to recover damages as compensation a plaintiff must prove that the defendant's wrong caused the plaintiff loss. I am including breach of contract and statutory causes of action for misleading or deceptive conduct or the like in my use of the word "wrong" for this lecture.
11. There are exceptions. A possible example is compensation by a trustee for loss "caused" by some breaches of fiduciary duty,⁴ but I don't need to discuss any exceptions.
12. The reason why a plaintiff must prove that the defendant caused her loss is that the plaintiff's entitlement to damages and the defendant's liability are founded in the principle that the defendant should compensate the plaintiff for the plaintiff's loss.
13. Let me step down the principle that applies one more level. What do we mean by compensate? The principle of compensation that informs an award of damages is that the plaintiff should be put back in the position as if the wrong had not occurred, so far as money can do it.⁵ That principle diverges in its

⁴ M Leeming, "Causation and Compensation for Breach of Fiduciary Duty", (1996) 70 ALJ 537.

⁵ *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191.

operation as between damages for breach of contract and damages in tort. For breach of contract the aim is to put the plaintiff in the position as if the contract had been performed.⁶ For tort, it is as if the tort had not been committed.⁷

14. The “as if” point in the analysis asks what would have happened if the wrong had not occurred. The obvious causal question that emerges is what would have happened “but for” the breach?
15. Hang on, you think. Time and again we have been told by the Judges⁸ and the academy that a “but for” question does not completely answer the question whether a wrong caused the plaintiff’s loss. But every day, over and over again, courts in Australia and elsewhere answer that very question in order to decide whether a plaintiff is entitled to an award of damages as compensation.
16. There is both a positive and negative application of “but for” causal analysis. The positive application is that to make the defendant liable the plaintiff must prove that but for the wrong the loss or damage would not have been suffered. The negative application is that if the loss or damage would have been suffered in any event the defendant did not cause it. The negative application is particularly powerful. I will call both applications “but for causation”.
17. There are situations where but for causation does not hold the ground. By that I mean that there are some situations where legal liability is found where the plaintiff cannot prove that but for the wrong the loss or damage would not have been suffered yet it is not established that the loss would have been suffered in any event.
18. Today’s lecture will reach into one of those aspects. In this country, a claim for damages for breach of contract or tort or breach of a statutory norm can result in an award of damages for “loss of a valuable commercial opportunity”, meaning the loss of a “valuable” opportunity to make a pecuniary gain (or to avoid a pecuniary loss).⁹ The language of “loss of a valuable commercial opportunity” does not mask that it is a claim for damages for loss of a chance. The plaintiff does not prove that but for the wrong the plaintiff would have obtained the gain or avoided the loss. The UK has a similar rule, but the causal elements may have been stated in a different way as between Australia and the United Kingdom. And in the United States, at best, only a limited recovery of this kind for loss of a chance is allowed. Why is that so and where are we or should we be headed?
19. The “loss of a chance” approach has also been considered in cases involving loss of a chance for a better outcome from a medical procedure or treatment. In Australia, the plaintiff has no right to damages for this kind of lost chance. In the United States, in many jurisdictions, recovery is allowed.

⁶ *Robinson v Harman* (1860) 1 Exch 850; 154 ER 363; See *Clark v Macourt* (2013) 253 CLR 1, 6 [7].

⁷ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.

⁸ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

⁹ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

20. The similarity between the two classes of case is that the plaintiff can't prove that but for the wrong the plaintiff would not have suffered the loss. Instead, the lost chance is treated as compensable in itself. But is this consistent with the accepted principles of causation of loss for damages for wrongs? Or is it not a problem of causation at all?

Causation in Australia

21. Before coming to the loss of a chance cases, it is necessary to clear some deadwood that can obscure what is really going on. In this area, the deadwood is in the case law. Fortunately, the quality of legal scholarship in both the academy and practising profession has done much to cut it away.¹⁰ But the Judges have only slowly followed their lead.
22. The seminal work of HLA Hart and Tony Honore in their *Causation in the Law*, was first published in 1959 and then revised in a second edition in 1985. It was a landmark in England and Australia, but it must be said that some heavy lifting was being done in the United States academy.¹¹ No-one who has paid attention to the relevant sections of the Second or Third Restatements of the Law of Torts and the writings that surround them could argue otherwise.¹² We Australians can proudly champion the work of Professor Jane Stapleton in this field, who brought the rigorous analytical technique of a scientific mind to the subject, and stripped away a lot of the fuzziness behind which the Judges obscure what they do.¹³

¹⁰ The following sample from recent years illustrates: E Bant and JM Paterson, "Statutory causation in cases of misleading conduct: Lessons from and for the common law", (2017) 24 TLJ 1; B Madden, "Genetic advice duties, normative causation and wrongful birth damages: a brief discussion following *Waller v James*", (2016) 13(1) CL 9; G Williams, G Thangasamy and Y Monfared, "Exceptional case provisions are not loop holes: *Carangelo v New South Wales* and the complexity surrounding evidentiary gaps in causation", (2016) 13(5) CL 62; G Turton, *Evidential Uncertainty in Causation in Negligence*, Hart Publishing, Oxford, 2016; D Hodgson, "Continental European Approaches to Causation and Intervening Causation Issues in Civil Proceedings", (2011) 19(2) Tort L Rev 94; J Lawrie, A Leeks and G McKee, "The test for causation in Canada: but for, but ... maybe not", (2008) 19 APLR 102.

¹¹ For example, RW Wright, "Causation in Tort Law", 73 California Law Review 1735 (1985), who is credited with the "NESS" or necessary element of a sufficient set acronym for the assessment of causation in fact.

¹² Two recent examples are J Morris, "Dirty Harriet: The Restatement (Third) of Torts and the Causal Relevance of Intent", 92 Texas Law Review 1685 (2014); and MP Gergen, "Causation in Disgorgement", 92 B.U.L. Rev. 827 (2012).

¹³ A sample of her extraordinary work over the years is J Stapleton, "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations", (2015) 35 Oxford Journal of Legal Studies 697; J Stapleton, "Reflections on Common Sense Causation in Australia", S Degeling and J Edelman (eds), *Torts In Commercial Law*, 2011, Ch 14; J Stapleton, "Factual causation and asbestos cancers", (2010) 126 LQR 351; J Stapleton, "The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims", 74 Brook. L. Rev. (2009), 1011; J Stapleton, "Choosing What We Mean by Causation in the Law", 73 Mo. L. Rev. (2008); J Stapleton, "An outsider's view of the restatement of torts", (2005) 16 APLR 62; J Stapleton, "Cause in fact and the scope of liability for consequences", (2003) 119 LQR 388; J Stapleton, "Lords aleaping evidentiary gaps", (2002) 10 TLJ 276; J Stapleton, "Law, causation and common sense", (1988) 8 Oxford Journal of Legal Studies 111.

23. For brevity, I will generally confine attention to decisions of the High Court, beginning with *March v E & MH Stramare Pty Ltd*.¹⁴ Mason CJ said this about but for causation:

“The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations. That in itself is something of an irony because the proponents of the ‘but for’ test have seen it as a criterion which would exclude the making of value judgments and evaluative considerations from causation analysis: see Weinrib, ‘A Step Forward in Factual Causation’, (1975) 38 *Modern Law Review* 518 at 530.”¹⁵

24. Deane J said:

“The ‘but for’ (or ‘*causa sine qua non*’) test may well be a useful aid in determining whether something is properly to be seen as an effective cause of something else in that sense. In particular, the test will commonly exclude causation for the purposes of the law of negligence if the answer to the question it poses is that the accident which caused the injuries would have occurred in the same way and with the same consequences in any event (see, eg, *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 414–15, 416–17, 419 ; 1 ALR 125 at 134–5, 138, 142–3). There are however, in my view, convincing reasons precluding its adoption as a comprehensive definitive test of causation in the law of negligence.”¹⁶

25. Statements like these, taken out of their context, are apt to mislead. The context in *March v Stramare* was a road accident where a driver collided with a stationary lorry parked in the middle of the road. The question was whether the negligence of the lorry driver in leaving it parked there was overtaken or displaced as a matter of causation by the driver’s subsequent negligent driving – whether the driver’s new act broke the causal “chain” between the loss or damage and the lorry driver’s negligence. But the true criticisms of but for causation are about how it deals with multiple causes from different defendants’ wrongs.

26. Those who challenge the logical ascendancy of but for causation point to the risk of “over determination”. A familiar example postulates simultaneous lethal shots by different shooters. The law does not countenance that neither is responsible – it says both are. Yet it must be accepted that the victim would have died in any event had either one of the shooters not fired. Even so, this is hardly a general weakness of “but for” analysis. Simultaneous lethal shots or their equivalent are not common in reality. And although at times it may seem a fine distinction, if the victim was dead when the second shooter fired, she did not cause the death as a matter of either criminal law or private law.

¹⁴ (1991) 171 CLR 506.

¹⁵ (1991) 171 CLR 506, 516-517.

¹⁶ (1991) 171 CLR 506, 522.

27. Some of the real trouble begins when there are concurrent causes and conditions necessary to produce the loss or damage and the defendant's contribution is minor, or where there are successive wrongs and the loss or damage caused by the second wrong overlays or truncates the effect of the first.
28. The trouble gets deepest when there are concurrent wrongdoers or concurrent causes including the defendant's wrong but proof of the effect of the wrong of the defendant is not possible. This admitted weakness in the application of but for causation reveals that there is a category of case where the liability of a wrongdoer is established as a policy choice made by the court.
29. Some of those who challenge but for causation also fasten upon the logical weakness of treating the wrong as the defining causal element when there are many necessary conditions for the loss or damage to be suffered. The logical conditions include facts as remote as the plaintiff's and defendant's births. For the most part, this is not a real problem of application of principle in law as opposed to a theoretical or philosophical distinction. It is the causal effect of the defendant's wrong that is being questioned in order to inform the answer to the liability question. Other necessary causal conditions for the loss to be occasioned are accepted.
30. So where do the biggest problems in the everyday legal application of but for causation appear, recognising that it has some limits when multiple causes are in play?
31. For some wrongs, courts have deployed the concept that but for causation is not necessary, provided the wrong was a "material contribution" to the loss or damage, meaning that the trier of fact forms the view that it had "some" effect or was "a" cause. I will call this the material cause concept. The obvious question is: what causal effect must a material cause have if it is not enough for but for causation? Something may be "a" cause even though it is not the only cause. Subject to what has been said before about proof of individual effect in the context of concurrent multiple causes, but for causation works perfectly well with a cause that is not sufficient without other causes. However, beyond that, the question of what is a material cause cannot be answered factually. Once that point is reached a material cause becomes a device to bridge the causal gap between the wrong and liability for the loss or damage when but for causation cannot be proved.
32. In the paper for this lecture I analyse briefly the High Court cases on causation since 2000. They support the point I have just made. But to illustrate the point for this lecture I have chosen a recent decision of the United States Supreme Court, *Burrage v United States*,¹⁷ because the passage is short, or relatively so:

"One prominent authority on tort law asserts that 'a broader rule . . . has found general acceptance: The defendant's conduct is a cause of the

¹⁷ 571 US 1 (2014).

event if it was a material element and a substantial factor in bringing it about.’ W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §41, p. 267 (5th ed. 1984) (footnote omitted). But the authors of that treatise acknowledge that, even in the tort context, ‘[e]xcept in the classes of cases indicated’ (an apparent reference to the situation where each of two causes is independently effective) ‘no case has been found where the defendant’s act could be called a substantial factor when the event would have occurred without it.’”¹⁸

33. In some cases, the answer as to how much causal effect is necessary for there to be a “material cause” is said to be a matter of “common sense”. That conceals the unanswerable factual question behind the cloak of “common sense”. I will come to that point shortly.
34. In the early Noughties, the question of causation of loss for a breach of duty to exercise reasonable care, whether in contract or in tort, received statutory attention around this country in the form of the various *Civil Liability Acts*. The question of causation in that context is now divided into two parts: factual causation and scope of duty. Factual causation requires a “but for” causal question to be answered. If the answer is no, the defendant is not liable, unless it is an exceptional case. If the answer is “yes” the court moves onto the scope of liability question.
35. The Queensland provision is the same as the other States and Territories. It is on the slide. There are three steps here, or two and a half steps. The first step is the necessary condition step. There is no difference between a “necessary condition” and but for causation. May I call that but for causation rather than the statutory label of factual causation. The second step is scope of liability. If I could borrow from Professor Stapleton’s language, this is a truncation step. If but for causation is satisfied, still the court may find no liability by truncating the scope of liability for normative or policy reasons. I would liken it to remoteness of damage. The half step goes back to the first step. In some exceptional cases, the plaintiff can’t show necessary element of but for causation but the factual causation hurdle is lowered.
36. The story behind those changes is a fascinating one, but it is unnecessary to tell it for my purposes. However, I cannot overlook two points. First, an important criticism made by Professor Stapleton is that this taxonomy still treats scope of liability as a part of the causal question when it should be separated from causation.¹⁹ In other words, causation is best confined to causation in fact while other questions such as scope of liability or remoteness should be separately classified. Second, it should not be forgotten that the recommendations in the Ipp Report as to causation were made about personal injury cases only. However, the *Civil Liability Acts* that enacted the recommendations also apply to

¹⁸ 571 US 1 (2014), 11.

¹⁹ “Cause in fact and the scope of liability for consequences”, (2003) 119 LQR 388.

property or pure economic loss as the Act applies to “any civil claim for damages for harm”²⁰ and “harm”²¹ is defined to include them.

37. As foreshadowed, there are other criticisms of but for causation. It is not necessary for this lecture to dive into some of those murky waters. It is enough for now to point out that but for causation continues as the central concept of causation in many contexts and its ongoing importance has been cemented in this country by the (not quite uniform) *Civil Liability Acts*, including in this State, where it applies to negligent breaches of contract and tortious negligence as a “breach of duty”.²²
38. The High Court said in *March v Stramare* that the problems with but for causation required that causation questions must be answered as a matter of common sense.
39. Although the civil trial in our country has evolved mostly into a judge only affair,²³ it should not be forgotten that this “common sense” approach was originally deployed as a method to answer the causal question when the jury answered that question. No reasoning was required to support the jury’s answer. Common sense thus gave a great deal of latitude. Perhaps this explains why we would do well to continue to pay close attention to the developments of United States common law jurisdictions on causal principles, where they retain civil jury trials in many cases, and have focussed heavily on causal concepts, although they have done so in response to the primacy that used to be given under their common laws to concepts of “proximate cause” or “legal cause”. The Third Restatement on Torts is a marked deviation away from those concepts.
40. Since the Second World War, in this country Judges have decided causal questions for the most part. Professor Stapleton has criticised the courts’ performance in these terms:

“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 the ‘glib submission’ that its resolution rests on nothing much more than “common sense’.”²⁴

41. *March v Stramare* was decided in 1989. What has the High Court said since? There is a surprising number of cases. Happily, recent authority has acknowledged the weakness of, if not the masking effect of, the “common sense” basis for a finding of causation.

²⁰ *Civil Liability Act* 2003 (Qld), s 4(1).

²¹ *Civil Liability Act* 2003 (Qld), s 8 and Schedule 2.

²² *Civil Liability Act* 2003 (Qld), s 11(1), and Schedule 2, definition of “duty”.

²³ Pace defamation lawyers.

²⁴ J Stapleton, “Reflections on Common law Causation in Australia”, (2011)

42. In the written paper for this lecture, I deal with 13 cases where the High Court has considered questions of principles about causation since 2000 in an Appendix. Well actually 1999. The point is to illustrate that but for causation generally holds the ground upon the causal question, although the impact of the *Civil Liability Acts* must be acknowledged.
43. In particular, I must ask you to accept for the rest of this lecture that the common sense concept as an explanation of causation has been laid to rest as a matter of generality, leaving some categories of case where analysis beyond but for causation is required. In my view, this is a welcome change.
44. There isn't time to rehearse that conspectus of 13 cases in the oral part of this lecture. Instead, I must ask you to assume an increasing acceptance of the predominant role of but for causation for the purposes of what follows.

Loss of a valuable commercial opportunity

45. Against this too brief summary of causation as a legal requirement of compensation for loss or damage, in general, let me turn to the Australian development of loss of a valuable commercial opportunity.
46. Cases where a plaintiff alleges that the defendant's wrong caused the plaintiff loss or damage in the form of a loss of profits or monetary gain are common place. For this lecture, it is enough to begin by referring to two cases decided in the High Court in the 1980s. First, *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd*.²⁵ Second, *Gates v City Mutual Life Assurance Society Ltd*.²⁶ In both cases, the plaintiff alleged that the defendant's wrong caused the plaintiff to suffer loss or damage in not obtaining a possible gain in the form of indemnity from an insurer.
47. In *Norwest*, the plaintiff's claim was that the defendant had failed to give the plaintiff proper advice about the ineligibility of the plaintiff's boat for insurance under a group policy. The boat was lost by fire and the loss was not covered by the group policy. The cause of action was negligence. The question arose whether, but for the negligence of the defendant, the plaintiff could and would have been able to obtain effective insurance.
48. The plurality judgment said this:

"Of course the onus of proving its damage rests upon *Norwest*. Therefore, in order to sustain the judgment of the Full Court, it must point to evidence showing that, on the balance of probabilities, had the Co-operative discharged its duty of care *Norwest* could have secured, at no higher cost, effective insurance cover against the risk that ultimately destroyed *The Sonoma*."²⁷

²⁵ (1984) 157 CLR 149.

²⁶ (1986) 160 CLR 1.

²⁷ (1984) 157 CLR 149, 160.

49. In *Gates*, the plaintiff's claim was that the defendant engaged in misleading or deceptive conduct about the extent of the cover provided under a trauma policy of insurance. The plaintiff suffered injury not covered by the policy. The question arose whether, but for the misleading or deceptive conduct of the defendant, the plaintiff could and would have been able to obtain effective cover.

50. The plurality judgment said this:

“in the present case if the appellant were able to establish that, but for his reliance on Mr Rainbird's representation, he could and would have entered into policies of insurance containing a disability clause of the kind represented by Mr Rainbird, he might then succeed in obtaining an award of damages equal to the benefits which would have been payable under such policies less the premiums paid or payable in respect of them.”²⁸

51. These cases were typical instances of but for causation. The plaintiff in *Gates* failed because he failed to prove he had suffered loss or damage caused by the defendant's wrong because he failed to prove that he could and would have obtained effective insurance cover but for the defendant's wrong, on the balance of probabilities.

52. You may have noticed that in the last sentence I have for the first time in this discussion included a statement of the civil onus of proof. The point of doing so is to frame the basis on which the court finds the past or future hypothetical fact whether the plaintiff would have obtained the claimed financial benefit. In principle, if the plaintiff proves to a probability of more than 50 percent that the outcome would have occurred, then in law it is treated as a fact that would have occurred and the plaintiff's damages are measured in the full amount of the cover that would have been obtained.

53. This same reasoning applied to all claims for loss of profits or pecuniary gains that would have been made or pecuniary losses that would have been avoided but for the defendant's wrong. The context was often a claim for damages in contract or tort for negligence in carrying out a professional retainer or, in this country, damages for misleading or deceptive conduct.

54. The point is illustrated by both *Norwest* and *Gates* in the High Court. But another leading case was *Sykes v Midland Bank Executors & Trustees*.²⁹ A firm of architects claimed damages for negligent breach of contract against their solicitors for failing to advise of unusual clauses in a lease that exposed the plaintiff to a higher than market rent. The plaintiff failed because when asked whether they would not have entered into the lease at that rent if properly advised their representative said that he could not truthfully answer one way or the other. The plaintiffs' claim was dismissed because they had not proved on

²⁸ (1986) 160 CLR 1, 12.

²⁹ [1971] 1 QB 113.

the balance of probabilities that but for the negligence they would have avoided the loss or damage of above market rental liability.

55. This model of causation and recovery of damages was turned upside down in *Sellars v Adelaide Petroleum NL*.³⁰ The plaintiff's claim in that case was that the defendant engaged in misleading or deceptive conduct about its intention to enter into a contract with plaintiff. After the contract between plaintiff and defendant was not made the question arose whether but for the defendant's wrong the plaintiff would have entered into a similar contract with a third party. As it turned out, the plaintiff did enter into a contract with the third party, but on less advantageous terms than had been treated earlier. Applying *Norwest, Gates and Sykes* one might have expected that the plaintiff would be required to that they could and would have obtained the benefit under the earlier invitation to treat but for the defendant's wrong.
56. But that was not how the case was decided. Instead, the High court applied a different causal question and a different methodology for assessing loss. The first question asked was whether the plaintiff suffered a loss of a valuable commercial opportunity. In *Sellars*, that meant whether the opportunity to enter into the alternative contract was of some value. If the answer to the first question is yes, the second question is how much the opportunity is worth, measured on the possibilities. In *Sellars*, that meant somewhere in a range between 1 percent and 100 percent of the full value of the alternative contract.
57. This is the critical proposition taken from *Sellars*:
- “... [d]amages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s. 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued.”³¹
58. The ascertainment is subject to the proviso that the plaintiff first:
- “... [s]hows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.”³² (emphasis in the original)
59. This is vastly different from whether the plaintiff can prove that they could and would have made the expected pecuniary gain under the alternative contract but for the defendant's conduct. In *Sellars*, it was held that the plaintiff must prove the loss of commercial opportunity had some value on the balance of probabilities. That looks a bit more conventional but is it really?

³⁰ (1994) 179 CLR 332.

³¹ (1994) 179 CLR 332, 355.

³² (1994) 179 CLR 332, 355.

60. That question can be framed in “but for” language. Would the plaintiff have gained the lost valuable commercial opportunity but for the wrong? So far so good. The next step is the critical one. What is the loss or damage? If the answer is the loss of a valuable commercial opportunity, then that is a new species of loss or damage. Until now, the loss was the loss of the pecuniary gain not obtained or detriment suffered itself, not the chance of obtaining or not suffering one.
61. What is connoted by the requirement that the lost opportunity is valuable? Ordinarily, value implies a transaction of sale in a market or a proxy process for market value. It might be thought that if the lost opportunity is one that has market value it is something that can be sold to a buyer who will be willing to pay the market value. If the range of compensable lost valuable commercial opportunities were confined to this kind of opportunity, and the amount of the loss was the market value measured on the balance of probability, there would be little difficulty.
62. But that is not what *Sellars* was about at all. The commercial opportunity for the plaintiff to enter into the alternative contract was not one that the plaintiff could have sold to a third party. Accordingly, the value was not the value of a market transaction to sell the opportunity but the assessment of the percentage chance of the pecuniary gain the plaintiff might have made under the alternative transaction.
63. It will be appreciated that *Sellars* swept away *Norwest* and *Gates*, decided only a few years earlier. Accordingly, *Sellars* amounted to a tectonic shift in the law about recovery of damages for loss of a pecuniary gain or loss of profits from the requirement that the plaintiff show that but for the wrong the plaintiff could and would have suffered the loss. Or did it?
64. There are important questions about *Sellars* that have not been answered, even though 20 years have passed since this ground moved. For example, can the plaintiff still claim to recover 100 percent of the loss, if the plaintiff can prove on the balance of probabilities that but for the defendant’s wrong it could and would have made the amount of the loss? Or is the plaintiff confined to the loss of a valuable commercial opportunity methodology?

Loss of an opportunity of a better medical outcome

65. I mention *Tabet v Gett*³³ in the Appendix to the written paper. In that case, the High Court rejected a plaintiff’s claim for damages for negligence for the loss of the opportunity of a better medical outcome where the plaintiff could not prove on the balance of probabilities that a better outcome would have occurred but for the defendant’s negligence.
66. It is not necessary to rehearse the reasons of the court in detail. There are four points to note for present purposes. First, all members of the court who considered the question recognised that acceptance of a claim for damages for

³³ (2010) 240 CLR 537.

loss of a chance of a better medical outcome would have been a major development in the common law. Second, the reasons of Gummow ACJ in particular recognised that to accept such a liability would do away with proof of (but for) causation on the balance of probabilities as a requirement of the cause of action for damages.³⁴ Third, all the reasons recognised that an award of damages as compensation for loss of a valuable commercial opportunity was an analogous basis of liability, but concluded that the analogy should not be extended to damages for loss of a chance of a better medical outcome. Fourth, some of the reasons recognised that to do so would elevate the loss of the chance to a species of actionable damage in itself.

67. The comparison with loss of a valuable commercial opportunity led Kiefel J to distinguish breach of contract cases as involving a commercial interest that could be seen to be of value in itself. Her Honour referred to *Commonwealth v Amann Aviation Pty Ltd*³⁵ and *Sellars* as such contract cases. But that characterisation is not strong. *Amann* was a breach of contract case but was notable because a plaintiff who could not prove that the contract would have been profitable was able to recover wasted expenditure in performing the contract instead. In other words, the plaintiff was returned to the position as if it had not entered into the contract. This was held to be acceptable provided that the contract would not have resulted in a loss if performed. As to *Sellars*, it was not a case of damages for breach of contract at all.
68. The characterisation of the chance to conclude a single contract with a third party as valuable was not analysed in *Sellars*. It might have been tested by asking whether the chance could have been transferred by the plaintiff to a fourth party for value – as in a transaction of sale. If the answer is “no”, what is the basis of distinction between loss of a valuable commercial opportunity and loss of chance of a better medical outcome?
69. It is notable also that at the time of deciding *Tabet* the High Court had the benefit of recent comparable decisions in 2005 in the House of Lords,³⁶ 2008 in the Supreme Judicial Court of Massachusetts³⁷ and 1991 in the Supreme Court of Canada.³⁸ The House of Lords and the Supreme Court of Canada rejected such claims, but the Supreme Judicial Court of Massachusetts allowed them.
70. These cases tend to confirm that *Sellars* created a new species of loss. One that is recognised if the loss or damage is a chance of an outcome that can be called a valuable commercial opportunity, but not otherwise.
71. It is curious, however, that in the United States loss of a chance of a better medical outcome is a basis for recovery of damages as compensation for medical negligence in many (but still a minority of) States. The judgments in *Tabet* referred to one of them, *Matsuyama v Birnbaum*, decided in 2008, which established that basis of recovery for medical negligence cases for the State of

³⁴ (2010) 240 CLR 537, 562.

³⁵ (1991) 174 CLR 64.

³⁶ *Gregg v Scott* (2005) 2 AC 176.

³⁷ *Matsuyama v Birnbaum* (2008) 890 NE 2d 819.

³⁸ *Laferriere v Lawson* [1991] 1 SCR 541.

Massachusetts. The seminal United States case seems to have been *Hicks v United States*³⁹ in 1966 and one of the earliest scholarly law review articles was written in 1981.⁴⁰

72. What is the justification for the difference? Is United States law so different?⁴¹ I don't think it is, although it is difficult to align United States product liability law with our tort cases.
73. Before leaving the physical loss or damage context of medical negligence cases, one other point is worth noticing. The line of cases of which *McGhee v National Coal Board* is often treated as the seminal case, and which has had some influence in the asbestos cases, was referred to by both Gummow J and Kiefel J in *Tabet* as having some relationship to the loss of a chance of a better medical outcome, I would suggest because in those cases also the plaintiff was unable to prove but for causation on the balance of probabilities. However, there was no detailed discussion of the true basis of those cases or whether they supported the plaintiff's claim in *Tabet*. Since the *Civil Liability Acts*, those cases must fall within the "exceptional case" category to qualify for relaxation of the requirement of proof of "but for" causation.
74. But if *Tabet* is rightly decided, what does that say about *Sellars*? Can an anomalous species of loss of a valuable commercial opportunity co-exist with the other accepted principles for awarding damages as compensation for loss or damage caused by a wrong?

An opportunity to make a profit or to make a loss

75. There is another inherent problem built into the concept of damages for loss of a valuable commercial opportunity. In a case like *Sykes, Norwest, or Gates* the plaintiff is seeking to recover a simple benefit not obtained or detriment not avoided. In *Sykes*, it would have been avoiding the detriment of the higher rent. In *Norwest* and *Gates* it would have been obtaining the benefit of payment under a policy that responded to the insured event. In *Sellars* it was that the lost contract with the third party would have been of greater benefit.
76. But another, more complex case, is the loss of a valuable opportunity to conduct a business where the plaintiff's downside was the risk it would have made a loss that existed alongside the upside that it would have made a profit. This was the position in *Amann*, but damages assessed as a percentage of the upside maximum were not sought in that case.
77. We can reasonably assume that the range of cases where damages may be claimed for loss of a valuable commercial opportunity must include a case where there is a chance of a loss as well as a chance of a profit. That is

³⁹ 368 F. 2d 626, 628-630.

⁴⁰ J King, "Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Condition and Future Consequences", 90 Yale Law J 1353, 1370 (1981).

⁴¹ See A Ferot, "The Theory of Loss of Chance", 8 FIU L. Rev. 591 (2013); S Buckler, "Medical Malpractice Law – Loss of Chance: Recovery for the Lost Opportunity of Survival", 5 J. Health & Biomedical L. 117 (2009).

because the principal judgment in *Sellars* refers to and follows the decision of the New Zealand Court of Appeal in *Takaro Properties Ltd v Rowling*.⁴²

78. The *Sellars* methodology is not easy to apply in such a case. If the lost commercial opportunity is valuable, the plaintiff is entitled to recover the value of the loss of commercial opportunity on the possibilities. Does this mean that a plaintiff can recover on a 30 per cent chance of making alleged projected profits, when the assessment entails that it was more likely than not that the profit would not have been made? What is to be done if it is more likely than not that the plaintiff would have actually made a loss? How does the *Sellars* methodology cope with the risk that a plaintiff would have lost money, not made a profit? It may seem surprising, but cases of authority have not dealt with these problems, so far as I am aware.
79. So what should happen if it is more likely than not that the plaintiff would make a loss in carrying on the business? That question was raised but not clearly dealt with in *Takaro Properties*. The primary Judge in that case held that the development project would have been unprofitable and dismissed the claim. On appeal it was held that he had failed to consider what we now call the loss of a valuable opportunity basis of claim and his finding on the balance of the probabilities that the project would have been unprofitable was held to have been erroneous.
80. There was no discussion in *Takaro Properties* of what should be the result if the plaintiff was more likely to make a loss than to make a profit? But in a claim for damages for breach of contract, *Amman* says that no damages could be awarded for expenses thrown away if the business was loss making. And in *Sellars* the principal judgment clearly specified that the new methodology is to apply to breach of contract, tort and misleading or deceptive conduct.

Assessing the possibilities

81. Another inherent feature of the process of applying the *Sellars* methodology is how the possibilities are to be assessed. The prior methodology awarded a plaintiff who established on the balance of probabilities that they had suffered loss or damage the full amount of the loss or damage. Where it was a loss of profits in carrying on a business, the court would make findings as to the most likely income and expenses. If the amounts were too speculative, but the court was satisfied that some loss or damage had been suffered, the court might award a global amount by reference to and that could be supported by the evidence.
82. But once the *Sellars* methodology is to be applied, how is the amount to be assessed? In principle, it is said by assessing on the possibilities what amount of loss the plaintiff has sustained. The model is to identify the full amount of the hypothetical benefit that the plaintiff might possibly have gained or detriment that the plaintiff might possibly have avoided and to assess the percentage chance that the plaintiff had.

⁴²

[1986] 1 NZLR 22; reversed (on other grounds) [1987] 2 NZLR 700.

83. What tools does a court have to carry out that process? The answer is none, unless useful evidence is presented to assist in the assessment. By what factors does the Judge assess that a plaintiff had a 20 percent chance of gaining the possible maximum benefit as opposed to a 40 percent chance? And why should a plaintiff who proved that they were more than likely to make the possible maximum benefit now receive only 60 percent of the amount as damages when before *Sellars* they would have recovered the full amount? The cases so far have not explained or solved these problems. It is not unlikely that different minds will come to significantly different views about what is an inherently speculative process. If the court has no robust methodology for working out the result of assessing the possibilities in a repeatable way, it is likely that the parties will be dissatisfied.

Loss of a valuable commercial opportunity in the United States

84. If there were not enough complexity arising out of the *Sellars* methodology already, there is another jurisdictional inconsistency that must be acknowledged. While some United States jurisdictions recognise that damages for loss of a chance of a better medical outcome are permissible, in general United States case law would not recognise damages for loss of a valuable commercial opportunity to make profits from a business opportunity that was not started.

85. It was said in 2015 in the United States District Court that:

“Broadly speaking, all American jurisdictions require the party seeking recovery of lost profits must establish those lost profits ‘with reasonable certainty’.”⁴³

86. It has also been said that “the epithet ‘certainty’ is overstrong, and that the standard is a qualified one, of ‘reasonable certainty’ merely, or, in other words, of ‘probability.’”⁴⁴ Rather, “reasonable certainty means by preponderance of the evidence as in other civil contexts.”⁴⁵

87. That rule replaced an earlier rule described by Caruso and Schaeffer,⁴⁶ thus:

“In deciding whether lost profits have been proven with reasonable certainty, courts often distinguish between established businesses and ‘new businesses’ because new businesses must generally meet a higher evidentiary burden. For many years, the common law ‘new

⁴³ *HB Williamson Co v Ill-Eagle Enters* (US District Court, S.D. Illinois, No Cv 0575–MJR–PMF, 25 February 2015), 12.

⁴⁴ *TAS Distrib Co v Cummins Engine Co* 491 F 3d 625, 632 (7th Cir, 2007).

⁴⁵ *MAC Sales v El DuPont de Nemours* (US District Court, E.D. Louisiana, No Civ. A. No. 89–4571, 8 March 1996).

⁴⁶ R M Lloyd and N J Chase, “Recovery of Damages for Lost Profits: the Historical Development”, (2016) 18 University of Pennsylvania Journal of Business Law 315.

business rule' stood as a formidable barrier to the recovery of lost profits by any business that did not have a track record of profits. At its peak, the new business rule approached per se status in many jurisdictions, meaning that a business without a track record of profits was categorically barred from recovering lost future profits, which were deemed too speculative as a matter of law 'for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.'"

88. The development of the law as to recovery of lost profits in the United States as a matter of legal history is entertainingly essayed by Lloyd and Chase in a recent article, including the role played by the jury, the opposition of the famed Justice Joseph Story to the whole idea as a subject of "utter uncertainty" and the developments that followed until the 1891 decision of the Supreme Court of the United States in *Howard v Stillwell & Bierce Manufacturing Co*⁴⁷ where the reasonable certainty test was adopted.
89. A recent illustration of the law as applied in the US at the level of the United States Court of Appeals may be seen in *Nycal Offshore Development Corporation v United States*.⁴⁸
90. As a caveat, however, it should not be thought that all United States Courts speak with the one voice about denying recovery for a loss of a chance outside the aleatory contract context.⁴⁹ But in tort, loss of a chance recovery outside the medical negligence context is not allowed.⁵⁰

English cases

91. I mention in the Appendix to the written paper, that in *Badenach v Calvert*⁵¹ the High Court pointed out that there may be a difference between *Sellars* based loss of a valuable commercial opportunity and recent English loss of commercial chance cases such as *Allied Maples Group Ltd v Simmons*.⁵²
92. There is not time in this lecture to discuss the possible differences. However, *Allied Maples* was a similar sort of case to *Sykes v Midland Bank* and *Sellars*. The claim was against solicitors for negligence in failing to advise the plaintiff who was acquiring the shares in a company of the company's risk of continuing liability on the covenants of an assigned lease. The causal question was whether the contractual counterparty would have agreed with the plaintiff to indemnify the company against the liability. The leading judgment included the following:

"... in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative

⁴⁷ 11 S Ct 500 (1891).

⁴⁸ 743 F 3d 837, 843 (Fed Circ, 2014).

⁴⁹ *Miller v Allstate Ins Co* 573 So 2d 24, 29 (Fla Dist Ct App 1990).

⁵⁰ Eg *Frey v AT & T Mobility LLC* 379 F App'x 727, 729 (10th Cir 2010).

⁵¹ (2016) 257 CLR 440.

⁵² [1995] 1 WLR 1602.

one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”

93. This is remarkably similar to the two step *Sellars* methodology. It may be thought surprising that *Sellars* was not mentioned. It was decided in March 1994 while *Allied Maples* was decided in May 1995. As in *Sellars*, significant attention was given in *Allied Maples to Chaplin v Hicks*⁵³ and *Kitchen v Royal Airforce* as loss of a chance cases. The House of Lords refused permission to appeal.
94. There is a detailed discussion of the English caselaw on loss of a chance in *McGregor on Damages*.⁵⁴ Again I don't have time to canvass it in this lecture.
95. Most recently, in *Wellesley Partners LLC v Withers LLP*⁵⁵ the Court of Appeal reviewed the application of loss of a chance methodology to a solicitor's negligence claim for a failed opportunity to obtain the benefit of a client connection and the profit costs that might have been earned from that client. The British cases on the topic were reviewed, including *Allied Maples*. No attention was paid to cases from other jurisdictions. The discussion points out some of the difficulties, but did not attempt to resolve any inconsistency among the cases.

An unjustifiable step

96. In my view, among the many difficulties that attach to awarding damages for loss of a valuable commercial opportunity, one stands out.
97. No rational basis in principle has emerged for compensating a plaintiff by awarding a sum that the plaintiff would not have made. The principle is to put the plaintiff in the position as if the wrong had not been committed, recognising the different sub-principles that operate where the wrong is a failure to perform a contract on the one hand or a tort on the other hand. Any other basis of arriving at an amount of damages is not compensation.
98. Although there are other potential objections,⁵⁶ this is where, in my view, the footings of loss of a valuable opportunity sink into a quagmire. The question raised is whether it would be better to abandon the whole experiment as infirm, than to leave damages for loss of a valuable commercial opportunity to operate on a special basis.

⁵³ [1911] 2 KB 786.

⁵⁴ *McGregor on Damages*, 19 ed, Sweet & Maxwell, 2014, [10-039] – [10-103].

⁵⁵ [2016] 2 WLR 1351.

⁵⁶ In particular, why should a plaintiff who can prove a better than 50 percent chance of success be confined to that proportion of the maximum recoverable amount, when hitherto they were entitled to the full amount?

99. As well, what is the basis for permitting recovery of damages for loss of a valuable commercial opportunity in a case to which the *Civil Liability Act* applies? It can only be if the valuable commercial opportunity is treated as the “particular harm” for the purposes of (Qld) s 11(1), rather than the amount of the benefit lost or detriment suffered, unless some characterisation of an “exceptional case” can be fashioned under s 11(2).
100. If that means that cases like *Chaplin v Hicks* and *Fink v Fink*⁵⁷ must also be abandoned or confined, that would be a better outcome than to persist with a methodology that has a fundamental flaw in principle and operates as an unjustifiable outlier in relaxing the usual requirement that a plaintiff who claims damages for a wrong must prove that the wrong caused the plaintiff to suffer loss or damage.
101. On the other hand, there are subtle differences in some categories of case that justify the otherwise anomalous category of loss described, in my view too broadly, as the loss of a valuable commercial opportunity. The obvious example is a claim for damages for negligence against a solicitor for failing to start a proceeding before the limitation period expires. In such a case, the plaintiff is not required to prove that he or she would have succeeded against the original prospective defendant. The damages are assessed having regard to the fact that the plaintiff may have successfully negotiated a settlement with the original prospective defendant short of a decision at trial. The plaintiff’s rights that were lost as a result of the solicitor’s negligence were likely to have resulted in a positive financial outcome that did not depend on obtaining judgment at trial.

Analysing some fact situations and cases

102. A moment ago, I mentioned *Chaplin v Hicks*. It is considered the leading case on loss of a chance. May I tell you a bit more about it. It is sometimes described as a loss of chance to win a beauty contest. That is not entirely accurate. The contest was more of a talent quest. The Daily Express newspaper was involved. It published hundreds of photographs for the reading public to choose 50 finalists based on their beauty. The 50 were then to be seen and interviewed by the defendant. The defendant was to select 12 who were to be awarded a contract to perform in the theatre conducted by the defendant. Ms Chaplin was selected as one of the 50, but not notified in time for the audition with the defendant. That was a breach of contract. She did not get a job. Statistically, she had slightly less than a 25 percent chance of getting one. The contract was to be for three years. On average, the salary was to be 4 pounds per week, being a total remuneration of 624 pounds. The jury awarded her 100 pounds as damages. Nothing was said in the report about a deduction for any alternative employment.
103. As an aside may I mention some details about Seymour Hicks the defendant. In Edwardian times and even later his career was extraordinary. First an actor, then a writer and theatre manager of successful musical theatre, the success of Hicks and his wife who was also an actor led to fame and wealth. Some of you

⁵⁷ (1946) 74 CLR 127.

may have been to the Aldwych or Gielgud Theatres in London. Both were built by Hicks in 1905 and 1906 respectively. The Gielgud was originally named the Hicks Theatre. His plays were staged in New York as well, where Jerome Kern wrote music for some of them. Even much later in life he was successful. For example he played Scrooge in the original “talkie”⁵⁸ film of “A Christmas Carol” and is reputed to have given a young Alfred Hitchcock his first employment as a film director.⁵⁹

104. During the time of *Chaplin v Hicks*, starting in 1908, he was at the height of his powers as what we would now call a producer of musical comedies. In the Court of Appeal his counsel argued that the damages were incapable of assessment. The obvious point in response was made that difficulty in calculation does not preclude assessment by a court. Vaughan Williams LJ then said:

“There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach. In the present case there is no such difficulty. It is true that **no market can be said to exist**. None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But **a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that every one would recognize that a good price could be obtained for it**. My view is that under such circumstances as those in this case the assessment of damages was unquestionably for the jury. The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, **deprived the plaintiff of something which had a monetary value**. I think that they were right and that this appeal fails.”

105. I do not understand the concept of something that can't be bought or sold yet a good price could be obtained for it. The necessary step to make sense of this logic is to remove the inability to buy and sell. As soon as that is done, and the amount assessed is the value on that sale or hypothetical sale, this methodology is unobjectionable. The lost right to be in the competition is given a proxy market value. But for the defendant's breach of contract, the plaintiff would have had that value.

106. I would add that it is not unknown in commerce for someone to pay for the opportunity to obtain an occupation. Examples from the not so recent past are some forms of apprenticeship. Also, there are many contracts to enter into competitions for a prize; horse racing is the exemplar, although usually the prize money does not cover the cost of maintaining and training the horse.

⁵⁸ He also played Scrooge in a silent version in 1913.

⁵⁹ “Always Tell Your Wife”, 1923.

107. Before I leave *Chaplin* another interesting note is that in 1920 the famous economist John Maynard Keynes published a book entitled *A Treatise on Probability*. He devoted attention to *Chaplin*⁶⁰ as illustrative of the practical yet subtle response of lawyers to the troubling distinction between probabilities that can be estimated within somewhat narrow limits and those that cannot.
108. On the other hand, even if *Chaplin* can be explained as I suggest, *Fink v Fink* in 1946 is not so easy to explain. The plaintiff wife and defendant husband contracted to resume co-habitation for twelve months in an attempt to reconcile. The defendant breached the contract. The loss of a right to attempt to reconcile is not one that can be moulded into a market analysis. Even so, the High Court split over whether, in principle, damages might be recoverable for the breach.
109. Dixon and McTiernan JJ rejected that there was an analogy between the chance to reconcile and the chance of success in case like *Chaplin*, because the chance of reconciliation was intangible. Starke J held that the purpose of the contract was not to give the wife the opportunity of reconciliation but the husband the opportunity to consider whether he would forgive her, therefore no damages flowed from the husband's breach. Latham CJ and Williams J thought the case comparable to *Chaplin* in principle.
110. One curious feature of *Sellars* is that the plurality judgment said this about *Fink v Fink*:

“*Fink v Fink* concerned a contract to provide a contract for a reconciliation breach of which was held to entitle the wife to damages.”

111. The implication is that the wife was held entitled to damages for the lost opportunity of a reconciliation. In fact, on that point, her claim was held to be not maintainable, although without a clear ratio. I cannot explain why that was not recognised in *Sellars*.
112. In my view, *Amann* and another case like it, *McRae v Commonwealth*⁶¹ present no similar difficulty. They show that in principle it is an acceptable measure of damages for breach of contract to restore wasted expenditure to a plaintiff when it is not possible to determine what the plaintiff's loss or damage would have been but for the defendant's wrong.
113. However, another oddity about the plurality judgment in *Sellars* is how it treated *Amann*, as follows:

“...in *Commonwealth v Amann Aviation Pty Ltd*, Mason CJ and Dawson J, Brennan J and Deane J concluded that a lost commercial advantage or opportunity was a compensable loss, even though there was a less than 50% likelihood that the commercial advantage would be realised. Damages for breach of contract were assessed by

⁶⁰ At pp 26-29.

⁶¹ (1951) 84 CLR 377.

reference to the probabilities or possibilities of what would have happened.”

114. With all respect to the Judges of the plurality, this is something of an overstatement or oversimplification. It can fairly be said to describe Deane J's analysis. There isn't time now to challenge some of the aspects of his Honour's free-wheeling discussion, nor is it necessary for me to do so. The damages in *Amann* were not in fact assessed by reference to the probabilities or possibilities. They were assessed by reference to wasted expenditure and on the proviso that it was not shown that the business would have been unprofitable. So *Amann* cannot be said to directly justify lowering the causation threshold to get at a proportion of the hoped for opportunity.
115. Lastly, may I come back to *Sykes v Midland Bank*, the solicitor's negligence case where the Court of Appeal, like the later High Court cases of *Norwest* and *Gates* applied but for causation in concluding that the plaintiff had not proved loss or damage, because it had not proved it would not have entered into the disadvantageous lease but for the negligent advice.
116. In *Sellars*, the plurality judgment said of *Sykes*, *Norwest* and *Gates*, as follows:

“It may be that *Sykes*, *Gates* and *Norwest* are to be treated as cases which turn primarily on the issue of causation which is ordinarily governed by the general civil standard of proof. The distinction between proof of causation and damages was emphasised in *Hotson v East Berkshire Area Health Authority*. There Lord Ackner stated that the first issue that fell to be determined was that of causation. This was to be determined on the balance of probabilities. Once liability was established, the assessment of the plaintiff's loss could proceed, taking into account any reductions arising from the uncertainty of future events.”

117. In my view, two things should be kept in mind about that explanation of *Sykes*. First, the trial Judge in the court below had awarded damages for the loss of a chance. That was the decision that the Court of Appeal set aside. Second, the distinction drawn between causation and assessment of the loss was taken from *Hotson*, a physical damage personal injuries case, where now it has been conclusively held that there can be no recovery for loss of a chance of a better outcome.

Way forward

118. What then, is the way forward? In my view, there are two steps at least. First, it would be better to recognise that a general category of loss of a valuable commercial opportunity is drawn too broadly and operates unjustifiably alongside the usual application of the pre-existing principles of causation of financial loss. In most such cases, it should not be permitted to water down the requirements in proof of causation of loss.

119. Second, as in some categories of cases involving multiple causes, a category of case should be recognised as an exception to the application of the usual principles of causation in respect of financial loss, where a particular value of the plaintiff's rights has been interfered with and lost by the wrong that may be admitted as a basis for recovery of damages, such as in the case of the solicitor who allows a plaintiff's claim to become time barred, or the valuable chance of obtaining a prize.
120. This will avoid the primary objection to the category of loss of a valuable commercial opportunity, by getting rid of it in most cases. As to what remains, it can fairly be said that I offer no general principle that will inform future cases. But this objection does not invalidate the argument for a much narrower category or categories of exception to the usual causal principles.
121. If a comparator is needed, the recognition of the failure of the concept of proximity as a general determinant of the existence of a duty of care did not require a new general principle to take its place. Instead it was recognised that the salient features were fact intensive and appropriate to categories of case. This works, in the tradition of the common law, by hugging the coastline of established categories of case and cautiously developing new categories as appropriate.
122. In my view, this is better than categorising all hypothetical financial loss as a loss of a valuable commercial opportunity.

APPENDIX

High Court cases since 1990

123. Some of the cases decided by the High Court on causal questions since *March v Stramare* do not fit the simple model of liability in tort or for breach of contract. Gibbs CJ is said to have remarked that ss 52 and 82 of the *Trade Practices Act 1974* (Cth) would take over a lot of civil litigation previously resolved by contract and tort. I doubt that he foresaw the extent to which they have done so. The result is that the High Court has considered the question of causation posed under the statutory provisions on numerous occasions. Purists say causation under the statute is a matter of statutory interpretation, not common law principle. That is right, but there is no case as yet in which that difference has affected the result, with the possible exception of the (contentious) decision in *Murphy v Overton Investments Pty Ltd*.⁶² So, for this discussion, I will include some cases discussion of causation of damages for misleading or deceptive conduct as well as some miscellaneous causes of action.

124. The most recent statement of the High Court was made in *Robinson Helicopter Company Inc v McDermott*,⁶³ as follows:

“... at the level of principle, this Court has set its face against recovery of loss of a chance in the law of negligence relating to personal injuries. Although proof of causation may sometimes entail the robust, pragmatic drawing of inferences, especially where there are a number of possible causes and there is difficulty in ascertaining which of them was the cause of damage suffered, proof of causation still requires proof on the balance of probabilities that the alleged breach of duty was the cause of the damage suffered.”⁶⁴ (footnotes omitted)

125. The footnotes cross referred to the *Civil Liability Act 2003* (Qld), *Tabet v Gett*⁶⁵ and invite a comparison with *McGhee v National Coal Board*.⁶⁶

126. Another recent statement emerged from the workers compensation context in *Comcare v Martin*.⁶⁷ The causal question was statutory, whether an adjustment disorder was suffered “as a result of” workplace conditions. The court below had answered that question negatively applying what they said was a “common sense” test called up by the statute. The High Court did not agree and said this:

“Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has

⁶² (2004) 216 CLR 388.

⁶³ (2016) 331 ALR 550.

⁶⁴ (2016) 331 ALR 550, 569.

⁶⁵ (2010) 240 CLR 537.

⁶⁶ (1973) 1 WLR 1.

⁶⁷ (2016) 258 CLR 467.

been said more than once in this Court that it is doubtful whether there is any "common sense" approach to causation which can provide a useful, still less universal, legal norm. Nevertheless, the majority in the Full Court construed the phrase 'as a result of' in s 5A(1) as importing a 'common sense' notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose."⁶⁸ (footnotes omitted)

127. It is not necessary to set out more of *Comcare*. The causal question under the statute was answered by what was a recognisable but for causation analysis.

128. The next case to mention is *Badenach v Calvert*.⁶⁹ It was a claim against a testator's solicitor, made by a disappointed beneficiary, for negligence in advising the testator as to the will. The complaint was that the solicitor ought to have advised the testator to transfer the estate to the intended beneficiary inter vivos, to avoid the possibility of a family provision claim against the estate, because such a claim might interfere with the proposed gift under the will. The plurality said:

"Section 13(1)(a) of the *Civil Liability Act 2002* (Tas) contains a requirement of factual causation. As with other statutory tests of this kind, it requires the application of a 'but for' test of causation. The respondent must prove, on the balance of probabilities, that but for the solicitor's failure to give the advice contended for, the respondent would have received the client's estate. The respondent has not discharged this onus of proof.

The respondent seeks to overcome problems of proof by redefining the loss occasioned by the alleged breach of duty as the loss of the chance that the client may have undertaken the inter vivos transactions. The chance could not be of a better testamentary disposition; none is identified as available.

It has been explained that to speak of loss as the loss of a 'chance' distorts the question of causation. It involves the application of a lesser standard of proof than is required by the law and, it follows, by s 13(1)(a). It confuses the issue of the loss caused with the issue of assessing damages which are said to flow from that loss. In that assessment a chance may be evaluated.

The respondent's case on causation is not improved by seeking to equate the chance spoken of with an opportunity lost. It may be accepted that an opportunity which is lost may be compensable in tort. But that is because the opportunity is itself of some value. An opportunity will be of value where there is a substantial, and not a merely speculative, prospect that a benefit will be acquired or a detriment avoided.

It remains necessary to prove, to the usual standard, that there was a substantial prospect of a beneficial outcome. This requires evidence of

⁶⁸ (2016) 258 CLR 467, 479.

⁶⁹ (2016) 257 CLR 440.

what would have been done if the opportunity had been afforded. The respondent has not established that there is a substantial prospect that the client would have chosen to undertake the inter vivos transactions. Therefore, the respondent has not proven that there was any loss of a valuable opportunity.

The onus of proving causation of loss is not discharged by a finding that there was more than a negligible chance that the outcome would be favourable, or even by a finding that there was a substantial chance of such an outcome. The onus is only discharged where a plaintiff can prove that it was more probable than not that they would have received a valuable opportunity. To the extent that the majority in *Allied Maples Group Ltd v Simmons & Simmons* holds that proof of a substantial chance of a beneficial outcome is sufficient on the issue of causation of loss, as distinct from the assessment of damages, it is not consistent with authority in Australia and is contrary to the requirements of s 13(1)(a) of the *Civil Liability Act*.⁷⁰ (footnotes omitted)

129. The next case is *Sidhu v Van Dyke*.⁷¹ It was a case about the element of causation necessary to justify the finding that a plaintiff has suffered a detriment to sustain an estoppel and is accordingly outside the mainstream of our interest, but in passing I note the High Court framed the causal question thus:

"Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from action) to that which [the party] did had the relevant assumption not been induced?"⁷²

130. That is an application of but for causation. As Deane J acknowledged in *March v Stramare*, the negative application of the "but for" test is a strong measure of causation. That is, if plaintiff would have suffered the loss even if the wrong had not occurred the wrong is not the cause of the loss.

131. The next case is *Wallace v Kam*.⁷³ It is an important case. The claim was for negligence by a doctor in failing to advise a patient as to the risk of an adverse outcome of a surgical procedure. The particular risk was of a possible catastrophic outcome. If warned of the risk the plaintiff contended that he would not have undertaken the procedure and thereby avoided another negative outcome of the procedure that did occur although the catastrophic outcome did not occur.

132. The High Court said:

"The determination of factual causation in accordance with s 5D(1)(a) [of the NSW *Civil Liability Act*] involves nothing more or less than the

⁷⁰ (2016) 257 CLR 440, 454-455.

⁷¹ (2014) 251 CLR 505.

⁷² (2014) 251 CLR 505, 531.

⁷³ (2013) 250 CLR 375.

application of a 'but for' test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.

In a case where a medical practitioner fails to exercise reasonable care and skill to warn a patient of one or more material risks inherent in a proposed treatment, factual causation is established if the patient proves, on the balance of probabilities, that the patient has sustained, as a consequence of having chosen to undergo the medical treatment, physical injury which the patient would not have sustained if warned of all material risks. Because that determination of factual causation necessarily turns on a determination of what the patient would have chosen to do if the medical practitioner had warned of all material risks, the determination of factual causation is governed by s 5D(3). What the patient would have done if warned is to be determined subjectively in the light of all relevant circumstances in accordance with s 5D(3)(a), but evidence by the patient about what he or she would have done is made inadmissible for that purpose by s 5D(3)(b), except to the extent that the evidence is against the interest of the patient.

Three factual scenarios have been presented by the cases. One is where the patient would have chosen to undergo the treatment that was in fact chosen even if warned of all material risks. In that scenario, a determination can be made of no factual causation. That is because, absent the negligent failure to warn, the treatment would still have gone ahead when it did and the physical injury would still have been sustained when it was. Leaving aside the possibility of an exceptional case in which s 5D(2) might be invoked, the negligent failure to warn can therefore be determined not to have caused the physical injury.

Section 5D(1)(a) is not satisfied in that scenario and there is no occasion to consider the normative question posed by s 5D(1)(b).

Another scenario is where the patient would have chosen not to undergo the treatment at all if warned of all material risks. In that scenario, a determination of factual causation can be made without difficulty. That is because, absent the negligent failure to warn, the treatment would not have gone ahead at any time and the physical injury would not have been sustained.

Yet another scenario is where the patient, if warned of material risks, would have chosen not to undergo the treatment at the time the treatment in fact took place but may have chosen to undergo the treatment at a later time. Analysis of that further scenario has been more controversial. The better analysis is that it is also a scenario in which a determination of factual causation should be made. Absent the negligent failure to warn, the treatment that in fact occurred would not have occurred when it did and the physical injury in fact sustained when the treatment occurred would not then have been sustained. The same treatment may well have occurred at some later time but (provided that the physical injury remained at all times a possible but improbable result of the treatment) the physical injury that was sustained when the treatment in fact occurred would not on the

balance of probabilities have been sustained if the same treatment had occurred on some other occasion.

To determine factual causation in a case within the second or third scenarios, however, is to determine only that s 5D(1)(a) is satisfied. Satisfaction of legal causation requires an affirmative answer to the further, normative question posed by s 5D(1)(b): is it appropriate for the scope of the negligent medical practitioner's liability to extend to the physical injury in fact sustained by the patient?

In a case falling within an established class, the normative question posed by s 5D(1)(b) is properly answered by a court through the application of precedent. Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled. In a novel case, however, s 5D(4) makes it incumbent on a court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. What is required in such a case is the identification and articulation of an evaluative judgment by reference to 'the purposes and policy of the relevant part of the law'. Language of 'directness', 'reality', 'effectiveness' or 'proximity' will rarely be adequate to that task. Resort to 'common sense' will ordinarily be of limited utility unless the perceptions or experience informing the sense that is common can be unpacked and explained.

A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach. In a similar way, 'a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action' but 'only for the consequences of the information being wrong'. A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a 'foreseeable consequence of mountaineering but has nothing to do with his knee'.⁷⁴

133. The next significant case in the High Court is *Strong v Woolworths Ltd.*⁷⁵ The question was what was required to prove that a negligent failure to clean a shopping centre floor at regular intervals caused the plaintiff's fall? The argument was that the plaintiff had not proved that the thing that caused her to slip had not been dropped on the floor only a few minutes before her fall. The High Court extensively analysed the operation of the "but for" principle thus:

⁷⁴ (2013) 250 CLR 375, 383-386.

⁷⁵ (2012) 226 CLR 182.

“...Section 5E [of the NSW *Civil Liability Act*] provides that, in determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. As earlier noted, the principles governing the determination of causation are set out in s 5D. Relevantly, that provision states:

- (1) A determination that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

The determination of factual causation under s 5D(1)(a) is a statutory statement of the ‘but for’ test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence. While the value of that test as a negative criterion of causation has long been recognised, two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Secondly, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm.

The division of the causal determination under the statute into the distinct elements of factual causation and scope of liability is in line with the recommendations in the Final Report of the Committee convened to review the law of negligence (the Ipp Report). The authors of the Ipp Report acknowledged their debt to Professor Stapleton's analysis in this respect. The policy considerations that inform the judgment of whether legal responsibility should attach to the defendant's conduct are the subject of the discrete ‘scope of liability’ inquiry. In a case such as the present, the scope of liability determination presents little difficulty. If the appellant can prove factual causation, it is not in contention that it is appropriate that the scope of Woolworths's liability extend to the harm that she suffered. In particular cases, the requirement to address scope of liability as a separate element may be thought to promote clearer articulation of the policy considerations that bear on the determination. Whether the statutory determination may produce a different conclusion to the conclusion yielded by the common law is not a question which is raised by the facts of this appeal.

Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the

particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm. This is pertinent to the appellant's attack on the Court of Appeal's reasons, which is directed to [48] of the judgment:

'Now, apart from the *'exceptional case'* that section 5D(2) recognises, section 5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words *'comprises the following elements'* in the chapeau to section 5D(1). *'Material contribution'*, and notions of increase in risk, have no role to play in section 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within section 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether section 5D(1) is satisfied in any particular case. [Emphasis in original.]' The appellant submitted that the Court of Appeal had proceeded upon a view that factual causation under s 5D(1)(a) excludes consideration of factors making a "material contribution" to the harm suffered by a plaintiff. This interpretation was said to require that the defendant's negligence be the "sole necessary condition of the occurrence of the harm" and to have prompted a differently constituted Court of Appeal to disagree with it. The latter submission was a reference to the observations made by Allsop P in *Zanner v Zanner*, to which reference will be made later in these reasons.

The reference to *'material contribution'* (Court of Appeal's emphasis) in the third sentence of para 48 was not to a negligent act or omission that is a necessary, albeit not the sole, condition of the occurrence of the harm. So much is clear from the sentence that follows. Any confusion arising from the Court of Appeal's analysis may be the result of the different ways in which the expression *'material contribution'* has come to be used in the context of causation in tort.

The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century. In a case in which several factories had contributed to the pollution of a river, the defendant factory owner was held liable in nuisance for the discharge of pollutants from his factory which had "materially contributed" to the state of the river. Liability was not dependent upon proof that the pollutants discharged by the defendant's factory alone would have constituted a nuisance.

In *Bonnington Castings*, the expression *'material contribution'* was employed in determining the causation of the pursuer's pneumoconiosis, a disease caused by the gradual accumulation of

particles of silica in the lungs. There were several sources of exposure: the pneumatic hammers, the floor grinders and the swing grinders. The employer's breach of statutory duty lay only in exposing the pursuer to the dust generated by the swing grinders. The greater proportion of the pursuer's exposure to silica dust had come from the use of the pneumatic hammers. Lord Reid characterised the 'real question' as whether the dust from the swing grinders 'materially contributed' to the disease. The swing grinders had contributed a quota of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease.

The Ipp Report distinguished the concept of 'material contribution to harm' applied in *Bonnington Castings* from the use of the same expression merely to convey 'that a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm'. Allsop P made the same point in *Zanner* (at [11]):

[T]he notion of cause at common law can incorporate 'materially contributed to' in a way which would satisfy the 'but for' test. Some factors which are only contributing factors can give a positive 'but for' answer.

His Honour illustrated the point by reference to two negligent drivers involved in a collision that is the result of the conduct of the first, who drives through the red light, and of the second, who is not paying attention. His Honour went on to observe (at [11]):

However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the 'but for' test) such as in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 are taken up by s 5D(2) which, though referring to 'an exceptional case', is to be assessed 'in accordance with established principle'.

This observation is consistent with the discussion in the Ipp Report of cases in which an 'evidentiary gap' precludes a finding of factual causation on a 'but for' analysis and for which it was proposed that special provision should be made. The Ipp Report instanced two categories of such cases. The first category involves the cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable. *Bonnington Castings* was said to exemplify cases in this category. The second category involves negligent conduct that materially increases the risk of harm in circumstances in which the state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff's harm. *Fairchild v Glenhaven Funeral Services Ltd* was said to exemplify cases in this category.

Section 5D(2) makes special provision for cases in which factual causation cannot be established on a 'but for' analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of

causation in accordance with established principles under the common law of Australia has not been considered by this court.³⁷ Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.

The authors of the Ipp Report and Allsop P in *Zanner* assume that cases exemplified by the decision in *Bonnington Castings* would not meet the test of factual causation under s 5D(1)(a). However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd v Booth* with respect to proof of causation under the common law. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm.

As earlier noted, the limitations of the "but for" analysis of factual causation include cases in which there is more than one sufficient condition for the occurrence of the plaintiff's injury. At common law, each sufficient condition may be treated as an independent cause of the plaintiff's injury. The Ipp Report noted the conceptual difficulty of accommodating cases of this description within a 'but for' analysis, but made no recommendation because the common law rules for resolving cases of "causal over-determination" were generally considered to be satisfactory and fair. How such cases are accommodated under the scheme of s 5D does not call for present consideration.

Correctly understood, there is no conflict between the Court of Appeal's analysis of s 5D in this proceeding and Allsop P's analysis of the provision in *Zanner*. The Court of Appeal correctly held that causation is to be determined by reference to the statutory test. Contrary to the appellant's submission, the Court of Appeal said nothing about how the application of that test might lead to an outcome that differed from the outcome that would have been reached by the application of the common law. The causation issue presented by the appellant's claim has nothing to do with concepts of material contribution to harm, material increase in risk of harm, or any of the difficulties discussed by the text writers in the context of the limitations of a 'but for' analysis of factual causation."⁷⁶ (footnotes omitted)

134. In simple terms, this passage does away with the argument that there are lurking unresolved weaknesses of but for causation. It also puts the "material contribution" concept in its place. Except where the problem is one where there are concurrent causes relevant to liability and they are all necessary to satisfy but for causation, it is a label that masks the inability to prove but for causation.

135. The problem with material contribution or cause in the second sense is that it does not produce a basis for proof of cause in fact beyond the idea that an

⁷⁶ (2012) 226 CLR 182, 190-195.

increase in the risk of harm is a sufficient cause of harm, whether or not in fact the increase in risk caused the harm. This approach has a family relation in the law relating to damages for loss of a valuable opportunity.

136. The next case is *Amaca Pty Ltd v Booth*.⁷⁷ It is an asbestos case. It deals with the interplay between science and law on questions of causation and how law should respond to epidemiology as an explanation of correlation and as a method of proof of causation. Because of this different focus I pass it by for the purposes of this lecture. Still, it is one of the best places to find discussion of the distinction between what is a risk or chance of loss or damage and what is a cause of loss or damage. Not surprisingly, the discussion of French CJ, a highly skilled scientist as well as lawyer, is compulsory reading here.
137. That brings me to *Tabet v Gett*.⁷⁸ It is one of the most important cases for this lecture. The question was whether a plaintiff, whose diagnosis was delayed by the failure to carry out a radiological investigation, but who could not prove that she would not have suffered the adverse medical outcome by earlier treatment could nevertheless recover on the basis that earlier treatment would have given a better chance of avoiding some or all of that outcome. In short, can a plaintiff in a medical negligence cases who suffers personal injuries recover for the loss of an opportunity to avoid those injuries.
138. This case is dealt with in the substance of the lecture. For now, it is enough to observe that the court accepted that the general test for causation for damages for negligence is the “but for” test and rejected that there could be a loss of a chance species of compensable loss for damages for personal injuries as opposed to the loss of a chance species of compensable loss called the loss of a valuable commercial opportunity where damages are claimed for purely economic loss.
139. The next case is *Amaca Pty Ltd v Ellis*.⁷⁹ It is an asbestos case. *Booth* was concerned with the proof of causation of mesothelioma by the defendant where the plaintiff had multiple exposures to asbestos from sources both from and other than from the defendant. There was no dispute that Mr Booth’s mesothelioma was caused by asbestos exposure. The question was the defendant’s responsibility. It fits into the category of case where but for causation may not be able to be proved against an individual defendant, although a group of defendants acting separately cumulatively did cause the loss or damage.
140. *Ellis*, on the other hand, was concerned with proof that Mr Ellis’s lung cancer, (not mesothelioma) was caused by asbestos exposure when there were competing possible causes, including that he was a heavy smoker for many years. Although *Ellis* is again interesting as a discussion of the interplay between scientific and legal causation, it proceeded on the assumption that the plaintiff must prove but for causation.

⁷⁷ (2011) 246 CLR 36.

⁷⁸ (2010) 240 CLR 537.

⁷⁹ (2010) 240 CLR 111.

141. The next case is *Adeels Palace Pty Ltd v Moubarak*.⁸⁰ Like *Strong*, it is a case where the NSW *Civil Liability Act* applied to causation. However, there is a useful additional statement about the relationship of the statutory test to the common law, as follows:

“Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v E & M H Stramare Pty Ltd* to be the common law’s approach to causation. The references in *March* to causation being ‘ultimately a matter of common sense’ were evidently intended to disapprove the proposition ‘that value judgment has, or should have, no part to play in resolving causation as an issue of fact’. By contrast, s 5D(1) treats factual causation and scope of liability as separate and distinct issues. It is not necessary to examine whether or to what extent the approach to causation described in *March* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1). It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.

Next it is necessary to observe that the first of the two elements identified in s 5D(1) (factual causation) is determined by the ‘but for’ test: but for the negligent act or omission, would the harm have occurred?”⁸¹

142. With all respect, in my view, there is no real reason to think that the common law’s approach to causation would have presented any different conclusion in a case like *Adeels Palace*.

143. The next case of some interest is *Roads and Traffic Authority v Royal*.⁸² The reason for interest was that the plurality judgment reiterated that since *March v E & H Stramare Pty Ltd* to treat the “but for” test as a comprehensive test for causation is erroneous. The statement is literally true. As I’ve said, but for causation can’t resolve causal over determination. Nor does it deal with the exceptional case category under the *Civil Liability Act* or what we now call “scope of liability” questions. Professor Stapleton has compellingly argued that “scope of liability” is not part of causation at all but belongs alongside remoteness of damage and any other policy based liability limiting legal principles. But none of those points arose in *Royal*. In deciding that case the High Court did in fact apply but for causation to show that the loss or injury suffered was not in fact caused by the defendant’s negligence.

144. *Royal* was a motor accident case. The plaintiff was injured when he proceeded from a side road to cross over the Pacific Highway at an intersection and his car collided with the defendant’s car that was travelling along the highway at speed. The appellant was the authority responsible for the design and construction of the intersection. The defendant and the plaintiff were both

⁸⁰ (2009) 239 CLR 420.

⁸¹ (2009) 239 CLR 420, 440.

⁸² (2008) 245 ALR 653.

held to have driven negligently. Each had a clear view of the other before the collision occurred. The appellant was also found negligent in the court below because the design of the intersection was such that depending on the positioning of vehicles on the highway travelling in two lanes approaching the intersection, the view of a driver in the position of either the plaintiff's car or the defendant's car might have been obscured. This was found to have caused the collision as well as the negligent driving. In the High Court, it was held that the drivers on this occasion in fact had a clear view of one another so that any negligence in the design of the intersection did not cause the collision.

145. Remembering that but for causation works strongly in its negative form, namely that the postulated negligence is not a cause of loss or damage if it would have happened in any event, that is what the High Court found in *Royal*. Accordingly, it was irrelevant for the court to say that the "but for" test is inadequate as a comprehensive test.
146. *Royal* is also worth noting for Kiefel J's separate reasons. Her Honour came to grips with a well-known statement of Dixon J in *Betts v Whittingslowe*,⁸³ that indorses the idea that causation may be decided by reasoning from the fact that the defendant's negligence increased the risk of loss or damage and the fact that the plaintiff suffered the loss or damage to the conclusion that the defendant caused the plaintiff's loss or damage. That is to say, without establishing by proof that the loss or damage would not have been suffered "but for" the defendant's negligence. Anyone who reads her Honour's perceptive analysis of that reasoning should be left in no doubt that if Dixon J's reasoning stands for anything more than that it is permissible in some cases to make robust findings on the evidence that but for causation is established, then Dixon J was wrong.
147. The next case is *Travel Compensation Fund v Tambree*.⁸⁴ It was a claim for damages for misleading or deceptive conduct against the auditor of a travel agent. A travel agent was required to be licensed and to lodge audited accounts. The plaintiff fund was obliged to compensate customers of a travel agent for loss of funds paid when the travel agent became insolvent. The fund claimed that it was exposed to claims by customers because the audited accounts prepared by the defendant for a particular travel agent were misleading. A question was whether the loss was caused by the auditor's misleading or deceptive conduct in making an inaccurate audit statement. I am not concerned to discuss the particular facts further. The relevant point was that the court below had relied on the proposition that the question of causation of loss was to be resolved as a matter of common sense.
148. Gummow and Hayne JJ dealt with the role of common sense in typical acidic style. It was dispatched, hopefully never to be resurrected by those who look for a way to jump across evidentiary gaps. Their Honours said:

⁸³ (1945) 71 CLR 637.

⁸⁴ (2005) 224 CLR 627.

“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.

In *Allianz*, McHugh J noted that considerations of legal policy may enter into the selection of those causative factors which are determinative of liability. However, to accept that proposition, as it should be, is not to adopt a quite different proposition that in any given case the ultimate issue is whether ‘the defendant *ought* to be held liable to pay damages for [the] harm [suffered]’. This approach to questions of causation taken by Ipp JA in *Ruddock v Taylor* was adopted by the Court of Appeal in the present case.

In *Sullivan v Moody*, this court, in the joint judgment of five justices, affirmed the rejection in Australia of what has been identified as the three-stage approach in negligence cases adopted by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*. This appended to questions of duty and foreseeability of damage a criterion of what in the given situation was ‘fair, just and reasonable’. Of this, it was said in *Sullivan v Moody*:

‘The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.’

There are indications in the United Kingdom that, in determining for the law of tort questions of sufficient or determinative causal linkage, a similar approach to that in *Caparo* should be adopted by asking whether as ‘a value judgment’ the defendant ought to be held liable. However that may be, the considerations referred to in *Sullivan v Moody* when affirming the rejection in Australia of *Caparo* apply likewise to the approach taken by the Court of Appeal in this case by reference to *Ruddock v Taylor*.

In the present case, where one of the claims made (and the claim to which most attention was given both in the courts below and in this court) was a statutory claim, ‘notions of ‘cause’ as involved in [that] statutory regime are to be understood by reference to the statutory subject, scope and purpose’. In particular, the question presented by s 68 of the *Fair Trading Act* was whether the conduct of each respondent, that constituted a contravention of that Act, was a cause of the loss or damage sustained. The characterisation of Ms Fry's conduct as unlawful was not relevant to that inquiry.

Although these conclusions about the *Fair Trading Act* suffice to require the allowing of the appeal, it is as well to add that the appellant's claim in negligence neither required nor permitted some different answer to the question of causation that had to be answered in demonstrating liability for that tort. Ms Fry's continued trading, after her participation in the fund was terminated, was not an intervening event that broke the chain of causation between the negligent misstatements the respondents made and the loss the appellant suffered. The appellant relied on the accuracy of the statements made by the respondents. The appellant's reliance on the statements, its conduct in terminating Ms Fry's participation, and its conduct after the termination, were all held to be reasonable. Had the respondents not acted as they did, the appellant would not have suffered loss because the regulatory steps that were taken to stop Ms Fry trading would have been taken much sooner than they were. No question of value judgment, about the extent of loss for which the respondents should be held liable, arose in this case."⁸⁵ (footnotes omitted)

149. A further point can be made about the “common sense” notion, remembering that it derives from the context when the question of causation was decided by the jury as a question of fact. All experienced jury trial judges are familiar with directions that are given every day in criminal cases on similar questions of causation that the jury should approach the evidence and decide the question using their common sense. And so they should, but it is a perverse twist of that process to elevate “common sense” into a diluting factor in the solution required as a matter of law to satisfy the test of cause in fact.
150. The next case is *Rosenberg v Percival*.⁸⁶ It is an outlier in the cases I’ve mentioned so far, because it does not establish or discuss in a significant way any point of principle about causation. Those of you familiar with the cases dealing with causation for professional negligence will know of it because it is one of the few cases where a defendant won on the question of cause in fact in a failure to warn or advise case.
151. There is more than one reason for this structural bias in the way that the law operates on the question of causation. The first is that where the plaintiff alleges the loss or damage suffered would not have been suffered but for the defendant’s failure to warn or advise, she will get into the witness box and say that is exactly what she would have done. The problems with this self-serving evidence given with the benefit of hindsight are so significant that they were commented on in *Chappel v Hart*⁸⁷ and ultimately led to statutory interference, in the form of the section in the *Civil Liability Acts* that prohibits a plaintiff from giving such evidence in a negligence case whether brought in contract or in tort. That measure is not as effective as it might have been because it doesn’t apply to the alternative characterisation of the same facts as a claim for damages for misleading or deceptive conduct. Second, the question is asked and answered

⁸⁵ (2005) 224 CLR 627, 642-644.

⁸⁶ (2001) 205 CLR 434.

⁸⁷ (1998) 195 CLR 232.

in the light of what has happened with the benefit of hindsight. It is difficult to reconstruct the hypothetical or counterfactual scenario free from the influence of what has happened. A passage from the reasons of McHugh J is of assistance:

“Under the Australian common law, in determining whether a patient would have undertaken surgery, if warned of a risk of harm involved in that surgery, a court asks whether *this patient* would have undertaken the surgery. The test is a subjective test. It is not decisive that a reasonable person would or would not have undertaken the surgery. What a reasonable person would or would not have done in the patient's circumstances will almost always be the most important factor in determining whether the court will accept or reject the patient's evidence as to the course that the patient would have taken. But what a reasonable person would have done is not conclusive. If the tribunal of fact, be it judge or jury, accepts the evidence of the patient as to what he or she would have done, then, subject to appellate review as to the correctness of that finding that is the end of the matter. Unlike other common law jurisdictions, in this field Australia has rejected the objective test of causation in favour of a subjective test.”⁸⁸ (footnotes omitted) (emphasis in original)

152. My last case in this little conspectus since the turn of the century is in fact from 1999, being *Kenny & Good Pty Ltd v MGICA (1992) Ltd*.⁸⁹ The reason I choose it is that the High Court in effect did not follow a decision of the House of Lords concerning a similar question of causation from a few years before in a way that emphasised the role of cause in fact and declined to limit the operation of causation in that case by a scope of liability argument.

153. The House of Lords decision was *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*.⁹⁰ The effect of the decision was that a valuer who gave a negligent valuation to a lender for the purpose of assessing the value of proposed security for a loan was not responsible for loss suffered by the lender due to a general fall in market conditions after the loan was made, notwithstanding that the lender would not have made the loan but for the negligent overvaluation.

154. *Kenny* was a case of a similar kind. The plaintiff was a mortgage insurer who was identified to the valuer as a party who would rely on the valuation obtained by the lender. Accordingly, the claim was in negligence not breach of contract but the relationship was described as “akin to contract”. As Gummow J put it, *Bank Bruxelles* was treated in England as:

“specifying a duty of care with a settled and limited scope, which applies where the plaintiff has provided funds or other financial

⁸⁸ (2001) 205 CLR 434, 443.

⁸⁹ (1999) 199 CLR 413.

⁹⁰ [1997] 1 AC 191.

accommodation on security of property, against a negligent valuation thereof by the defendant.”⁹¹

155. In *Kenny*, the plaintiff would not have agreed to insure repayment of the mortgage loan but for the valuer’s negligence. The High Court refused to follow the English cases that the part of the loss suffered because of the effect of general market decline on the value of the mortgaged property was not within the scope of the defendant’s liability for negligence.

⁹¹ (1999) 199 CLR 413, 444.