

# *Reflections on Common Sense Causation in Australia*

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## OVERVIEW

This chapter is comprised of two distinct Parts. Part I<sup>1</sup> argues that the High Court's so-called "common sense test" of causation is an empty slogan, neither a test nor anything to do with common sense. For clarity of legal analysis the issue of whether a factor was involved with the existence of the relevant phenomenon (that is, the issue of factual causation) should be kept explicitly separate from the issue of the appropriate scope of legal responsibility for that phenomenon. Expressing the latter scope issue as a "causal" issue is obfuscating and should be abandoned. This Part also argues: that Australian courts should cease referring to the "scope of the duty"; that a factor should be recognised as a factual cause if it contributes *in any way* to the existence of the phenomenon in issue even if it is neither a "but for" nor a sufficient factor for the existence of that phenomenon; and that aspects of the civil liability legislation prompted by the *Review of the Law of Negligence: Final Report*<sup>2</sup> (the "Ipp Report") can and should be ignored.

In his chapter the President of the Court of Appeal of the Supreme Court of New South Wales, Justice Allsop, seems more sanguine about the value of "common sense" as an approach to issues of "causation". Part II is my respectful response to His Honour's contribution. In it I elaborate the "factual causation then scope-of-liability-for-consequences" approach with illustrations from the common law and under statute, including many of those commercial cases discussed by Justice Allsop.

## PART I: FACTUAL CAUSATION

The doctrinal parameters of the tort of negligence are remarkably open-textured which is why it has typically been in negligence cases that foundational

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- 1 Part I is reprinted from J Stapleton, "Factual Causation" (2010) 38 *Federal Law Review* 467, a special issue in Honour of Professor Leslie Zines on his 80th birthday.
  - 2 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canprint Communications, Canberra, 2002).

formulations of factual causation have been made. This area of law has recently undergone an extensive restatement by the American Law Institute (the “ALI”) and been the subject of legislative attention in all Australian states. In the light of these developments this chapter sketches some essential issues relevant to factual causation which apply not only to the tort of negligence but throughout the law.

### *The Restatement of United States tort law*

At the end of the 20th century the ALI launched a project to compile a *Third Restatement* of the general principles of the United States law of torts. Previous restatements had covered a field described as “legal causation” so the question arose as to how to restate this field. The orthodox starting point for common law analysis is to read the cases and deduce therefrom the meaning courts ascribe to relevant terms such as “duty” or “breach”. This most basic of analytical techniques fails utterly in the area of causal terms. In the First and Second *Restatement of Torts* the term “legal cause” signified an amalgam concept consisting of both an historical connection element (did the breach contribute to the injury?) and a truncation of legal responsibility element (should the party in breach be liable for this injurious consequence of the breach?). Yet in some cases “legal cause” signified only the truncation of legal responsibility element. Exactly the same terminological disarray was present in relation to the term “proximate cause”: in some contexts it signified the amalgam of the two elements; in others, the most common usage, it referred only to the truncation issue. So it was that United States case law contained both: statements that proximate cause was the second component of legal cause;<sup>3</sup> and statements that legal cause was the second component of proximate cause.<sup>4</sup>

Compounding this confusion was the indiscriminate<sup>5</sup> deployment by United States courts of the term “substantial factor” (akin to the shifting use of “material contribution” in the Commonwealth<sup>6</sup>). Sometimes “substantial factor” was used in relation to the requirement that the legal complaint relate to an injury that is more than trivial. Elsewhere it was used: as a synonym for the “but for” test; or as a fudge to mask the inadequacy of the but for test of historical connection in cases such as where there are two or more sufficient factors;<sup>7</sup> or to mask radical rules developed to permit a plaintiff to jump an otherwise unbridgeable evidentiary gap.<sup>8</sup>

There was no value in the ALI attempting to “restate” this causal usage. Clarity of exposition required that causal terminology be confined to a single idea, namely the objective idea of historical connection, conveniently captured

3 See, for example, *Winn v Posades* 913 A 2d 407 at 411 (Conn 2007).

4 See, for example, *Harrison v Binnion* 214 P 3d 631 at 638 (Id, 2009).

5 D Dobbs, *The Law of Torts* (West Group, St Paul MN, 2000) at 416, “The substantial factor test is not so much a test as an incantation”.

6 See J Stapleton, “Cause-in-Fact and the Scope of Liability for Consequences” (2003) 119 *Law Quarterly Review* 388 at 394-395.

7 See, for example, *Anderson v Minneapolis, St Paul & Sault Ste Marie Ry* 179 NW 45 (Minn, 1920), a case involving the merging of two fires where the term was first coined by a United States court.

8 See J Stapleton, “The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims” (2009) 74 *Brooklyn Law Review* 1011.

by the term “factual causation”. It was crucial that this question of fact (and the special rules of law relating to its proof) be recognised as completely distinct from the issue of where and why responsibility for the infinite chain of consequences of conduct should be truncated. This truncation issue, sometimes known outside the United States as “remoteness”, rests entirely on the *normative* analysis of the facts. Accordingly it was recommended to the ALI:<sup>9</sup> that each of these two issues be given its own separate chapter in the new *Restatement*; that terms such as “legal cause”, “proximate cause” and “substantial factor” should be completely abandoned; and that henceforth, the truncation issue should be described in the completely non-causal terms of “the scope of liability for the consequences of breach”, or “scope of liability” for short.

It was a reflection of the deep dissatisfaction with the state of United States doctrine in the area, and in particular with the description of the truncation issue in causal terms, that all these suggestions were smoothly adopted by the ALI, despite their radical nature both in terms of their departure from the terminology of case law and in terms of the structure of preceding *Restatements*. Accordingly in volume 1 of the *Restatement Third, Torts: Liability for Physical and Emotional Harm*, Chapter 5 deals with the issue of “Factual Cause” while a completely separate chapter, Chapter 6, deals with the distinct truncation issue of “Scope of Liability”.

### *The Commonwealth*

What then about the state of case law on these issues in the Commonwealth? Remarkably, here there has been even more disarray for, whereas United States courts had long accepted that there were two separate issues at stake, the historical connection issue and the truncation issue, Commonwealth courts have struggled to express this separation in a consistent and coherent manner. One major source of difficulty in Australian courts has been the frequent and lamentable recourse to the slogan of “common sense” causation.<sup>10</sup>

Of course in some cases what the court means by this slippery term is simply the permission to infer facts from common experience. Even here, however, appeals to “common sense” can mislead. For example in *Naxakis v Western General Hospital* Gaudron J stated that:<sup>11</sup>

“For the purpose of assigning legal responsibility, philosophical and scientific notions are put aside ... in favour of a common sense approach which allows that ‘breach of duty coupled with an [event] of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the [event] did occur owing to the act or omission amounting to the breach’”.

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- 9 See J Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences” (2001) 54 *Vanderbilt Law Review* 941.
- 10 A typical example is *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; (2005) 221 CLR 568 at 581 [41] per McHugh J. Appeal to the idea of “common sense” causation is extremely rare in the United States and is widely deprecated in the United Kingdom. See, for example, *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391 at 1448 [5] per Lord Phillips.
- 11 [1999] HCA 22; (1999) 197 CLR 269 at 281 [36], citing *Betts v Whittingslowe* [1945] HCA 31; (1945) 71 CLR 637 at 649 per Dixon J.

Recent judgments of the High Court such as *Roads and Traffic Authority v Royal*<sup>12</sup> helpfully highlight the danger in such “common sense”: namely that a court will elide proof of breach (which increased the risk of a certain outcome) and foreseeable result (of the same type of outcome) with proof that the breach was a factual cause of that result in the specific case at hand, and fail adequately to consider whether there was, on the evidence, “any sufficient reason to the contrary”. In *Betts v Whittingslowe* Dixon J was careful to support the inference he drew with an explicit finding that “the facts warrant no other inference inconsistent with liability on the part of the defendant”<sup>13</sup>.

But more often the term “common sense causation” has been used by Australian courts in an attempt to navigate the analytical morass that results from a failure clearly to distinguish historical involvement and truncation. For decades the result has been that across swathes of Australian case law the deployment of causal terminology has been muddled and often incomprehensible, obscuring the underlying reasoning of the court. It brings the law into disrepute if, when confronted with a hotly disputed complex dispute about the appropriate point at which legal liability should be truncated, a court accepts the “glib submission”<sup>14</sup> that its resolution rests on nothing much more than “common sense”.

Resort to this problematic device was greatly fuelled by the publication in 1959 of *Causation in the Law* in which Herbert Hart and Tony Honoré sought to study the usage of causal terms by lawyers which they argued had tracked “the plain man’s use of causal notions”.<sup>15</sup> Importantly, while the book was being written Hart spent a sabbatical leave at Harvard where he observed at close quarters United States lawyers using causal terms such as “proximate cause” and “legal cause” to refer to or at least encompass the truncation issue. Influenced by such usage, Hart and Honoré asserted that both the question of historical contribution and the question of truncation of responsibility were “causal” questions: that causation in the law was “bifurcated”.

From selected data of causal usage, Hart and Honoré extracted what they called “common sense principles” of causation.<sup>16</sup> This is not the place to rehearse all the grave difficulties in their complex approach.<sup>17</sup> But it is worth looking at one of their elaborate and ultimately unhelpful “principles” because it illustrates the sort of textual obfuscation that runs through key Australian decisions. In looking at cases which turned on the truncation issue they found that it was often the case that liability was denied when, after the defendant’s breach of obligation, a third party or an abnormal event (such as lightning) had intervened. Australian courts often communicated this result by stating that the

12 [2008] HCA 19; (2008) 82 ALJR 870; (2008) 245 ALR 653. See also *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 and *Commissioner of Main Roads v Jones* [2005] HCA 27; (2005) 79 ALJR 1104 at 1119 [80]; (2005) 215 ALR 418 at 437 per Callinan J.

13 Above n 11 at 649.

14 K Mason, “Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?” (2000) 19 *Australian Bar Review* 201 at 210.

15 HLA Hart and AM Honoré, *Causation in the Law*, (2nd ed, Clarendon Press, Oxford, 1985) at 11.

16 Hart and Honoré, above n 15 at 26

17 See J Stapleton, “Choosing what we mean by ‘Causation’ in the Law” (2008) 73 *Missouri Law Review* 433 at 458-465.

intervention “broke the chain of causation” while, as we have seen, American courts typically did so by stating that the tort was not the “legal cause” or was not the “proximate cause” of the outcome. Since Hart and Honoré were committed to the project of mapping causal usage they concluded that: “courts have often applied, in their determinations of causal questions, a central concept in which great emphasis is laid on voluntary action or abnormal and coincidental events as negating causal connection”<sup>18</sup>

But the fact remained that there were myriad situations where the law imposed liability in the presence of just such an intervention.<sup>19</sup> While the fact of intervention of a third party or abnormal event certainly *may* be relevant to our enquiry about where liability should be truncated, it is not clear from Hart and Honoré *when and why* the intervention might be relevant: what they produced was merely a topography of causal usage not a geology of the normative reasoning lying beneath that usage. This absence of normative rationale exposes a judge to the temptation of merely asserting a conclusion on the truncation issue without providing reasons, while reciting some version of Hart and Honoré’s “central concept” of causal connection – a temptation to which McHugh J fell victim on a number of occasions.<sup>20</sup> This is hardly an advance on what Hart and Honoré rightly called the “obscure metaphor”<sup>21</sup> of the intervention “breaking the chain of causation”.

The temptation to resort to mere assertion was further exacerbated by Hart and Honoré’s characterisation of their observed patterns of truncation in terms of *causal* connections. Just as the Americans found that giving the truncation issue causal names such as “proximate cause” or “legal cause” carried with it the risk of confusing jurors, jury-free jurisdictions also face risks if the truncation issue is characterised as a “causal” question. This is because for many of us the notion of causation has a factual ring.<sup>22</sup> In ordinary speech we tend to think of something either being a cause or not, and we often do not see our conclusions on the matter as requiring normative justification. In short, so long as the truncation issue is framed in causal language, some judges will be tempted to present their determinations relating to truncation without adequate normative justification. Accompanying this is the risk that, so long as both the factual issue of historical involvement and the normative issue of the truncation of liability are framed as “causal” questions, a trial judge may not easily recognise whether statements in previous appellate cases concerning “causation” relate to historical involvement or truncation. Judges would better communicate their reasons if the historical contribution question was kept absolutely separate from the truncation question and if causal terminology was confined to the former.

18 Hart and Honoré, above n 15 at 130-131.

19 For example, sometimes there is liability even though lightning has intervened and sometimes there is no liability: we need to delve into the reasons why this is so. See Stapleton (2008), above n 17 at 461-464.

20 See, for example, *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408 at 429-430; *Nominal Defendant v Gardikiotis* [1996] HCA 53; (1996) 186 CLR 49 at 55. On the general point see Stapleton (2008) above n 17, 463-464; J Stapleton, “Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*” (2006) 122 *Law Quarterly Review* 426 at 431-436.

21 Hart and Honoré, above n 15 at xxxiii.

22 Indeed, Hart and Honoré even characterised their truncation notions as not just causal but “factual”. See Hart and Honoré, above n 15 at lii and 91.

The argument for such clarification of terminology<sup>23</sup> was referred to with approval in the Ipp Report which recommended the clear separation of factual causation and the scope of liability.<sup>24</sup> Bizarrely, however, the Ipp Report chose to retain the umbrella term of “causation” to signify the amalgam of both issues. So it was that, at the very time the ALI was stripping the truncation issue of its misleading causal label throughout the law of torts, the Ipp Report was entrenching that barrier to clarity of legal analysis in Australia: for all Australian states plus the Australian Capital Territory<sup>25</sup> followed the Ipp Report’s recommendation in question and adopted the “causation” umbrella term albeit only in the limited field covered by that Report, namely where the focus is on the “fault of a person (the ‘tortfeasor’);”<sup>26</sup> “negligence”<sup>27</sup> or a “breach of duty.”<sup>28</sup> So long as the “causation” term is used as such an umbrella concept, it renders incoherent the many judicial statements that “causation is essentially a question of fact.”<sup>29</sup>

Nothing would be lost and much would be gained if Australian courts quietly ignored the umbrella term both under these civil liability statutes where it does no substantive work and elsewhere, resisted the temptation to refer to “common sense causation” and proceeded directly to the analysis of the separate issues of factual cause and scope of liability. This substantial improvement in the clarity of exposition of judicial reasoning would, it is to be hoped, then work its way into legislative drafting which has been so bedevilled by cryptic terms aimed at capturing some amalgam of factual cause and scope of liability.<sup>30</sup>

### *Doctrinal requirements analytically prior to and affecting the factual cause issue*

Factual cause is not the only element of any plaintiff’s cause of action. For example, in the tort of negligence a plaintiff must show her claim to be a type of complaint that is actionable in this tort: she cannot, for example, complain of discomfort from noise or smells, even though these may be actionable in another cause of action such as the tort of private nuisance. The list of types of complaint that are actionable in a cause of action is not closed. One important

23 See Stapleton, above n 6.

24 Commonwealth of Australia, above n 2 at 109 n 6, 117-118 [7.49] (Recommendation 29).

25 *Civil Law (Wrongs) Act 2002* (ACT), s 45; *Civil Liability Act 2002* (NSW), s 5D; *Civil Liability Act 2003* (Qld), s 11; *Civil Liability Act 1936* (SA), s 34; *Civil Liability Act 2002* (Tas), s 13; *Wrongs Act 1958* (Vic), s 51; *Civil Liability Act 2002* (WA), s 5C. Neither the Commonwealth nor the Northern Territory has implemented any provision relating to “causation”.

26 *Civil Liability Act 2002* (WA), s 5C(1).

27 *Civil Law (Wrongs) Act 2002* (ACT), s 45(1); *Civil Liability Act 2002* (NSW), s 5D(1); *Civil Liability Act 1936* (SA), s 34(1); *Wrongs Act 1958* (Vic), s 51(1).

28 *Civil Liability Act 2003* (Qld), s 11(1); *Civil Liability Act 2002* (Tas), s 13(1).

29 *Bennett v Minister of Community Welfare* above n 20 at 412-413 per Mason CJ, Deane J and Toohey J; *Roads and Traffic Authority v Royal* above n 12 at ALJR 886 [81]; ALR 674 per Kirby J.

30 All liabilities, including those arising under statute, are limited. A statute may expressly limit the type of consequence that comes within its scope: see, for example, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* above n 10. Or such limits may be generated implicitly by the clear purpose of the statute, for example, *Gorris v Scott* (1873-1874) LR 9 Ex 125. More often these must be divined by the court from more general interpretations of the purpose of the rule in the light of the general law.

area of current controversy is whether a negligence plaintiff will be allowed to complain about the loss of a chance. This is relevant to my topic tangentially because sometimes courts create a special rule to assist a plaintiff and it is not clear whether the rule extends the list of complaints that are actionable or is a special rule about proof of factual cause.

Next, the plaintiff must establish that the defendant owed her a duty of care in relation to the damage of which she complains. Traditionally, duty operates as an “incidence” rule by specifying the contexts in which, were a defendant to have appropriate legal advice before he conducted himself, he could be advised that he owed “such and such” a legal obligation. For example in relation to physical injury we owe a duty to the whole world when we engage in affirmative action. The *nature* of that duty to the whole world is always the same: simply to take reasonable care to avoid causing physical injury to anyone (though its *content*, that is what reasonable care requires in the circumstances, will vary).<sup>31</sup>

One could, of course, collapse all the elements of the tort of negligence – actionable damage, duty, breach, factual cause and scope – into one amorphous unstructured proposition of law: that in the circumstances the defendant owed this plaintiff a duty of reasonable care not to cause this particular outcome of which the plaintiff complains. But this merges, and therefore dulls to the point of uselessness, any specific messages about, and themes within, the underlying legal concerns influencing the outcome of the case. For example, the duty analysis provides the opportunity to signal systemic concerns such as the concern with individual autonomy that underlies the no-duty-to-rescue-a-stranger doctrine. Moreover, it does not help people to understand, and to the extent possible, be guided by the law.<sup>32</sup>

Alas, this was the step Lord Hoffmann took in *South Australia Asset Management Corp v York Montague Ltd*.<sup>33</sup> In communicating his decision that a valuer was not liable for a particular outcome suffered by the plaintiff, his Lordship asserted that such an outcome did not fall within “the scope of the duty” of the valuer. In making this move His Lordship not only collapsed the specific truncation issue in the case into some duty-breach amalgam but also failed to justify why the liability of this valuer did not extend to the particular loss.

It may well be that the reason why conduct is judged to be a breach provides a sound basis on which to determine whether a particular consequence of that breach should be judged to be within or outside the appropriate scope of liability for consequences. For example, if, as in *Chappel v Hart*<sup>34</sup> (discussed

31 The situation is more complex where the duty is one of affirmative action or the form of actionable damage in issue is nervous shock or pure economic loss. Here there is a normative “envelope” confining the obligation to certain types of risk: see J Stapleton, “The Risk Architecture of the *Restatement (Third) of Torts*” (2009) 44 *Wake Forest Law Review* 1309 at 1322, 1325-1326 and 1328.

32 See Stapleton, above n 9 at 996 n 142.

33 [1997] AC 191 (HL).

34 [1998] HCA 55; (1998) 195 CLR 232 (“*Chappel*”). In general, see Stapleton, above n 20 at 447-448. But even if it is completely uncontroversial that the outcome was “the very kind of thing” the risk of which had been a reason why the defendant’s conduct was judged to be a breach, this does not relieve the plaintiff from proving factual cause: see *Adeels Palace Pty Ltd v Moubarak* above n 12 at 442 [51].

in detail in Part II<sup>35</sup>), the central ground on which the defendant's conduct was held to be a breach of the duty of care was that a reasonable person would have warned about the risk of a *certain* consequence, this provides a straightforward ground for including such a consequence within the scope of liability even if the risk had been of extremely low probability. Conversely, the mischief to which a statutory liability is expressly targeted provides a sound reason for judging some other consequence to fall outside the appropriate scope of that liability.<sup>36</sup>

But typically, outside the warning and some statutory contexts, the bearing that the nature of the breach has on the truncation (that is, scope) issue is much more complex and contestable, and these qualities are masked when the judgment on the truncation issue is communicated in terms of a merely asserted "scope of the duty".<sup>37</sup> By 2005 Lord Hoffmann had recognised the inappropriate bootstraps quality of his "scope of the duty" approach and explicitly disapproved it, recognising that by the term "scope of the duty" he had intended to refer to what is required to avoid breach, which is always and simply to take reasonable care in the circumstances. This question "has nothing to do with the extent of the consequences for which the valuer is liable".<sup>38</sup>

Regrettably Australian courts often refer to the "scope of the duty". It is preferable for such usage to cease: where courts want to refer to the issue of breach, namely what it was that reasonable care required of the defendant in the circumstances, safer, more transparent terms are available such as the "content of the duty of care" or the "content of the obligation".

## *Factual cause*

### *Necessary factors*

Courts throughout the world are agreed that the relation of necessity (that is, "but for") between the breach and outcome is one that the law should designate as causal. If then, according to the fact-finder's evaluation of the evidence, the plaintiff has established to the requisite standard of proof that the outcome would not have occurred if the breach had not occurred; the plaintiff has shown that the breach is a factual cause of the outcome. Thus in *Chappel* it was because, in the evaluation of the fact-finder, Mrs Hart would not have had the operation where and when she did had Dr Chappel given her the warning he should have given, that his breach was a factual cause of her perforated oesophagus. Similarly, in *March v Stramare (E & MH) Pty Ltd*<sup>39</sup> the breach was clearly a factual cause: had the defendant not carelessly parked his truck in the mid-line of the street, the intoxicated plaintiff would not have hit it. The controversial issue in both *Chappel* and *March* concerned the normative truncation question: should this outcome of the breach be regarded as within the appropriate scope of the defendant's liability? This is not a question of fact or "common sense" but of normative judgment on which reasonable minds might differ.

35 [1997] AC 191 at 213 (HL) ("SAAMCO"). See below pp 353–356.

36 *Gorris v Scott* above n 30.

37 J Stapleton, "Negligent Valuers and Falls in the Property Market" (1997) 113 *Law Quarterly Review* 1 at 1-7; Stapleton, above n 6 at 390-391.

38 L Hoffmann, "Causation" (2005) 121 *Law Quarterly Review* 592 at 596.

39 [1991] HCA 12; (1991) 171 CLR 506 ("*March*").

There can be more than one necessary factor, as illustrated by the facts of *March* itself where both the plaintiff's intoxicated driving and the defendant's careless parking of the trunk on the mid-line of the road were but for factors of the collision.<sup>40</sup>

#### *Multiple sufficient factors*

Though the but for test of factual causation is notoriously inadequate, the Ipp Report made no recommendation on the issue of which relations besides this one of necessity should be designated as causal by the law. The grounds given for this omission were unconvincing. First it was said that the problem lay in cases of overdetermination by multiple-sufficient factors. An example of this is what I call the "double hit hunters' case" where two hunters carelessly shoot and a mountain walker is hit by both bullets each of which would have been sufficient to kill instantly. In fact the problem for the law is, as we will see, much more extensive than these special cases. The second argument for inaction, namely that "the law has devised rules for resolving such cases in ways that are generally considered to be satisfactory and fair",<sup>41</sup> is wishful thinking: judicial treatment of these cases is confused, a state of affairs that is understandable given the relative neglect of causal analysis by legal scholars.

Though a regime of tort law might confine its interest to necessary (that is, but for) factors, clearly none does this. In other words, the law is interested in the possibility of imposing liability on non-necessary factors and in order to do so must recognise them as qualifying as "causal". The most often-cited examples of non-necessary relations that the law chooses to designate as causal are multiple *sufficient* factors that are *independent* of one another. In such cases each tortious factor is designated as causal even though not necessary:<sup>42</sup> so, in the example in the previous paragraph, each hunter is recognised as a cause. The equivalent recognition would no doubt be afforded where the multiple non-necessary factor is an omission (which would be the case if, for example, the hunters were children and the defendants were the parents who had independently and culpably failed to control their respective children). Moreover, there are plausible reasons why the same approach should be taken to the relation to the outcome of multiple *sufficient* omissions which are *dependent* – that is where, to avoid the outcome one party would have had to act on a state of affairs set up by another but where the first omitted to act and the other omitted to set up: for example where one doctor carelessly failed to place in a patient's medical record a note of critical information concerning a patient's medical history and a later treating doctor carelessly failed to seek the patient's medical records.<sup>43</sup>

40 An illustration of multiple but for factors that are omissions was given in *Bennett v Minister of Community* above n 20 at 429.

41 Commonwealth of Australia, above n 24 at 109 [7.26].

42 *March* above n 39 at 516 per Mason CJ; *Chappel* above n 34 at 283 [116] per Kirby J.

43 Cf *Elayoubi bnhf Kolled v Zipser* [2008] NSWCA 335. But the point has divided academic opinion: see Stapleton, above n 17 at 477-479.

*Non-necessary non-sufficient factors*

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

Five members of a club's governing committee unanimously, but independently and in breach of duty, vote in favour of a motion to expel Member X from the club, where a majority of only three was needed under the club's rules. The vote of Committee Member Number 1 is neither necessary nor sufficient for the motion to pass. This is true of the vote of each member, yet the motion passed. Where there is a liability rule requiring proof that the vote of the individual voter was a factual "cause" of a motion passing, the law must recognise this relation of one vote to the passage of the motion as "causal".<sup>44</sup>

Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic lookout at the edge of a mountain. Their combined force results in the car rolling over a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by the push of any one actor would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient.<sup>45</sup> The negligence of any one actor is neither necessary nor sufficient for the car's destruction, this is true of each actor, yet the car was destroyed. Again, the law is interested in the possibility of imposing liability on the individual pusher so it must recognise the relation of one push to the car's destruction as "causal".

There are many other instances where the contribution of the defendant's breach of duty to the outcome in issue is neither necessary nor sufficient. Moreover, there may be situations where the extent of a factor's contribution to an outcome is hard for the honest plaintiff to quantify so that, while he can show it contributed, he is unable to show that this contribution was necessary or sufficient for the outcome. This is typically the situation in pollution cases and in cases where the plaintiff has made a decision after taking into account a number of considerations. For example, consider the following:

Three factories each independently and in breach of duty discharge oil into a bay. By a regulatory standard, fishing in the bay is forbidden if the concentration of oil is greater than a particular level. By the time the pollution is detected the concentration level far exceeds this regulatory standard. When the ban is triggered this causes grave economic injury to local commercial fishermen who are unable to quantify the contribution each factory's discharge made.

44 Stapleton, above n 17 at 443. The concept of a causal contribution must be carefully distinguished from the notion of "damage". Suppose three voters had not been in breach of a duty: then a defendant's vote in a breach of duty would be a factual cause of the expulsion; but would not have caused "damage" to X (that is, to the prospects to which X was legally entitled) because had X suffered no breaches of duty he would still have been expelled.

45 *Restatement Third, Torts: Liability for Physical and Emotional Harm*, vol 1, § 27, Illustration 3 at 380-381 which designates the relation of each actor's negligence to the car's destruction as being a "factual cause".

Xavier, Yadra and Zach independently but fraudulently advise Penny that the published financial statements of a company, Tenron, are honest and strong. This advice is sufficient to persuade Penny to invest in Tenron, whose share price almost immediately collapses when it is revealed that the financial statements of the company dishonestly misrepresented the health of its finances.

What these four examples show is that a non-necessary non-sufficient factor may contribute to the existence of a phenomenon. It does so by forming part of an undifferentiated whole that operates to bring about the existence of the phenomenon: a single vote formed part of the unanimous resolution; Able's push formed part of the total physical force that sent the car off the edge of the mountain; the discharge by one factory formed part of the total concentration that exceeded the regulatory standard; and Xavier's advice was part of the total information that persuaded Penny. The examples also illustrate how the law is interested in the possibility of imposing liability on non-necessary and non-sufficient factors. To do so the law needs to designate a notion of factual causation that is wide enough to accommodate these contributions. This is why the "but for" test of factual cause is under-inclusive and why courts grasp at vague undefined labels such as "substantial factor" and "material contribution" to their attempt to recognise a non-necessary non-sufficient factor as a "cause".

It is only the seductive simplicity of the "but for" test that distracts courts from enunciating an appropriately wide statement of the relation of "factual cause": namely, that a factor is a factual cause if it contributes *in any way* to the existence of the phenomenon in issue. Courts should no longer allow the fact that in most cases the contribution in issue will have been one of necessity (but for), to mislead them into regarding necessity as the fundamental form of causal relation recognised by the law: courts should grasp that it is the relation of contribution.

An appreciation that contribution is the fundamental form of causal relation is especially important in the context of decision-making where, as McHugh J emphasised in *Henville v Walker*:<sup>46</sup>

"... the long-standing recognition of the possibility that two or more causes may jointly influence a person to undertake a course of conduct ... a representation need not be the sole inducement in sustaining the loss. If 'it plays some part even if only a minor part', in contributing to the course of action taken – in that case the formation of a contract – a causal connection will exist."

Two associated points need to be mentioned here. First, notice that the four examples given so far involve an *indivisible* outcome and the discussion has been about a non-necessary non-sufficient contribution to the existence of that indivisible outcome: if the breach did make such a contribution and if all other elements of the cause of action are established, the defendant is jointly and severally liable for the entire indivisible outcome. This should be sharply

46 [2001] HCA 52; (2001) 206 CLR 459 at 493 [107]. See also *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1 at 8, where the plaintiff's injuries from the tort were a "contributing cause of his decision to retire".

distinguished from cases where the issue is whether a factor is a factual cause of only part of a *divisible* outcome, say pneumoconiosis or deafness: here if all elements of the cause of action are established, the defendant is only liable for that part of the divisible outcome in relation to which the breach was shown to be a factual cause (unless a special proof rule is available<sup>47</sup>).

Secondly, though it is for normative reasons that the law requires its notion of “cause” to be wider than the relation of necessity (that is, but for factors) and to include any relationship of contribution to the existence of the phenomenon, whether this relationship is present in any individual case is a matter of objective fact not normative choice. Two amplifications of this latter point should, however, be noted when we move to the quite separate issue of how this factual causation relationship of contribution might be *proved*: the evaluative nature of assessing evidence; and the possibility of special proof rules.

The relevant evidence on causal contribution is often disputed even in the most banal of orthodox cases so that the decision-maker must make an evaluative decision on whether this factual relation of causal contribution is to be treated as having been established to the requisite standard of proof: but the evaluative nature of this process does not alter the factual nature of the underlying relation in dispute.<sup>48</sup>

The other useful amplification here is that, as we will see below, in a very few distinct areas the law constructs special localised proof rules: while these are prompted by particular normative concerns, they also do not alter the factual nature of the underlying relation in issue.

### *The Ipp Report*

We are now in a position to consider the following recommendations of the Ipp Report with respect to factual causation:<sup>49</sup>

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

47 See below p 352.

48 Cf *Roads and Traffic Authority v Royal* above n 12 at ALJR 887 [84]; ALR 675 per Kirby J that “the determination of causation-in-fact is not one that can be made without recourse to broader considerations”.

49 Commonwealth of Australia, above n 2 at 118 [7.49].

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

### *Proof of factual cause*

The formulation of breach fixes what needs to be proved in the factual cause inquiry. For example, suppose a person is driving at 60km/ph, which is 10km/ph above what is reasonable in the circumstances, when a child darts out and, being unable to stop in time, the driver collides with the child. What should the subject matter of the factual cause inquiry be? Should it be the tortious aspect of the conduct, which is the increment of speed above what was reasonable? Or should it simply be the actor's conduct, namely, his driving? Clearly, it is the former. The law is not interested in whether "driving" contributed to the collision; it is interested in whether the breach did so.

It is sometimes forgotten that it is the formulation of breach that sets up what needs to be proved in the factual cause step of legal analysis. For example, in *Roads and Traffic Authority v Royal*<sup>50</sup> the alleged breach by the defendant, a road authority, was that it had allowed an intersection design in which one moving car could obscure or mask the presence of another moving car from the view of a car stationary at the intersection.<sup>51</sup> Yet, as the High Court (Gummow, Hayne and Heydon JJ) found, in this particular case the stationary driver had been able to see the relevant vehicle<sup>52</sup> so the breach *as formulated* could not have contributed to the accident at all.<sup>53</sup>

Next: the orthodox rule is that on the issue of factual causation the plaintiff bears the burden of proof on the balance of probabilities. The Ipp Report confirmed the wisdom of this and disapproved the recognition of special proof rules that shift the burden of persuasion to the defendant.<sup>54</sup>

Sometimes this proof involves a number of steps. For example in a failure-to-warn claim against a pharmaceutical manufacturer the plaintiff typically has to establish that the drug is capable of contributing to the relevant outcome

50 Above n 12.

51 Above n 12 at ALJR 877 [26]; ALR 660-661.

52 Above n 12 at ALJR 875 [18]; ALR 659.

53 See also *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5; (1998) 192 CLR 431 at 452 [45] per Toohey and Gummow JJ: "if the appellant established a breach of the duty of care cast upon the respondent, by reason of the failure to provide a fence a finding of causation was almost inevitable. If negligence lay in the failure to provide a warning sign, causation would remain a live issue."

54 Commonwealth of Australia, above n 2 at 111 [7.34].

(that is, that it has what we might call “generic capacity”<sup>55</sup>) and that it did so in this individual case (which we might call “individual agency”) before the critical factual cause question can be asked about whether the failure-to-warn contributed to the outcome.

Another complexity arises here. It is often easy to grasp the notion of how a contribution that is neither necessary nor sufficient may contribute to the existence of a phenomenon by forming part of an undifferentiated whole that operates to bring about the existence of the phenomenon: for example, how a single vote formed part of the unanimous resolution and how Able’s push formed part of the total physical force that sent the car off the edge of the mountain.<sup>56</sup> But it may sometimes be helpful for courts or commentators to be able to refer to an algorithm that represents the notion of contribution. This is known as the NESS test:<sup>57</sup> a factor, such as a single vote in our club example, “contributes” to the outcome if it is a Necessary Element for the Sufficiency of a Subset of the facts. This algorithm identifies the contribution of the vote of Committee Member Number 1 to the passage of the motion to expel: this vote is necessary for the subset (consisting of the vote of Member Number 1 along with the votes of Members Number 2 and Number 3) to be sufficient for passage.

Even in the typical case where the plaintiff’s claim of factual cause rests on the claim that the breach was necessary for the outcome, proof of factual causation clearly involves establishing both facts about the actual past and speculation about what would have happened in the past in some hypothetical world where (*inter alia*) the breach had not occurred.<sup>58</sup> Orthodoxy requires both to be established on the balance of probabilities.<sup>59</sup> (These issues are often hotly contested requiring the decision-maker to make careful evaluations of complex evidence). So, for example, where hypothetical conduct is in issue the relation of interest to the law is what the particular individual would probably have done. The Ipp Report correctly emphasised that the relation of interest is what the relevant individual would have done, not what some normative creation, such as a “reasonable person”, would have done: thus, in *Commissioner of Main Roads v Jones*<sup>60</sup> the issue was what this driver would probably have done had there been relevant warning and speed signs, not what a reasonable driver would have done. In their post-Ipp Report civil liability reform legislation<sup>61</sup> five States explicitly re-iterated this rule in relation to the hypothetical conduct of the injured person.

55 See, for example, *Seltsam v McGuinness* (2000) 49 NSWLR 262 (NSWCA) (is inhalation of asbestos capable of contributing to the contraction of renal cells carcinoma?).

56 See the text above accompanying nn 44-45.

57 See Stapleton, above n 17, 444, 459, 471-480.

58 See, for example, *Naxakis v Western General Hospital* above n 11; *Gates v City Mutual Life Assurance Society Ltd* [1986] HCA 3; (1986) 160 CLR 1.

59 These issues must be distinguished from the “contingency” that another factor which did not operate might have done so and caused the phenomenon in issue (such as an injury): see *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638.

60 [2005] HCA 27; (2005) 79 ALJR 1104; (2005) 215 ALR 418.

61 *Civil Liability Act 2002* (NSW), s 5D(3)(a); *Civil Liability Act 2003* (Qld), s 11(3)(a); *Civil Liability Act 2002* (Tas), s 13(3)(a); *Wrongs Act 1958* (Vic), s 51(3); *Civil Liability Act 2002* (WA), s 5C(3)(a).

But the Ipp Report and the responding legislation are significantly incomplete: the appropriate subjectivity rule is a general one and applies to the hypothetical conduct, not only of the injured person, but also of the defendant and third parties. Fortunately the High Court has been alive to the need to supplement the post-Ipp civil liability legislation with common law principles. Thus in *Adeels Palace Pty Ltd v Moubarak*<sup>62</sup> when two patrons who had been shot by another patron sued a restaurant for providing inadequate security, the High Court correctly inquired into whether the evidence of the specific assailant, “a determined person armed with a gun and irrationally bent on revenge”,<sup>63</sup> supported the plaintiff’s claim that additional security staff would have succeeded in deterring him.

### *Special rules concerning proof of factual causation*

Plaintiffs can face insuperable<sup>64</sup> evidentiary gaps when trying to establish either the relevant past facts or what would have happened in a hypothetical past situation. Of course usually such a plaintiff fails<sup>65</sup> but on occasion courts or legislatures have, in response to a particular policy concern, crafted a special rule allowing the plaintiff to leap the evidentiary gap and establish factual cause.

Before analysing these, however, it is worth noting that in rare cases a special rule of proof of factual cause has been created which makes the plaintiff’s task *more* difficult.

#### *Self-serving testimony*

In some contexts the concern that a plaintiff will give self-serving testimony as to what they would have done in the relevant hypothetical past situation has triggered a rule barring such testimony. The Ipp Report recommended such a rule and four States have included it in their reform legislation.<sup>66</sup>

What these moves overlook is that self-serving testimony may be proffered by any party. Consider a medical negligence case where the alleged breach was a failure to attend to the patient. If the plaintiff can prove that, had the defendant attended, the defendant would, on the balance of probabilities, have taken steps that would have prevented the deleterious outcome, factual cause will be established. But what if one possible reasonable treatment would not have achieved such prevention: as was the case in *Bolitho v City and Hackney Health Authority*.<sup>67</sup> The defendant has a real incentive to give the self-serving testimony that, had she attended the patient, she would have chosen the treatment regime that would have made no difference to the outcome.

62 Above n 12.

63 Above n 12 at 441 [49].

64 Of course many evidentiary gaps can be bridged by legitimate inference as in *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267; (1979) 23 ALR 345.

65 See, for example, *West v Government Insurance Office of NSW* [1981] HCA 38; (1981) 148 CLR 62.

66 *Civil Liability Act 2002* (NSW), s 5D(3)(b); *Civil Liability Act 2003* (Qld), s 11(3)(b); *Civil Liability Act 2002* (Tas), s 13(3)(b); *Civil Liability Act 2002* (WA), s 5C(3)(b).

67 [1998] AC 232 (HL). For an especially insightful discussion, see M Jones, *Medical Negligence* (4th ed, Sweet & Maxwell, London, 2008) at 445-446.

*Heeding presumption*

Much more commonly courts and legislatures have crafted a special rule concerning the proof of factual cause to *assist* the plaintiff. Sometimes such a rule relates to proof of what would have happened in the relevant hypothetical past world had there been no breach. A striking example was created in the United States when plaintiffs brought defective product claims and alleged that the defect was a failure to warn.<sup>68</sup> When relying on such an allegation the plaintiff is required by orthodox rules to show that, had an adequate warning been given, it would have been read and heeded and the injury avoided. But how can a plaintiff prove this in the face of firm psychological evidence that suggests people rarely read labels? For policy reasons many United States courts decided to assist a plaintiff over this evidentiary problem by recognising a “heeding presumption”, that the warning would have been heeded and acted upon: this is virtually always enough to get the issue to the jury.

*Market share doctrine: known mechanism; indivisible injury*

In other contexts a special pro-plaintiff rule of proof of factual causation allows the plaintiff to jump an evidentiary gap concerning past facts. An exotic example of this is the market-share doctrine under which the plaintiff need not establish that the defendant’s product was the one that injured her and can recover against that defendant in proportion to its market share in relation to that product.<sup>69</sup> In California this special rule is characterised as one merely going to the proof of factual causation and not to a reformulation of what can form actionable damage, that is, what can form the “gist” of the claim.<sup>70</sup>

*Alternative liability: known mechanism; indivisible injury*

The most well-known rule relating to an evidentiary gap concerning past facts is the “alternative liability” rule from *Summers v Tice*<sup>71</sup> which has been adopted by virtually all United States jurisdictions. Here there were two hunters: the mechanism of injury was known to be due to just one agent (only one shot had hit the victim); the injury was known to be indivisible; the number of tortfeasors was small (two); all tortfeasors were before the court; and identification of the involved agent was impossible. Each was held jointly and severally liable.

*The “indivisibility-of-injury” rule: known mechanism; cumulative injury*

In some jurisdictions<sup>72</sup> a different pro-plaintiff rule of proof about past facts has been created in certain cases where the total injury was known to be divisible

68 DG Owen, *Products Liability Law* (2nd ed, Thomson West, St Paul MN, 2008) at 797-801.

69 See *Sindell v Abbott Labs* 607 P 2d 924 at 937 (Cal 1980); *Brown v Superior Court* 751 P 2d 470 at 485-487 (Cal 1988).

70 See *Jolly v Eli Lilly & Co* 751 P 2d 923 at 930 (Cal 1988). In New York the doctrine cannot be characterised this way because there it is no answer to the claim for the defendant to prove the relevant unit could not have been one he produced: see *Hymowitz v Eli Lilly & Co* 539 NE 2d 1069 at 1078 (NY 1989).

71 199 P 2d 1 (Cal 1948).”

72 The argument that in *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 Dixon CJ had recognised an equivalent special rule shifting the legal burden on to the defendant “to do the disentangling” was rejected in *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164. On which see H Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis, Sydney, 2006) at 152-155.

but the relative contributions to the total injury could not be adequately determined so that while it was known that each agent had tortiously caused some but not all the total injury, the defendant was nevertheless held jointly and severally liable for the total injury as if it was indivisible. In the United States courts commonly recognise such an “indivisibility-of-injury” fiction in relation to water pollution and asbestos.<sup>73</sup>

While the result in *Bonnington Castings Ltd v Wardlaw*<sup>74</sup> is also consistent with the “indivisibility-of-injury” fiction, it is unclear whether the House of Lords intended to create such a special rule of proof of factual cause because the case revolved around a more fundamental issue, namely whether a defendant could be liable at all if his breach had only caused part of a total injury.<sup>75</sup> When the point came for resolution in other cumulative disease cases in the United Kingdom<sup>76</sup> no special rule was applied: the plaintiff was required to show, on a rough and ready basis, how much of the injured’s total injury the breach had factually caused.

*The material contribution/exposure to risk doctrine: unknown mechanism; indivisible injury*

Much more radical is the rule created in some jurisdictions to allow plaintiffs to establish that one source of risk among many was a factual cause of an indivisible medical condition when the mechanism of that condition is unknown, as is the case with mesothelioma. A victim of such a condition could not succeed on orthodox principles because it is not possible to make a “robust and pragmatic”<sup>77</sup> inference that the individual source of risk contributed to the condition: an impossibility elegantly exposed in *Fairchild v Glenhaven Funeral Services Ltd*.<sup>78</sup> Nor is it possible to apply the special *Summers v Tice*<sup>79</sup> proof rule of alternative liability which requires all risk-creators to be culpable and before the court; nor can the plaintiff seek to use the “indivisibility-of-injury” fiction which requires that it is known that the total injury resulted from cumulative injuries from every source of risk.

The radical rule of proof adopted in these unknown-mechanism cases, described as the “material contribution to risk” doctrine in the United Kingdom or the “exposure to risk” doctrine in the United States, does present significant challenges, for example: what is its incidence (for example, does the rule

73 See Stapleton, above n 8. Both the “indivisibility-of-injury” rule and the “alternative liability” rule have been restated in § 28 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. The former had been covered by § 433B(2) of the *Restatement (Second) of Torts* while the latter had been covered by § 433B(3).

74 [1956] AC 613 (HL).

75 J Stapleton, “Lords a’leaping Evidentiary Gaps” (2002) 10 *Torts Law Journal* 276 at 283.

76 See, for example, *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 QB 405 (QB) (deafness) and *Holtby v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086 at 1094–1095 [20] (asbestosis).

77 *Wilsher v Essex Area Health Authority* [1988] AC 1074 (HL) at 1090 per Lord Bridge in a doomed attempt to fit *McGhee v National Coal Board* [1973] 1 WLR 1 (HL); [1972] 3 All ER 1008 into orthodox principles.

78 See, for example, [2002] UKHL 22; [2003] 1 AC 32 at 57–58 [22] per Lord Bingham.

79 Above n 71.

only apply to “single-agent” conditions)?<sup>80</sup> Does the rule shift the burden of persuasion? Does the rule support *in solidum* or joint and several liability? And is the rule appropriately characterised only as a special rule of proof of factual causation or is it preferable to see it as recognising exposure to risk (that is, loss of a chance) as actionable damage in the limited area of incidence of the rule?<sup>81</sup> Nevertheless, turning a blind eye to the dilemma that such diseases present to orthodoxy leads to the sort of incoherence that bedevils the case law on asbestos cancers in Australia which currently proceeds on the basis of unacknowledged and conflicting fictions about aetiology.<sup>82</sup>

### *The Ipp Report*

We are now in a position to consider the Ipp Report’s recommendation in relation to proof of factual causation that “[i]n appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation”<sup>83</sup> so long as the normative nature of such a special rule of proof is acknowledged and openly analysed. The recommendation is to be welcomed in as much as it will bolster the separation of the factual question of whether a factor is a cause from the normative issue of whether this particular class of plaintiff should be afforded a special rule of proof on this factual issue.

Five States have enacted a provision broadly in line with this recommendation but South Australia and the Australian Capital Territory limited their provision to cases where the plaintiff “has been negligently exposed to a similar risk of harm by a number of different persons (the defendants) and it is not possible to assign responsibility for causing the harm to any one or more of them”.<sup>84</sup> The latter provision is clearly not wide enough to authorise special rules in one-wrongdoer cases such as a heeding presumption or the approach adopted in cases such as *McGhee v National Coal Board*.<sup>85</sup> This limited provision may not even authorise a rule purporting to cover situations where not all risk creators need be joined as defendants such as the market share doctrine, the “indivisibility-of-injury” rule and the material contribution/exposure to risk doctrine.

But such developments may still occur at common law. Apart from the entrenchment of the rule that the burden of proof rests on the plaintiff, there is nothing in the post-Ipp Report civil liability legislative provisions dealing with either factual causation or scope of liability that inhibits the future recognition of special rules of proof or the enunciation of guiding principles governing the scope of liability. In relation to both, the legislation is best seen as reporting

80 See Stapleton, above n 8. Cf *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572 and *Rutherford v Owens-Illinois Inc* 941 P 2d 1203 (Cal 1997).

81 Note the problematic characterisation by Lord Hoffmann in *Barker v Corus UK Ltd* above n 80 on which see Stapleton, above n 20 at 448 n 77.

82 See J Stapleton, “Factual Causation and Asbestos Cancers” (2010) 126 *Law Quarterly Review* 351 (a note on *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111).

83 Commonwealth of Australia, above n 2 at 118 [7.49], Recommendation 29(d).

84 *Civil Law (Wrongs) Act 2002* (ACT), s 45(2); *Civil Liability Act 1936* (SA), s 34(2).

85 Above n 77.

the legitimate law-making role of the courts,<sup>86</sup> save with the caveat that courts must enunciate the considerations that have been taken into account. Beyond that the legislation properly “offers no further guidance about how the task is to be performed”.<sup>87</sup> In these areas, and despite superficial variations in statutory language, the critical role of the High Court in nurturing and developing a national system of common law remains undiminished.

### *The future*

Australian courts have struggled to express the distinction between factual causation and the truncation (that is, the scope) issue, a struggle compounded by the lamentable recourse to the slogan of “common sense causation”. The attempt by the Ipp Report and the responding legislation to achieve the separation of these two issues was undermined by the retention of the umbrella term of “causation” to cover the amalgam of both. Since that umbrella term does no substantive work in the legislation, Australian courts should quietly ignore it. They should also no longer obscure their judicial reasoning by reference to “common sense causation”. A great advantage of such moves is that it encourages exposure of the nature, variety and complexity of concerns in play at the truncation stage.

If then, the obfuscation of “common sense causation” is stripped out of future truncation analysis what might we find? It is obvious that, just as with the issue of what “reasonableness” requires on the facts of a case, the scope issue cannot be reduced to some formula. On the other hand, just as with “reasonableness”, the scope issue does contain some internal structure which we can begin to enunciate. For example, we can say that a consequence will fall outside the appropriate scope of liability for negligence unless it at least: can plausibly be said to fall within the “perimeter rule” of “foreseeability of the type of harm”;<sup>88</sup> is “damage” relative to the normal expectancies of the plaintiff absent torts;<sup>89</sup> is not a coincidental consequence;<sup>90</sup> and is the result of one of the risks that made the conduct careless.<sup>91</sup> Moreover, in judging where the chain of responsibility should be truncated a court may take account of a range of other

86 J Stapleton, “The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable” in P Cane (ed), *Centenary Essays for the High Court of Australia* (Butterworths, Sydney, 2004) 242 at 244: A “vital secret of our constitutional arrangements is the close union of the judicial and legislative powers in the court of ultimate appeal and...our common law legal systems embrace a form of the separation of powers doctrine that accommodates this substantial law-making capacity”.

87 *Adeels Palace Pty Ltd v Moubarak* above n 12 at 443 [54].

88 Derived from *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The “Wagon Mound” (No 1))* [1961] AC 388 (PC) and *Hughes v Lord Advocate* [1963] AC 837 (HL).

89 Stapleton, above n 6 at 401, 412-417. *Travel Compensation Fund v Robert Tambree* [2005] HCA 69; (2005) 224 CLR 627 runs counter to the usual judgment that if, but for the breach of an obligation of care, the plaintiff would have suffered an equivalent loss in a different transaction, it lies outside the appropriate scope of liability.

90 Stapleton, above n 20 at 438-448.

91 Stapleton, above n 31 at 1324-1325.

factors such as concern with disproportion<sup>92</sup> and attenuation, or a concern to shield a particular class of defendant.<sup>93</sup> In other words, the biggest payoff of separating factual cause from scope and abandoning the slogan of “common sense causation” is that we can get to work on understanding what principles, policies and concerns govern the scope issue.

## PART II: A RESPONSE TO JUSTICE ALLSOP

Part I argued that the common sense test of causation, like “proximity” that other empty High Court slogan from an earlier era,<sup>94</sup> is so indeterminate that it is effectively worthless as an analytical guide for lawyers confronting the facts of a new situation. In its place I have argued for an analytical structure that provides a clear separation between two questions: whether the defendant’s breach of the legal rule contributed in any way to the occurrence of the result of which the plaintiff complains (the “factual causation” question); and, if so, whether in the context of the relevant legal rule the defendant should be legally responsible for this result of his breach (the normative “scope-of-liability-for-consequences-of-breach” question).

In his chapter<sup>95</sup> Justice Allsop seems more sanguine about the value of “common sense” as an approach to issues of “causation”. In this Part, in deference to the theme of this volume, I add some commercial examples on the topic of factual causation but principally I respond to Justice Allsop by elaborating the “factual causation then scope-of-liability-for-consequences” approach with illustrations from the common law and under statute, including many of those discussed by His Honour.

### *Factual causation: a striking commercial illustration from Germany*

Recall from Part I my arguments: that we should confine causal terminology to the factual causation question as this is genuinely a matter of objective fact in an individual case, not normative choice; and that in law the relation of “factual cause” should be taken as satisfied if the defendant’s breach of the legal rule contributed *in any way* to the occurrence of the result of which the plaintiff complains, even if that breach was neither necessary for it nor sufficient.

For commercial lawyers a particularly powerful illustration of why the law needs the “causal” relation to be defined this widely is provided by the famous “Lederspray” case heard by the Federal Court of Justice of Germany in 1990.<sup>96</sup> Here a company produced a spray to be used by consumers on their

92 See, for example, *Homac Corp v Sun Oil Co* 180 NE 172 (NY 1932).

93 Stapleton, above n 6 at 420-421.

94 J Stapleton, “Duty of Care Factors: A Selection from the Judicial Menus” in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998) 59 at 61.

95 See Chapter 13.

96 Bundesgerichtshof (German Federal Court of Justice), 37 BGHSt 106, 6 July 1990 reported in (1990) BGH NJW 2650. See also *Goldwater v Carter* 617 F 2d 697 at 711 (DC Cir 1979): “a legislator whose vote contributed to the legislative action will have standing”.

leather clothing. The company discovered that the spray was extremely toxic for certain elderly people and others with respiratory conditions. The relevant group of executives voted unanimously not to withdraw the product from the market. Subsequently the product injured many consumers. In some cases it killed them.

Consider one of these individual executives. But for his vote not to withdraw the product, the product would still have remained on the market: his vote was not a but for factor in relation to the later injuries suffered by the consumers. But nor would his vote alone have been sufficient to injure them. Here then is a classic example of a factor which is neither necessary for the injury at stake nor sufficient for it. Of course, if the law reserved the term “a cause” for only factors that were but for factors or factors that were sufficient like one of the merging fires,<sup>97</sup> our individual German executive would escape any criminal or civil liability that required him to have been a “cause” of the consumer injuries. And indeed that is exactly what each executive did, in fact, argue when each was prosecuted in relation to being a “cause” of the consumer injuries. But the German court rightly saw that the contribution of a non-necessary non-sufficient factor to an outcome was a relation of interest to the law and held that this was enough of a relation to be a “causal” relation. The criminal convictions of the executives were upheld.

A major advantage of the law clearly recognising that a “causal” relation is present whenever the defendant’s breach of the legal rule contributed *in any way* to the occurrence of the result of which the plaintiff complains is that it exports to another stage of the analysis the question of whether the particular legal rule also requires, for example, that the breach was necessary for the occurrence of that result. This is especially important in commercial contexts where the injurious result flowed from a human decision (often that of the plaintiff) to which the breach of the defendant – say, a misstatement – made a contribution. As mentioned in Part I, it is commonly acknowledged that

“two or more causes may jointly influence a person to undertake a course of conduct ... a representation need not be the sole inducement in sustaining the loss. If ‘it plays some part even if only a minor part’ in contributing to the course of action taken – in that case the formation of a contract – a causal connection will exist.”<sup>98</sup>

But in some legal rules liability will not be imposed unless the relation has other additional features imposed for different normative reasons. In some the defendant’s breach must have been the “predominant” reason for the decision, in others it must have been a “necessary” reason and in yet others it must have “induced” the decision. It is because the rationales of these different requirements are not self-evident but normative that they should receive careful explication (in my view, at the scope of liability for consequences stage of the analysis).

Too often this does not happen and courts merely assert that, under this cause of action for the breach to be a “cause” it must bear a “but for” relation to the result or have “induced” it or so on. In my view the law should clearly

97 See above n 7.

98 *Henville v Walker* above n 46 at 493 [107] per McHugh J.

accept that *any* contribution to the occurrence of the result is a “cause” and should locate further requirements in some other analytical stage where their normative rationales are more likely to be addressed.

### ***Special rules concerning proof of factual causation: a commercial illustration from the United States***

Recall that Part I noted that, though the question of whether the defendant’s breach of the legal rule contributed in any way to the result of which the plaintiff complains is a factual question (hence its description as the “factual cause” question), it is one that proceeds by the fact-finder evaluating evidence against the requisite standard of proof. Often plaintiffs face insuperable evidentiary problems in establishing factual causation but occasionally courts and legislatures have, in small pockets and for specific normative reasons, crafted a special proof rule allowing plaintiffs to leap the evidentiary gap confronting them. To describe such rules as changing the meaning of causation is dangerously misleading: they should be seen as exceptional rules – often formally structured as rebuttable presumptions – relating merely to the *proof* of the causal relation.

A particularly important example of such a proof-of-causation rule in the commercial field was articulated by the United States Supreme Court in 1988 in *Basic Inc v Levinson*.<sup>99</sup> This is the “fraud-on-the-market” rule which provides a rebuttable presumption of reliance in securities fraud cases.

Again, when courts create such special proof rules for a limited type of case, the more transparent way of characterising what they are doing is that they are adjusting the requirements of proof, not changing the nature of what the law means by a “cause” in a local pocket of doctrine.

### ***Using the scope-of-liability-for-consequences approach: some common law cases***

I turn now to some of the common law cases discussed by Justice Allsop. In *March* it was obvious that the defendant’s breach had contributed to the occurrence of the result of which the plaintiff complained. The actual controversy in *March*, as in virtually all the other cases discussed by Justice Allsop, was about the normative question of whether, in the context of the relevant legal rule, the defendant should be legally responsible for this result of his breach. In other words, the controversy was about whether, given the breach *did* contribute to the result, the *features* of that connection between breach and result<sup>100</sup> are, *in the context of the relevant legal rule*, such that the defendant *should* be legally responsible for it. As we all know this is not a question of fact but a question of law. Thus in the context of a common law

99 485 US 224 (1988).

100 For example whether the rule requires: that the breach have been necessary for the occurrence of the result; that the result have been of a reasonably foreseeable type of result from the breach; that the result not be a coincidental consequence of the breach; that the result not have flowed from an unreasonable failure of the plaintiff to mitigate the position he found himself in due to the breach; and so on.

rule, it is the role of the ultimate court of appeal to reflect on the nature of the rule and then to *choose* which rules should govern the scope of liability for consequences, presenting them with detailed explanation and justification.

So if in his comments about the “scope of the duty”<sup>101</sup> or “the kind of causal connection required to create liability”<sup>102</sup> Lord Hoffmann simply means that it is the nature of the relevant legal rule which governs the answer to this latter scope-of-liability-for-consequences question I agree with him completely. What is regrettable, in my view, is framing this question in causal terms, such as: what type of “causal connection” does the relevant legal rule require? Was the breach “causative” of the result for which recovery is sought? Was the breach a “proximate cause” of this result? And so on. One worrisome consequence of framing this issue in causal terms is that it might suggest that the fundamental notion of a “cause” may differ in different areas of the law. Another danger is that it may lead a judge merely to assert that the context of the relevant legal rule requires the connection between breach and result to possess a particular feature without explaining why this is so, a particularly serious state of affairs in the commercial context where typically both sides to a dispute are repeat players who require clear guidance from the courts so they can plan future conduct.

My view is that it is analytically more efficient if a single meaning for the notion of a “cause” is adopted throughout the law, one that is a question of fact: in law it should be the case that either a “causal connection” exists between a breach and a result or it does not. This would lessen the second danger because, after resolution of this factual cause question, courts would then need to confront the complex normative issues that affect the “appropriate scope of liability for consequences of breach” without being tempted by the camouflage of vacuous causal assertions. Within this normative step of the analysis would fall the principles, rules and concerns traditionally labelled in terms of “remoteness of damage”, “mitigation of damages”, “proximate causation” and so on.

In the following comments I briefly suggest that, ironically, many of the cases discussed by Justice Allsop illustrate the grave indeterminacy generated where courts resort merely to assertions as to the “the kind of causal connection required to create liability”<sup>103</sup> or what result is dictated by “common sense causation”. In doing so I indicate how the use of a two-step approach (factual cause, then scope-of-liability-for-consequences-of-breach) offers greater clarity in the law.

#### *The failure to warn cases*

In *Chappel*, a case of a doctor’s failure to warn about a remote risk accompanying an operation which risk then eventuated, there was no significant disagreement about the relevant facts. Yet despite incantations of “common sense causation”<sup>104</sup> the High Court split 3:2 on whether the patient could recover for the result.

101 See discussion above at n 37.

102 Hoffmann, above n 38 at 598.

103 Hoffmann, above n 38 at 598.

104 *Chappel* above n 34 at 238-239, 240 per Gaudron J, 242-243 and 251 per McHugh J, 268-269, 276-277 per Kirby J, 281, 285, 290 per Hayne J. Cf the scepticism of Gummow J at 256.

As Justice Allsop shows, the judicial explanations for this result are not clear.<sup>105</sup>

But if we apply a two-step approach to this, or any failure to warn case, the issue and how it should be resolved becomes clear. Once it is accepted, as it was in *Chappel*, that the defendant's failure to warn was a breach of his legal duty and that, but for this failure the result would most likely not have happened, this establishes the breach was a factual cause of the result. Next we ask the scope question: does this consequence of the breach come within the appropriate scope of liability for breach of the relevant legal rule, a duty of care?<sup>106</sup>

As noted earlier,<sup>107</sup> to fall within the appropriate scope of liability the consequence must not merely fall within what I call the "perimeter" rule governing the cause of action which, for example, in the tort of negligence, is that the consequence must be of a type of harm that was a foreseeable consequence of the breach. Other requirements are applied though their recognition is often opaque. An important example within the tort of negligence is that unless the risk of such a consequence was one of the risks that made the defendant's conduct careless, the consequence will fall outside the scope of liability.<sup>108</sup> Lord Hoffmann gave a useful illustration of the requirement in *SAAMCO*:<sup>109</sup>

"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

It is true that the doctor not only failed to warn of the unfitness of the leg but also failed to warn of the risks of mountaineering (for example, rock falls and avalanches). But Lord Hoffmann's point is that while the former was a breach of the doctor's obligation of care, in the circumstances the latter was not a breach: in the circumstances it was not unreasonable for a doctor to ignore the risks of mountaineering; they were not among the risks that made this defendant's conduct careless. In other words, though the breach (in failing to warn about the unfitness of the knee) was a cause of the injury from a mountaineering risk and this consequence of the breach fell within the perimeter rule of being a foreseeable type of consequence of the doctor's advice, the injury fell outside the scope of liability.

Clearly this scope requirement – that the risk of such a consequence was one of the risks that made the defendant's conduct careless – necessitates an enquiry into which risks a reasonable person in the defendant's position would have taken precautions against. Where it is clear that a reasonable person would have warned against a certain risk, the eventuation of that risk squarely satisfies this requirement. In both *Chappel* and *Chester* it was held

105 See pp 307–309.

106 The case was framed as a breach of a contractual obligation of care but nothing turns on this for our purposes.

107 See the text above accompanying nn 88–93.

108 Stapleton, above n 20 at 444–445.

109 Above n 35 at 213.

that the legal rule in issue required the doctor to warn of the particular risk even though it was very remote. As I have explained in detail elsewhere,<sup>110</sup> it is this uncontroversial identification *by the legal rule* that the defendant is obliged to warn of this particular risk, that supports the normative conclusion that the result falls within the scope of the defendant's liability. In this way we have identified a clear and general legal principle concerning scope: where a legal obligation of care requires the defendant to warn of a particular risk and his failure to do so is a cause of that risk eventuating, that result falls within the appropriate scope of his liability (subject to any other scope requirements being met). By applying the two-step analysis the normative basis of Dr Chappel's liability is both easily understood and revealed as an application of a general principle.

It is worth noting that, despite the obvious concern of members of the High Court,<sup>111</sup> Dr Chappel's liability was not liability for a "coincidental" consequence of breach. On the conventional definition a consequence of a factor is only coincidental if, as a general matter, that type of factor does not increase the rate of occurrence of that type of result.<sup>112</sup> Thus where a speeding bus is struck by lightning the speeding was a factual cause of the bus being struck but this consequence of the breach of duty was coincidental because, as a general matter, speeding does not increase the rate of occurrence of such lightning strikes.

It would be inappropriate for an obligation of care to require an actor to warn of the risk of mere coincidences about which nothing can be done: the bus driver does not have an obligation to warn his passengers that it might be struck by lightning. This in turn means that in the tort of negligence in the modern era a coincidental consequence can never fall within the scope of liability because the risk of such a consequence will never be one of the risks that made the defendant's conduct careless. Moreover such freakish outcomes are not reasonably foreseeable to someone in the defendant's position, so liability for them would also offend the fairness norm chosen in *Wagon Mound (No 1)*<sup>113</sup> as the basis for the shift to a foreseeability-based perimeter rule.

In contrast, where the tort of negligence imposes an obligation to warn of the risk of a certain complication inherent in an operation it does so for the very reason that the general giving of such advice *can* have an effect on how often that complication occurs in society. This is because, relative to a society where such warnings are not given, in a society where they are given the rate of occurrence of the complication can be lower because some of the informed patients may choose not to undergo the operation (no operation being non-elective). In other words, though the misfortune that befell Mrs Hart was a consequence of Dr Chappel's breach it was not, in the sense just described, a coincidental consequence of it because a general practice of failing to warn would tend to increase the rate of occurrence of the complication relative to

110 Stapleton, above n 20 at 446-448.

111 See, for example, *Chappel* above n 34 at 244-247 per McHugh J, 271 per Kirby J.

112 S Shavell, *Economic Analysis of Accident Law* (Harvard University Press, Cambridge MA, 1987) at 111.

113 Above n 88."

how often that complication would occur in a society where there was a general practice of warning.<sup>114</sup>

#### *The suicide watch case*

There are also other cases where we can – once we abandon the distraction of “common sense causation” – easily apply the scope requirement that the risk of the consequence was one of the risks that made the defendant’s conduct careless because it is not controversial that the reason the defendant’s conduct was recognised as a breach was because the law was concerned to avoid a particular type of consequence: that is, it is accepted that the relevant consequence was “the very thing”<sup>115</sup> about which the defendant should have taken care. For example, in *Reeves v Commissioner of Police of the Metropolis*, the law recognised that the prison was under an obligation “to take reasonable care to prevent [a prisoner] from committing suicide”,<sup>116</sup> that there had been a breach of that obligation and that this breach had been a cause of the prisoner’s suicide. The next issue is: did the suicide fall within the appropriate scope of liability? Clearly it satisfied the perimeter rule (because it was a foreseeable type of consequence of the prison’s breach) but it also satisfied the requirement that the risk of such a consequence was one of the risks that made the defendant’s conduct careless.

We must, however, be cautious: in many cases things are not so straightforward and there is no consensus that the risk of the relevant consequence of breach was one of the risks that made the defendant’s conduct careless. In such cases bald assertions by the plaintiff that this consequence was “the very thing” that the liability was designed to cover provide no assistance.

#### *The negligent auditor cases*

*Alexander v Cambridge Credit Corporation Ltd*,<sup>117</sup> another case discussed by Justice Allsop,<sup>118</sup> provides a clear illustration of the confusion generated when the “common sense causation” approach is adopted. In 1971 the defendant auditors had failed to spot an error in the accounts of a company. Had they done so it was highly likely a receiver would have been appointed at that time. Instead the company was not put into receivership until three years later by which time its net worth had declined by \$145m. In this case the New South Wales Court of Appeal unanimously embraced the “common sense causation” approach, yet, although the facts were not relevantly in dispute, the Court split on the question of whether the plaintiffs could recover for a loss that would not have occurred but for the breach of a duty of care:<sup>119</sup> Mahoney JA rejected the claim on the basis that a but for relation between breach and loss was not “enough to establish a causal relationship”,<sup>120</sup> McHugh JA rejected it on the

114 Stapleton, above n 20 at 441–443.

115 *Stone & Rolls Ltd v Moore Stephens* above n 10 at 1496 [177] per Lord Walker.

116 [2000] 1 AC 360 (HL) at 368 per Lord Hoffmann.

117 (1987) 9 NSWLR 310 (NSWCA).

118 See pp 313–314.

119 The case was framed as a breach of a contractual obligation of care but nothing turns on this for our purposes.

120 *Alexander v Cambridge Credit Corporation Ltd* above n 117 at 335.

basis that “[t]here was no causal connection between the auditors’ breach of contract in 1971 and the loss”;<sup>121</sup> while Glass JA in dissent took the view that “the auditors by their default failed to close the company down in 1971. It was that failure which in a commonsense way was a cause of the damage since but for the failure it would not have traded and ... would not have run down its assets in the calamitous way it did”.<sup>122</sup>

Again if we apply a two-step approach to this case, the issue and how it should be resolved becomes clear. There was no doubt that but for the breach of the auditors the loss would not have been suffered: in other words the controversy was not about whether the breach contributed to the loss – factual causation was clearly established. The controversy was about the scope question: whether this trading loss fell within the appropriate scope of liability for the consequences of breach of this legal rule, namely a breach of a duty of care. The trading loss clearly satisfied the perimeter rule (because it was a foreseeable type of consequence of the auditor’s breach) but did it also satisfy the requirement that the risk of such a consequence was one of the risks that made the defendant’s conduct careless? Whereas the plaintiffs in *Chappel* and *Reeves* were able simply to point to a consensus that the risk of the relevant consequence was one of the risks that made the defendant’s conduct careless, the plaintiffs in *Alexander* were unable to use this shortcut because there was no consensus that the risk of a trading loss was one of the risks that made the auditors conduct a breach of their obligation of care.

Note that a plaintiff must prove each element of their cause of action. This includes not only that the breach contributed to the occurrence of the result of which complaint is made (that is, factual causation) but also that this result falls within the appropriate scope of the relevant liability which, as we have seen, is in the tort of negligence governed not only by the *Wagon Mound/Hughes* perimeter rule but also by the requirement that that the risk of such a consequence was one of the risks that made the defendant’s conduct careless. In *Alexander*<sup>123</sup> the plaintiffs made no normative argument on this latter scope requirement relying solely on the but for relation of the breach to the loss. It was because of this gap in their case that their claim deserved to fail.

The Justices’ appeal to “common sense” causation obscured how straightforward this result should have been. Indeed, as Glidewell LJ noted in *Galoo Ltd v Bright Grahame Murray*, the Justices did not even “regard common sense as driving them to the same conclusion”!<sup>124</sup> Moreover, the Court failed to seize the opportunity to provide guidance to future plaintiffs on how they might succeed in showing that trading losses could come within the appropriate scope of an auditor’s liability, as Justice Allsop<sup>125</sup> concedes that they may be able to do. What *are* the features of the connection between the breach of an auditor and a trading loss such that, in the context of the relevant legal rule, the auditor should be legally responsible for it? With respect, to say that the issue is

121 *Alexander v Cambridge Credit Corporation Ltd* above n 117 at 337.

122 *Alexander v Cambridge Credit Corporation Ltd* above n 117 at 316.

123 Above n 117.

124 *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 at 1372 (CA); [1995] 1 All ER 16 at 27.

125 See p 314, noting *dicta* in *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392 (NZCA).

whether the facts “warrant the wrong being seen as the cause of [the harm]”<sup>126</sup> as a matter of “common sense” does not advance this normative task. It tends to obscure it.

### *The negligent valuer cases*

The two-step analysis allows us to identify clearly the issue at stake in *SAAMCO*:<sup>127</sup> what is the scope of liability for consequences of breach by a valuer who provides a lender with a negligent overvaluation of the property offered as security for the loan where the lender would not have lent if it had received a careful valuation of the property?<sup>128</sup> Specifically, does a loss associated with a fall in the property market occurring after the date of valuation and loan fall within this scope of liability?

First, let me emphasise a critical terminological point that I noted in Part I. In the case itself Lord Hoffmann described the issue at stake in terms of the “scope of the duty” owed by the valuer: “the scope of the duty, in the sense of the consequences for which the valuer is responsible”.<sup>129</sup> But in response to my criticism,<sup>130</sup> Lord Hoffmann later conceded “one is really speaking about extent of the liability and not about the scope of the duty”.<sup>131</sup> This terminological distinction is critical to the clarity of legal analysis because, while the duty issue is a categorical matter of law applicable to a class of cases, both the issue of what may form the breach allegation and the issue of the appropriate scope of liability for consequences of breach vary with and are wholly dependent on the facts of the individual case.

So what do we learn about how to analyse the scope-of-liability-for-consequences issue from *SAAMCO*? In his lead speech Lord Hoffmann at one point asserted that: “once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been *caused* by the valuation being wrong”<sup>132</sup>

None of the losses of which complaint was made would have happened but for the valuer’s breach, so by “cause” Lord Hoffmann must have meant something very much narrower than the “factual causation” relation (which is satisfied, *inter alia*, by the relation of necessity). This is because the clear holding in *SAAMCO* was that the scope of the valuer’s “liability was confined to the consequences of the client having too little security”<sup>133</sup> and did not extend to other losses associated with a fall in the property market even though they would not have been suffered but for the breach.

The explanations given for this result were, with respect, obscure.<sup>134</sup> On the one hand, in *SAAMCO* itself Lord Hoffmann noted that: “Normally the law

126 *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501 (NSWCA) at 516 per Mahoney J.

127 Above n 35.

128 Stapleton, above n 37.

129 *SAAMCO* above n 35 at 212.

130 Stapleton, above n 37.

131 Hoffmann, above n 38 at 596.

132 *SAAMCO* above n 35 at 221 (emphasis added).

133 Hoffmann, above n 38 at 596.

134 See Stapleton, above n 37.

limits liability to those consequences which are attributable to that which made the act wrongful.<sup>135</sup> If we assume his Lordship was only considering negligence liabilities in this statement,<sup>136</sup> it might be taken as another way of stating the scope requirement, illustrated by the mountaineer example, that the risk of the relevant consequence must be one of the risks that made the defendant's conduct careless. Even so this statement of principle alone does not explain the result in *SAAMCO* where his Lordship held that the appropriate scope of liability for consequences extends only to those losses that would not have been suffered if the advice had been correct (and the plaintiffs had therefore had the relevant security margin in the falling market). His Lordship did not explain why the risk of these losses were among those that made the defendant's conduct careless while the risk of a loss associated with a fall in the property market was not. Without such an analysis the stated principle does not explain the result.

Some years later Lord Hoffmann expressed his reason for the result in *SAAMCO*, extra-judicially, as being: "because the valuer had not been asked to advise on whether the client should lend. The valuation was to be only one factor which the client would take into account in making his own decision about whether to lend."<sup>137</sup> But is this an adequate explanation? Suppose a person is considering running in the Sydney City to Surf race and specifically asks his doctor whether there is a risk in relation to the fitness of his knee. The doctor responds negligently by understating the risk. But suppose a reasonable doctor, once invited to advise on this factor – a factor that the patient clearly "would take into account in making his own decision about whether to" run – would *also* have added advice about the general risk of heat stroke? The risk of heat stroke would then be one of the risks that made the doctor's conduct wrongful (because he failed to advise about it), and this then suggests that the consequence of heat stroke would be within the appropriate scope of liability. Yet notice that this is not an issue on which the defendant had been expressly "asked to advise" – the key fact seized on by Lord Hoffmann in his reasoning. In other words, why could not the plaintiffs in *SAAMCO* plausibly assert that one of the risks that made the careless valuation wrongful was the risk that in reliance on it the recipient could enter and then be locked into a transaction where they were hit by the falling market which would not have happened but for the tort?<sup>138</sup>

My point here is that, though I agree with Justice Allsop's central point that it is essential for a court to identify the issue at stake – and in these cases I identify it as being one of the scope of liability for consequences – this is not sufficient. The court must also provide substantive coherent reasons justifying how it

135 *SAAMCO* above n 35 at 213.

136 The statement is inappropriate in contexts such as deceit where a fraudster may be liable for an unforeseeable consequence, the risk of which, by definition could not have been one of the risks that *made* his conduct "wrongful".

137 Hoffmann, above n 38 at 596.

138 For simplicity, I am assuming here that, but for the tort, the plaintiffs would not have placed their funds in that same falling market. If they would have done so, another argument against liability for the loss arises: see J Stapleton, "Risk-taking by Commercial Lenders" (1999) 115 *Law Quarterly Review* 527 at 531-534.

answers that question. In my view, appeals to “common sense causation” or assertions about the “scope of the duty” not only obscure the task of identifying that it is this normative scope question that is in dispute but also hinder how clearly courts communicate their answers to it.<sup>139</sup>

### ***Using the scope-of-liability-for-consequences approach: statutory cases***

To recap: at common law, whatever the language used, a claim for damages must, *inter alia*, address two issues: whether the breach of the legal rule contributed in any way to the occurrence of the result of which the plaintiff complains (the “factual cause” issue); and whether, given the breach did contribute to the result, the features of that connection between breach and result are, in the context of the relevant legal rule, such that the defendant should be legally responsible for it (the “appropriate scope of liability for consequences of the breach of the legal rule” issue).

Any claim for damages under statute must also address these two issues. In particular it is worth emphasising that all liabilities, including those arising under statute, must be and are limited to only some of the consequences of which the legally sanctioned conduct was a factual cause. As noted in Part I, a statute may expressly limit the type of consequence that comes within the scope of liability for the contravention of one of its provisions<sup>140</sup> or such limits may be generated implicitly by the absolutely clear purpose of the statute.<sup>141</sup> More often these limiting principles must be divined by the court from more general interpretations of the purpose of the rule against the background of the general law.

Just as I argue that the clarity of analysis of common law claims is enhanced when this two step structure – factual cause then scope-of-liability-for-consequences – is followed, I also argue that in the context of statutory claims for damages this approach provides a more transparent vehicle for judicial reasoning and exposition of principle than concepts such as “common sense causation” which conflate disparate issues.

#### *The pollution case*

Of course, one problem we currently confront is that legislative drafters often themselves rely on a “conflating” term, that is, one that embeds within it both the factual cause issue and the separate scope issue. Although it does not involve an action for damages but a criminal provision, it is instructive to consider the pollution case discussed by Justice Allsop:<sup>142</sup> *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*<sup>143</sup> where a statute

139 Cf Gaudron J’s rejection of the SAAMCO approach in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25; (1999) 199 CLR 413 at 428 [28] on the basis of “the common sense approach required by *March v Stramare*”.

140 See, for example, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* above n 10.

141 See, for example, *Gorris v Scott* above n 30.

142 See pp 279–280.

143 [1999] 2 AC 22 (HL) (Lord Browne-Wilkinson, Lord Lloyd, Lord Nolan, Lord Hoffmann and Lord Clyde).

provided that: “A person contravenes this section if he *causes* or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.”<sup>144</sup>

The facts were not relevantly in dispute. The defendant company maintained a diesel tank in a yard which was drained directly into a river. The outlet from the tank was governed by an unlocked tap which was opened by a vandal and the entire contents of the tank drained into the river.

The lead speech by Lord Hoffmann presents difficulties by being expressed in causal language that does not separately identify the factual cause issue and the scope of responsibility issue both of which are embedded within the statutory term “cause”. For example, on the one hand his Lordship conceded that “foreseeability is not the criterion for deciding whether a person caused something or not”,<sup>145</sup> yet on the other hand he concluded that whether, under the statutory provision, the “causal connection” between the company’s maintenance of the tank at its location and the entry of the pollution into the river was severed turned on a form of foreseeability, namely “whether that act or event should be regarded as a normal fact of life or something extraordinary”.<sup>146</sup> These statements will, however, make sense if we interpret the former as referring to the issue of factual cause (which is not affected by foreseeability) and the latter as a statement of Lord Hoffmann’s conclusion about the appropriate scope of responsibility for the consequences of the company’s conduct.

Indeed, the case was clearly about this latter scope issue, a question of law. Factual causation was not in dispute in the case: had the company not maintained the tank where it was, the pollution would not have entered the river; the pollution was a consequence of the company’s conduct. The question in the case was what the legislature intended the scope of legal responsibility to be under the provision and specifically whether it encompassed cases where the pollution resulted from a vandal’s intervention. As we have seen, Lord Hoffmann’s conclusion as to what norm governed the scope issue was clear: whether the intervention should be regarded as a normal fact of life or something extraordinary.<sup>147</sup> Nevertheless, his Lordship proffered a rationale of statutory intention upon which that norm rested – namely that “[s]trict liability is imposed in the interests of protecting controlled waters from pollution”<sup>148</sup> – that is thinner and more opaque than it might have been had the normative nature of the issue at hand been squarely addressed instead of veiled by causal terminology.

It is worth stressing that such normative rationales would have been readily available to counsel and therefore to Lord Hoffmann in our pollution case. For example, it is plausible that the reason the legislature created a strict liability

144 *Water Resources Act 1991* (UK), s 85(1) (emphasis added).

145 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* above n 143 at 34.

146 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* above n 143 at 36.

147 On application of this norm to the facts: the company was legally responsible under the provision for the pollution because ordinary vandalism was, His Lordship judged, a normal fact of life: *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* above n 143 at 34.

148 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* above n 143 at 32.

criminal offence here was to generate an incentive on those in control of potential sources of pollution near controlled waters to reflect on the location and activity level of their operation. This is a well-accepted policy rationale for strict liabilities in the United States.<sup>149</sup> Moreover, on this rationale it would make perfect sense if the scope of responsibility for the consequences of the defendant's activity encompassed cases where the pollution came about by the intervention of a "normal fact of life" in such a vicinity but excluded cases where the intervention was extraordinary.

*The Trade Practices Act/the Australian Consumer Law*

The most important statutory provision governing actions for damages in Australian commercial life provides a particularly notorious example of legislative drafters relying on a "conflating" term. Sub-section 82(1) of the *Trade Practices Act 1974* (Cth) (the "TPA") reads:<sup>150</sup>

"a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

This has been replaced by sub-s 236(1) of the *Australian Consumer Law* (the "ACL"):<sup>151</sup>

"If:  
 a person (the *claimant*) suffers loss or damage *because* of the conduct of another person; and  
 the conduct contravened a provision of Chapter 2 or 3;  
 the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention."

Patently there is no explicit mention of either of the two issues I have been discussing, factual causation and scope of liability for consequences of a contravention: but since both must be involved in any claim under these provisions they must be embedded in the word "by" in the TPA and in the word "because" in the ACL.

As with any other statutory provision, the court must address the wording of this statutory provision in the light of its context or purpose. Yet if we consider our two embedded issues we see that the first, factual causation, is not by its nature plausibly affected by the statutory context or purpose. What this means is that, for example, in a case involving contravention of the statutory prohibition on misleading or deceptive conduct (s 52 of the TPA, now s 18 of the ACL<sup>152</sup>)

149 That strict liability generates an incentive on an actor to reflect on his activity level and location forms the accepted rationale for the strict liability tort of abnormally dangerous activities in the United States: see *Indiana Harbor Belt Railroad Co v American Cyanamid Co* 916 F 2d 1174 (7th Cir 1990) per Posner, Circuit Judge at 1177; *Restatement of Torts (Third): Liability for Physical and Emotional Harm* § 20, cmt b.

150 (Emphasis added).

151 (Emphasis added).

152 The Commonwealth prohibition is located at s 18 of sch 2 to Part XI ("Application of the Australian Consumer Law as a Law of the Commonwealth") of the *Competition and Consumer Act 2010* (Cth). Great thanks to my ANU College of Law colleague Ven Alex Bruce for his expertise in guiding me through this daunting statutory labyrinth!

the approach to the factual cause issue should be identical to that applicable in common law disputes about factual cause: if the contravention contributed in any way to the occurrence of the result of which the plaintiff complains, factual causation is established.

In contrast, the issue of the *appropriate* scope of liability for consequences of the breach of the legal rule is clearly influenced by the purpose of the legal rule. Indeed – to take a common law example – we can work backwards and deduce from the clear fact that the scope of liability for the consequences of the tort of deceit is more extensive than the scope of liability for the consequences of the tort of negligence, that the purpose of these two rules is not the same.

We should not, therefore be surprised to find that in a claim for damages under s 82 TPA (or in future, s 236 of the ACL) the court approaches the scope-of-liability-for-consequences issue with particular sensitivity not only to the “high public policy”<sup>153</sup> underlying the legislation generally but also to the different purposes of its “diverse legal norms”.<sup>154</sup> In other words vindication of the purposes of the TPA (and now the ACL) may well support the application of different scope of liability principles in s 82/s 236 claims according to which statutory provision has been contravened.

Indeed, there is also the question of whether, in the light of the statutory purpose, the scope analysis in relation to a *single* provision, say the statutory prohibition on misleading or deceptive conduct, should be sensitive to and vary according to whether the contravention was particularly reprehensible or merely inadvertently negligent. It could be argued that the legislature would have intended the scope of liability for the consequences of a merely negligent contravention of the misleading or deceptive conduct provision – say, an inadvertently careless valuation – to be less extensive than that of an intentional contravention – say that of the operator of a Ponzi scheme. This would parallel the common law where, for example, a consequence of tortious conduct that is a coincidental consequence is always judged to be outside the appropriate scope of liability for the tort of negligence,<sup>155</sup> but may *potentially* be held inside the scope of liability of a defendant in the tort of deceit.<sup>156</sup>

A comparable scale of concern might plausibly be recognised as appropriate in relation to contraventions of the statutory prohibition on misleading or deceptive conduct: liability for a merely careless contravention not extending to coincidental consequences, but liability for a particularly reprehensible contravention potentially extending to such consequences. It is significant

153 *Marks v GIO Australia* [1998] HCA 69; (1998) 196 CLR 494 at 528 [99] per Gummow J.

154 *Marks v GIO Australia* above n 153 at 528 [100] per Gummow J.

155 See above p 355.

156 See, for example, *Smith New Court Securities Ltd v Scrimgeour Vickers* [1996] UKHL3; [1997] AC 254 (HL) and *Fottler v Moseley* 70 NE 1040 (Mass 1904). My point is that, whereas there is a clear rule excluding liability for coincidental consequences of negligence, in deceit “the normative concern with deterrence ... may be judged to support the extension of the scope of liability to encompass consequences of breach that are merely coincidental” (Stapleton, above n 20 at 440 (emphasis added)). Since it is obvious (or should be) that other additional concerns will affect whether a particular coincidental consequence comes within the appropriate scope of liability for deceit in any particular case, I have never asserted a rule that in every case “coincidental loss is recoverable where the defendant commits the tort of deceit” (cf R Stevens, *Torts and Rights* (Oxford University Press, Oxford, 2007) at 166).

that support for the view that Parliament views intentional violators of the prohibition on misleading or deceptive conduct more harshly than other violators may be found in s 82(1B) TPA<sup>157</sup> which specifies this distinction in relation to whether damages may be reduced to take account of the plaintiff's share in responsibility for the loss or damage.

A final general point about scope of liability is in order. It should be obvious that resolution of the issue of what is the appropriate scope of liability for the consequences of wrongdoing does not simply consist of mechanical rules that are uncontroversial in application (such as the rule that the scope of liability for the consequences of breach of a duty of care always excludes coincidental consequences). Like the issue of whether conduct constitutes a breach of a duty of care, the rules governing the scope issue are often framed in terms such as reasonableness or foreseeability<sup>158</sup> which are matters on which, in application to a particular set of facts, reasonable minds might differ. But just as with the breach issue in an individual case, judges should be encouraged to give some indication of the factors that weighed in their determination of this scope issue.

## CONCLUSION: TERMINOLOGICAL CHOICE

As Justice Allsop's review of past cases so well illustrates, a key area in which lawyers' use of language has not been clear or consistent is that of causal terminology. Hart and Honoré's complex survey of mid-twentieth century causal usage<sup>159</sup> is also, ironically, an eloquent testament to this instability. Fortunately, lawyers are not held captive by the way words have been used in past cases, even by the most eminent of judges. As lawyers we are the masters of our own discourse and may choose to refine the meaning of our terms, to specify rules for our "language game",<sup>160</sup> in order to promote clarity. The ALI has done exactly that in relation to causal terms in the new torts *Restatement*.

The good news is that beneath the bewildering and shifting patterns of past causal usage in the law we can locate, not one, but two distinct and easily understood questions: whether a factor, such as a breach of a legal obligation, contributed in any way to a particular result, such a loss of which a plaintiff complains; and the normative question of whether the features of that connection between breach and result are, in the context of the relevant legal rule, such that the defendant should be legally responsible for it. It is true that the Ipp Report and the responding civil liability legislation retained the umbrella term of "causation" to cover the amalgam of both these questions, but, as noted in Part I,<sup>161</sup> since that umbrella term does no substantive work in the legislation, Australian courts should quietly ignore it.

157 Introduced in 2004, now s 137B of Part XI of *Competition and Consumer Act 2010* (Cth).

158 *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* ("Wagon Mound" (No 1)) above n 88.

159 Hart and Honoré, above n 15.

160 L Wittgenstein, *Philosophical Investigations* (Blackwell, Oxford, 1953).

161 See p 336.

What Australian lawyers should do is refine the legal meaning of the term “a cause” and confine it to the first question and abandon any practice of framing the second question as a “causal” issue, be it one of “proximate cause”, appropriate “causal connection” or “common sense causation”. As Part II’s analysis of the cases discussed by Justice Allsop demonstrates, we can then focus clearly on unpacking the legal reasoning addressing this latter issue of the appropriate scope of liability for the consequences of breach.

