Causation in the Law of Negligence

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This article seeks to understand the way in which a causal connection between an actor's conduct and the event for which he is responsible is considered to be a necessary conditions of liability. The High Court has saught to place the choice of such conditions on a principled footing by its espousal of 'common sense' notions of causation. Yet, it is argued, the High Court's belief that causal notions are questions of fact to be resolved as a matter of common sense reveals a process of ad hoc decision-making. Nevertheless, it is contended, a view of causation as a starting point of any ascription of responsibility is fundamental, for it is grounded in our belief in a link between our actions and the sense we have of ourselves as persons.

INTRODUCTION

This article is an examination of the role that causation plays in the area of tort law. In particular, it seeks to understand the way in which the common law selects a legal cause from amongst the set of necessary conditions preceding the event. Does the law apply 'common sense' notions, readily verifiable by recourse to principles or, does it instead, operate on the basis of intuition to answer questions felt to be not susceptible to detailed and analytical justification.

The first part of the article seeks to contextualise the argument by providing a background of the types and theories of causation. It in effect allows the ensuing discussion to be conducted in terms of readily understood ideas and concepts. For example, it seeks to define the criterion by which causal details are interpreted by the courts. Further it outlines the main types of theory, which are employed in the explication of causal phenomenon.

It then moves on to an analysis of the way in which the High Court has responded to the issue of causation. It begins with a consideration of some general matters such as the role of probability in the question of liability as well as the import of the idea of intervening events, followed by an analysis of two seminal cases in the High Court which have defined the current position for Australian courts. In particular it seeks to understand the precise effect of the Court's belief that causal notions are 'not susceptible of reduction to a satisfactory formula'.[1] The contention that causation is essentially a question of fact to be resolved as a matter of common sense is seen to open the Court to charges of ad hoc decision making.

The last section, while acknowledging the imperfections of the High Court position, asks what purpose is served by holding causation as the starting point for any ascription of responsibility. The question is viewed as part of a larger problem confronting tort law. Yet the answer, it is contended, may lie in a deep-seated belief in the inextricable link between our actions and the sense of ourselves as persons. That is, we are prepared to ascribe responsibility both

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1 *Fitzerald v Penn* (1954) 9 CLR 268, 277 (Dixon CJ, Fullagar and Kitto JJ).

morally and legally, to all *our* actions precisely because they are our actions. This is so even where confronted with the case of an agent whom we feel is not in a position to do any differently.

THEORIES AND TYPES OF CAUSATION

It is generally held that causal connection between the tortfeasor's conduct or the event for which he is responsible and the harm is a necessary condition of his liability. Liability is based upon the principle that the tortfeasor is only responsible for the harm he has actually caused. It is not, however, necessary to show that it is the tortfeasor rather than the thing under his control that has caused the harm; an employer's liability for the acts of his servant, for example.

The issue of causal connection involves two questions. The first is whether the tortfeasor's conduct was a *condition* of the harm. The test adopted is that of asking whether the harm would have occurred 'but for' the conduct or event. This is a factual enquiry, involving the use of hypothetical counterfactuals and the analysis goes by the rubric of 'cause in fact'. The defendant's negligence is a necessary condition of the plaintiff's loss if that loss would not have occurred but for that negligence. Hence it may be said that the defendant's act will be a factual cause of the plaintiff's loss if it was a necessary condition (*conditio sine qua non*) of that loss.[2]

The test is too indiscriminate to use without caution. For any happening may have an infinite number of antecedent necessary conditions. The vast majority of these are of no legal significance. Alternatively, we may find the test too selective as in instances of 'causal over-determinism'. An example of this is a situation in which multiple causes bring about a result, each of which was sufficient to effect the damage. For in such a case it is not true of either cause that but for its occurrence, the result would not have transpired. Hence the absurd result that neither may be said to be a cause proper.

Having decided the factual cause issue the court must then decide whether in the given instance the defendant is to be held legally liable. In Latin we would ask whether the factual *causa sine qua non* is the 'real' or 'effective' cause (*causa causans*). The enquiry is made much more straightforward because in a tort action the question is not 'what really caused the plaintiff's injury?' rather 'did the defendant's tort really cause the plaintiff's injury?'[3] The necessary conditions of a loss can be described as being the 'surrounding circumstances' upon which the effective causes of the loss in question operated.[4] There are two main views as to how the law picks out the legal cause from the mass of necessary conditions. The first view is that the law makes use of commonsense notions of causation and refers to the ordinary usage of causal language. The attributive causation question is a factual question; it is one appropriately answered by the person in the street. The responses of philosophy or science are not to the point in the context of the courtroom.[5] Yet where commonsense notions are not sufficiently detailed to determine a fact situation of particular complexity recourse is had to policy

2 *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 42.
3 P Craven (ed), *Atiyah's Accidents, Compensation and the Law* (6th Ed, 1999) 98.
4 *The Commonwealth v Butler* (1959) 102 CLR 465, 476 (Taylor J).
5 *Fitzgerald v Penn* (1954) 91 CLR 268, 276-278 (Dixon CJ, Fullagar and Kitto JJ).

considerations. However this is the marginal case. The second theory holds that commonsense use of causal language is an inappropriate standard for the solution of problems of attributive causation.[6]

Arguments in support of this position are as follows. Firstly, the reason a question is asked determines the response. Courts are concerned with the ascription of responsibility. It is by no means clear that the person in the street has this as their main purpose. Secondly, common sense notions of causation are 'extraordinarily difficult to formulate and apply'.[7] Thirdly, what seems to be commonsense to the uninformed may in fact be to the better-informed nonsense. Lastly, causal language tends to conceal the policy choices presented by many difficult causal questions. In essence the theory holds that attributive causation is ultimately a question of legal policy.

Two points seem to be at issue here. The first involves the role of rules and principles in the law. Proponents of the first theory tend to favour the formulation of relatively fixed and clear rules and principles on the basis of which cases can be decided and the outcome of cases predicted. Proponents of the second theory tend to favour deciding the causation issue by reference to the particular circumstances of each case. The inclination of most Australian judges would seem to be in the direction of the first approach.[8] The second point revolves around the question whether given the need for fixed rules these should be formulated by judges or rather be taken from ordinary language regardless of whether ordinary usages of causal words are directed to the attribution of responsibility or not. It seems that although courts are keen to stress that the lawyer's idea of causation is different from the scientist's or the philosopher's,[9] they do not seem particularly concerned to champion the ordinary person's answer to causal questions at the expense of the lawyer's answer.[10] The process of selection involves recognition of the purposes to which the enquiry is put. In the instance of a non-legal enquiry the explanatory, as distinct from attributive, purpose is of paramount import. A model employed in the field of science in order to distinguish causes from mere conditions is the primitive one of a person bringing about change by deliberately manipulating objects.[11]

In the instance of the law however, the distinction is less concerned with differences in the physical properties of the two than with context, the normal course of events and the state of our knowledge. Parameters are required in both fields of endeavour, the explanatory as well as the attributive, if the enquiry is not to become too wide. In the law the restriction takes the form of employing various epithets each suggestive of a causal theory. Terms such as 'proximate', 'direct' and 'adequate' each seek to limit the choice of conditions to the causally pertinent. Difficulties become apparent however in the instances where there are a number of causes each one of which is sufficient to bring about the damage. A method employed to determine this question is to view the course of events as a whole. Anglo-Australian law adopts the test of foreseeability, except in the instance of the tort of deceit, where it is a requirement for liability that both the

6 Craven, above n 3, 98-107.
7 Ibid, 107.
8 F Trindade and P Cane, *The Law of Torts in Australia* (3rd Ed. 1999) 479.
9 *March v Stramare* (1991) 105 CLR 506, 509 (Mason CJ); Cf *National Insurance Co Ltd v Espagne* (1960) 105 CLR 568, 592 (Windeyer J).
10 Craven, above n 3, 100.
11 H L A Hart and T Honore, *Causation in the Law* (2nd Ed. 1985) 30-41.

existence and the extent of damage be foreseeable.[12] While there does not seem to be a great deal of confusion concerning the establishment of conditions in any given situation a range of causal theories have evolved in order to determine whether the condition played a sufficient part to count as a cause of the harm. It is to a consideration of these that we now turn.

CAUSAL THEORIES

A starting point is to ask whether in fact a theory is really necessary. In Anglo-Australian law for example while courts commit themselves to the notion that the type of harm suffered must be foreseeable, they also inconsistently apply the rule that the tortfeasor takes his victim as he finds him.[13] For it would be fair to say that the foreseeability test cannot bear all the weight of deciding when to delimit the extent of liability. There may in fact be hidden a range of underlying value judgments. So in *Chapman v Hearse*[14] the High Court was prepared to find foreseeable, by the driver being helped, not only the intervention of the rescuer but also the negligence of the second driver. By way of contrast we may compare the reasoning of the English Court of Appeal in *Lamb v Cambden* LBC.[15] Lord Denning decided on policy grounds that the damage caused by the squatters was better charged to the insurance company holding the plaintiff's cover, rather than the council. It is in situations such as these where the conduct of a third party is involved that the evaluative component in the attributive causation question becomes explicit. The means by which this is effected is the principle that very 'unreasonable' conduct can break the causal nexus, it being considered unforeseeable. In the absence of authoritative guidance courts may have recourse in interpreting causal details to three criterion: (i) to the ordinary or common sense meanings of 'cause' and related terms; (ii) to their scientific or philosophic meanings; (iii) to the notion of judicial discretion or *jus moderandi*.[16] It will be seen that courts place greater reliance on those considered more suited to forensic analysis. We turn now to a consideration of these individually.

COMMON SENSE AND THE MEANING OF CAUSAL EXPRESSIONS IN ORDINARY SPEECH

While it is reasonable to have recourse to both commonsense and ordinary speech in the ascertainment of meaning the use of such criterion is open to objections. In particular it is objected that the principle of selection employed in choosing a cause from the number of conditions is so vague as to allow arbitrary choice.[17] Yet proponents of common sense views hold that such notions are limited to restricting consequences. This is so particularly in the instance where a too literal application of either scientific criterion or judicial discretion is considered to lead to decisions repugnant to an informed sense of justice. An application of commonsense principles has underlined the judgements of several High Court decisions recently, which are discussed below.

12 *Overseas Tankership Ltd v The Miller Steamship Co Ltd* [1961] AC .388; *Overseas Tankership Ltd v Morts Dock & Engineering Co Ltd* [1966] 2 All ER.

13 *Smith v Leech Brain* [1962] 2 QB 405; Cf: P J Rowe 'The Demise of the Thin Skull Rule?' (1977) 40 *Modern Law Review* 377, 387.

14 (1961) 106 CLR 112.

15 [1981] QB 625.

16 T Honore, 'International Encyclopedia of Comparative Law', Vol XI, 24.

17 Compare *March v Stramare* (1991) 171 CLR 506, 533 (McHugh J).

There has been an attempt to state a set of principles grounding this common sense criterion by HLA Hart and Tony Honore in their work *Causation in the Law*.[18] These principles may be stated as follows:

(a) Common sense causal judgements have been built up in the context of explanation. That to be explained is usually some change in the world any search for its cause or causes being a search for some preceding or accompanying event or state which may be regarded as 'intervening' in the normal course of events and accounting for the change. The paradigmatic case is that of the deliberate manipulation by human beings of objects, (pushing, striking), in order to bring about change.

(b) By analogy causal explanation is extended to other instances in which change is explained by reference to something which makes the difference between change and no change. For example, the explanation may lie in an action not intended to bring about the change; it may be an omission; a natural event; or a natural state of affairs.

(c) The choice of factors amongst the pool of conditions will be those which are abnormal in the context, and often also unknown. They will not include factors that are ever present or indifferently present or not when the change occurs. Hence it will not be the presence of oxygen that is to be noted as the cause of the fire but rather the deliberate lighting of the match.

(d) Of similar explanatory force is the contravention of a rule prohibiting certain conduct in order to avoid harm. Such a contravention is analogous to an abnormality in the course of nature and has similar force as a causal explanation.

(e) While free human conduct is an adequate explanation of the harm it occasions, free actions can be explained by pointing to the reasons or opportunities that prompted or facilitated them. The provision of such reasons or opportunities may be regarded as a type, albeit a weak type, of causal relation.

It is also important to appreciate the relativity of the causal enquiry. For what is to be explained, as well as the interests of the person seeking it, will determine what constitutes an explanation. So a lawyer is concerned with human conduct and other legally defined events which entail responsibility. A doctor, on the other hand, would be more interested in the development of disease in the body as a result of microorganisms. Hence it may be observed that the selection of causes reflects in an arbitrary way the preferences of the enquirer.

SCIENTIFIC AND PHILOSOPHIC NOTIONS OF CAUSATION

The starting point for any consideration of this group of criterion is the theory of John Stuart Mill.[19] According to Mill the cause of an event is the sum of the conditions which are jointly sufficient to produce the event, that is, which are uniformly and unconditionally followed by it. Philosophically, equivalence prevails between all conditions, as we have no objective criterion upon which to prefer one from the other. Yet this is for the lawyer of little help in the ascription of legal responsibility. Hence the received legal interpretation treats Mill as having said that each of the conditions expressed in counterfactual form, is a

[18] Hart and Honore, above n 11, 25-43.
[19] Hart and Honore, above n 11, 13-25.

cause of a result if and only if, but for the occurrence of the condition, the result would not have occurred. Hence jointly sufficient conditions include only those which are necessary members of the set of conditions in the sense that in their absence the set would have been incomplete and would not have been followed by the consequences. This is simply to say that any condition must be at least a *conditio sine qua non*. In this sense the theory asserts that every *conditio sine qua non* of an event is a cause of it, and every cause a *conditio sine qua non*. The major difficulty with this definition arises in the situation where there are multiple sufficient causes. In such a situation, in addition to the tortfeasor's act, there is also another act that is sufficient to bring about the result. For example, consider the situation where A and B simultaneously but independently shoot C, each shot being sufficient to kill C without the other.[20] The problem in such situations relates to the ascription of responsibility. For in imposing liability in such cases, the *conditio sine qua non* rule is violated, neither act in the example being in itself a necessary condition of the harm.[21] It may be observed, however, that the theory suffers several other drawbacks. The theory presupposes that it is possible to know that certain sets of conditions are invariably followed by certain types of events and that it is this which justifies us in asserting the existence of causal connection on a given occasion. This however is too rigid a requirement from the point of view of the law. For we are content to hold a party liable even though we may not be certain as to whether, given the precise same conditions, the party would behave in the same fashion. Additionally, we cannot be certain of all the conditions that are jointly sufficient to produce the event. We are content, that is, to assert a causal generalisation on the strength of a limited number of conditions. Such a generalisation amounts to holding that one or more of the conditions are present in the absence of any counteracting conditions. Hence the theory seems to be ill equipped to serve the purposes of lawyers for they are content with something less than a statement of the conditions in which an event will invariably and unconditionally follow.

JUDICIAL DISCRETION AND JUS MODERANDI

Judges in the exercise of their judicial functions set limits to responsibility that appears fair and reasonable.[22] This is particularly so in the case where a strict application of *conditio sine qua non* would yield transparently unjust or absurd results. Nevertheless, whether the exercise of such a *jus moderandi* may be justified on principle is open to question. What, however, is less open to doubt is the view that the judicial process is guided by the justice of the results. It is this sense of the 'justice of the result' which leads to a different meaning being attributed to causal expressions than would be expected.

TYPES OF THEORY

No need was felt for an elaborate theory until the industrial and mechanical developments of the nineteenth century multiplied accidents and forced lawyers

[20] G Williams 'The Two Negligent Servants' (1954) 17 *Modern Law Review* 66, 71.

[21] D M A Strachan 'The scope and application of the "but for" causal test' (1970) 33 *Modern Law Review* 386, 391.

[22] Cf: *Nader v Urban Transport Authority of New South Wales* (1988) 2 NSWLR 501, 509 (Mahoney J dissenting).

to adjudicate on complex sequences of events.[23] In the mid-nineteenth century the courts adopted the test of 'natural and probable consequences'.[24] By 1921 the courts came to view the negligent tortfeasor as responsible for the 'direct consequences' of his conduct.[25] In order to limit the too extensive liability to which defendants might be exposed under this doctrine a further reaction took place. The notion of foreseeability, in particular that the type of harm suffered must have been foreseeable, came to be considered as the orthodox position.[26] As Davies has shown,[27] while a wide remoteness test was unexceptionable when duty was narrowly conceived, a wide remoteness test in conjunction with a duty of reasonable care owed generally to a large class of persons ('neighbours' by Lord Atkin's test)[28] was objectionable in principle because of over- extensiveness. Honore has analysed the various types of theory around five basic ideas: (i) necessity; (ii) explanation; (iii) probability; (iv) the scope of the rule violated; and (v) equity.[29] For our purposes only the first three are of importance, and it is to these that we now turn.

NECESSITY THEORIES

This is essentially the *conditio sine qua non* theory according to which every condition in the absence of which the harm would not have occurred in the way in which it did occur, is a cause of the harm. The theory is nowadays employed as a test of what is referred to as cause in fact. The identification of conditions with causes involves a rupture with ordinary speech and with the actual practice of courts.

EXPLANATION: DIRECT CONSEQUENCE THEORY

The theory states that a tortfeasor is responsible only for the harm that is the direct consequence of his conduct or defined event. The tortfeasor is not liable for indirect consequences, it being understood that the relation in that instance is one of condition and consequence, not cause and consequence. One interpretation of 'indirect' is to say that it includes consequences that are caused by something other than the tortfeasor's conduct, particularly a condition that is abnormal in the context or is a free human decision. The latter formula was employed in England between 1921 and 1961.[30] As a result, a tortfeasor may be liable for unforeseeable damage. However, attempts were made to give a more extended meaning to 'direct consequence'[31] as well as restricting liability to the 'immediate consequences' of a negligent act, while counting at least certain economic consequences, or later physical consequences, as indirect. Hence, in the case of a defendant negligently sinking the plaintiff's dredger the owners could recover their loss on the contract on which the dredger was engaged, but not the extra expense incurred through having to hire an expensive substitute instead of

23 J G Fleming *The Law of Torts* (9th Ed, 1998) 9.
24 *Rigby v Hewitt* (1850) 155 ER 103, 104; *Greenland v Chaplin* (1850) 155 ER 104, 106.
25 *Re Polemis & Furness, Withy & Co* [1921] 3 KB 560.
26 *Overseas Tankership Ltd v The Miller Steamship Co Ltd* [1961] AC .388.
27 M Davies 'The Road from Morocco" (1982) *Modern Law Review* 534, 541-5.
28 *Donoghue v Stevenson* [1932] AC 562 (Lord Atkins).
29 Honore above n 16, 33.
30 *Re Polemis & Furness Withy & Co Ltd* [1921] 3 KB 560.
31 *Pigney v Pointer's Transport Services Ltd* [1957] 1 WLR 1121 (suicide).

purchasing one.[32] The latter expense was regarded as caused by the plaintiff's financial weakness. In 1961 the Privy Council decided that harm directly caused by the defendant's negligence was not recoverable unless of a foreseeable type.[33] So where the defendants negligently allowed oil to escape into a harbour and surround a wharf, they were held not liable for the destruction of the wharf by fire as a result of the oil catching alight. The scientific evidence available to the defendants indicated that the flash point of oil on water was in excess of that attainable under the circumstances. As such the fire damage was deemed unforeseeable.

Probability: Foreseeability Theory

Generally speaking the theory holds that the injured party can recover for harm, of which the alleged tortfeasor's conduct or the defined event was a condition, only if the type of harm was foreseeable. The alleged tortfeasor is liable if a reasonable person in his position would have foreseen the harm at the time of the wrongful act or defined event. It is immaterial what the alleged tortfeasor personally did, or could, foresee.[34] Harm is always conditionally foreseeable - it is the relevant probability of harm that would induce a prudent person to take the precautions that the defendant neglected, which results in liability. Anglo-Australian law holds that it is the *type* of harm alone that must be foreseeable.[35] So, for example, where damage by fire was foreseeable but the actual damage by fire is greater in extent than was to be anticipated, the additional damage is recoverable. Alternatively, in the instance where damage by the splashing of acid was foreseeable, any damage caused by an explosion is not recoverable.[36] Yet courts in defining the type of harm do not automatically demand that all conditions producing the harm be foreseeable. Hence the courts have maintained the so-called 'thin skull rule' whereby the tortfeasor takes his victim as he finds him.[37] The foreseeability issue is seen not as a test of causation but rather as a requirement in addition to it. Consider the case where A damages B 's property so that repairs are necessary, and C then further damages the property so that different repairs are required. Where the opportunity is concurrently taken to perform the original repairs, C is not liable for the cost of the repairs necessitated by A, even though in each case the damage was foreseeable and the defendant's conduct a *conditio sine qua non*.[38] The appeal of the theory lies in its ability to allow a person to estimate in advance the extent of his possible liabilities. While morally reassuring, the 'fictions of foreseeability' do little to protect tortfeasors as the amount, as opposed to the type of damage, need not be foreseeable.

The overriding impression one leaves with after viewing the various types of causal theories is that it is a highly discretionary and unpredictable branch of the law. Two factors may be cited as leading to this conclusion.[39] Firstly the various

32 *The Liesbosch Dredger v Edison* (Owners) [1933] AC 449.
33 *Overseas Tankship Ltd v Morts Dock & Enginerring Co Ltd* [1966] 2 All ER 709.
34 *Glasgow Corporation v Muir* [1943] AC 448, 457 .
35 *Hughes v Lord Advocate* [1963] AC 837 (explosion of the lamp of the same type as ordinary burning); *Chapman v Hearse* (1961) 106 CLR 112, 120-1.
36 *Doughty v Turner Manufacturing Co* [1964] 1 QB 518.
37 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405; P J Rowe 'The Demise of the Thin Skull Rule' (1977) 40 *Modern Law Review* 377.
38 *Performance Cars Ltd v Abraham* [1962] 1 QB 33.
39 Honore, above n 16, 66.

types of responsibility: some based on fault, some on risk creation, some on insurance. Within each of these there prevails a range of causal relations which determines what the appropriate ground of liability is to be. Hence it is simply not possible to formulate a general answer to the question of where liability is to fall.[40] Secondly, the extent to which compensation is paid is directly related to the economic level of the society in question and the prevalence of liability insurance. For while protecting the interest of the plaintiff the law also refuses to crush each and every tortfeasor. More generally, it may well be the case that not all causal questions are to be solved by recourse to any one particular theory. In fact, there is no logical reason to limit the courts in such a fashion - for in many instances courts will employ a range of devices, grounded in policy, to limit responsibility.

CAUSATION IN AUSTRALIAN LAW

Causation, proof and probability

The 'but for' test has recently been stated to be of limited usefulness in determining whether the defendant's negligence caused the plaintiff's injuries by the High Court of Australia:[41]

> The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgements and the infusion of policy considerations.[42]

Yet a salutary reminder of the degree that opinions may differ concerning the use of value judgements, is the case of *State Rail Authority of NSW v Wiegold.*[43] Samuels JA (majority), held that, as a matter of policy, the defendant's negligence while a sine qua non condition of the plaintiff's imprisonment, was not the cause of it: '...the application of the simple 'but for' test to determine causation would be singularly inappropriate in this case'.[44] Yet, the dissenting opinion of Kirby P held, that the 'but for' test *was* appropriate in the circumstances, and that there was no policy reason precluding its use.

Applied as a negative test of causation, the 'but for' test has a place in the resolution of causal questions.[45] The test is better at identifying what is a cause than in eliminating factors that are not a cause. As such it is liable to give false negatives. Yet every application of the 'but for' test involves an evaluation of what probably would have happened if the defendant had not been negligent, and a comparison of that situation with what actually happened. In its application of counterfactual hypotheticals the court may at best only provide an answer on the balance of probabilities. Yet, in a court of civil law, that will suffice: the court treats the answer 'probably yes' as Yes, and 'probably no', as No. Clarity of analysis would be aided if the relationship between the onus of proof on the

40 H L A Hart 'Varieties of Responsibility' (1967) 83 *Law Quarterly Review* 346.
41 *March v Stramare* (1991) 171 CLR 506; compare *Chappel v Hart* (1998) 156 ALR 517.
42 *March v Stramare* (1991) 171 CLR 506, 516 (Mason CJ).
43 (1991) 25 NSWLR 500.
44 (1991) 25 NSWLR 500, 514.
45 Cf: *Naxakis v Western General Hospital* [1999] HCA 22 (Unreported Kirby J, 13 May 1999), 45.

balance of probabilities and the 'but for' test was made explicit. To this end, one could pose the counterfactual question of 'what would have happened were the defendant not to have been negligent?', and then ask, 'is it more likely than not that the plaintiff would have been injured anyway?'. Where the answer is yes, then, on the balance of probabilities, the defendant's negligence was not the cause of the injuries. Where the answer is No, then the defendant's negligence is, on the balance of probabilities, the cause of the injuries. It is only through the rigour of such analysis that the manner in which common sense or intuition answers these questions is brought out. Further, such an analysis clearly brings out the degree to which the judgements are based on an unarticulated assessment of probabilities.[46]

The High Court considered the relationship between proof, hypothesis, inference and probability, in the case of *Bradshaw v McEwans Pty Ltd*:[47]

> ...[W]here direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and direct inference;...if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise ...All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission , left unexplained , should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood.

Yet the court makes perfectly clear that inference differs from conjecture. For the choice on the balance of probabilities requires more than a choice between 'conflicting inferences of equal degrees of opportunity'.[48] Where, on the other hand, all that is established is the injury suffered by the plaintiff, then an inference is raised that the defendant's negligence caused that injury. Yet, this does not raise a presumption of negligence on the part of the defendant. The plaintiff has merely made out a prima facie case of negligence against the defendant as 'the thing [injury] speaks for itself' (*res ipsa loquitor*). The defendant is under an evidentiary onus to produce evidence to explain the cause of the accident. The onus of *proof* does not shift to the defendant. Where the defendant does produce evidence of how the injury in fact come about the court must choose between any conflicting explanations. This necessarily entails a decision as to which is the more probable.[49]

Courts may, however, cast the evidentiary onus on the defendant by characterising the issue under consideration differently. Hence in *McLean v Tedman*[50] the defendant employer negligently failed to instruct its employees to use a safe system of garbage collection. The defendant argued that the plaintiff would have suffered his injuries even if it had taken reasonable care by giving

46 M Davies, *The Law of Torts* (3rd ed, 1999) 54.
47 *Bradshaw v McEwans* (Unreported, High Court of Australia, 27 April 1951)
48 *West v Australian Insurance Office of NSW* (1981) 148 CLR 62; compare *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345.
49 *GIO (NSW) v Best* (1993) Aust Torts Reps 81-210.
50 (1984) 155 CLR 306.

instructions about the method of garbage collection. The majority (Mason, Wilson, Brennan, and Dawson JJ) held: '...it was for the defendant to establish in the circumstances of the case it would have been unable to enforce compliance with the suggested system because its implementation would have been resisted by employers...'[51]

Analogously, a court may cast an evidentiary onus on the defendant by characterising the issue as one of *res ipsa loquitor*, which has much the same effect as a shift in the onus of proof. In *Brown v Target Australia Pty Ltd*,[52] the Full Court of South Australia held that, where a plaintiff fell on the floor of a supermarket, that fact in itself raised an inference that the injury was caused by the negligence of the defendant. As such, the defendant was required to rebut that inference by adducing evidence to the effect that the spilled substance would have been on the floor even if it had taken reasonable care.[53] In cases where the court is not prepared to make an inference of negligence from the very presence of the spilled substance on the floor, the onus of proof requires the plaintiff to prove that a reasonably safe cleaning system would have cleaned up the substance.[54]

Causation and novus actus interveniens

In deciding the issue of whether a subsequent act breaks the 'chain of causation', (the notional continuum between a cause and its effect), or is a link in the chain, courts are in fact determining whether the act is an 'effective' cause. That is, whether the act is suitable for the ascription of legal or moral responsibility with regards to the plaintiff's injuries. For where the act is a chain-breaking subsequent event it is considered to be a 'new intervening act' (*novus actus interveniens*).[55] The question as to when and why an event is considered to be extrinsic in this sense is examined in the case of *Haber v Walker*:[56]

> ...[An] intervening occurrence, if it is to be sufficient to sever the connexion [sic], must ordinarily be either-
> (a) human action that is properly to be regarded as voluntary, or
> (b) a causally independent event the conjunction of which with the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence...[57]

While providing us with an understanding of the questions involved, in determining whether a condition is a *novus actus interveniens*, *Haber v Walker* fails to provide us with the means of deciding how to identify whether, in fact, a condition is 'voluntary' or 'coincidental'. On the other hand, *Mahony v J Kruschich (Demolitions) Pty Ltd*,[58] is authority for the view that such questions are to be determined by applying the test of 'reasonable foreseeability'. In the instant case an employer sought to cross-claim against Mahony, a doctor, who

51 (1984) 155 CLR 306, 314.
52 (1984) 37 SASR 145.
53 Compare *Drakos v Woolworths* (SA) Ltd (1991) 56 SASR 431.
54 *Rose v Abbey Orchard Property Investments Pty Ltd* (1987) Aust Tort Reps 89-121.
55 *The Oropesa* [1943] 32.
56 [1963] VR 339.
57 (1963) VR 339, 358 (Smith J).
58 (1985) 156 CLR 522.

had treated a plaintiff employee for injuries sustained in a work place accident. The employer alleged that negligence on the part of the doctor led to the employee's subsequent disability. In proceedings to have the cross-claim struck out, one issue was whether the doctor's negligence was an intervening event. The High Court unanimously held that the cross-claim should not be struck out, and that the trial should proceed with the doctor as a party:

> When an injury is exacerbated by medical treatment...the exacerbation may be regarded as a foreseeable consequence for which the first tortfeasor is liable...The original injury can be regarded as carrying some risk that medical treatment might negligently be given...[59]

Notwithstanding this authority, the question has remained vexed. For it may be argued that reasonable foreseeability is concerned with possibilities, while the question of causation is concerned with proof on the balance of probabilities. Further, we would hold that notions of foreseeability do not determine notions of voluntary and coincidental at all. In fact we all can foresee the voluntary intervention of third parties and even of coincidences. On the strength of such arguments courts have entertained the view that reasonable foreseeability of the subsequent event, should not be relevant to the question of whether the defendant's negligence in fact caused the injury. A case in point is that of *Chapman v Hearse*.[60]

In *Chapman*, an accident was caused due to the negligence of Chapman. A passing doctor, by the name of Cherry, while rendering assistance to the injured Chapman was run over and killed by another vehicle, driven by Hearse. Cherry's estate sued Hearse alleging that his death had been caused by Hearse's negligence. Hearse joined Chapman as a third party claiming that Cherry's death had been caused by Chapman's original act of negligence. In issue, inter alia, was the question of whether in fact Hearse's negligence operated as an intervening act thereby severing the chain of causation between Chapman's original act and Cherry's death. The High Court held that Hearse's negligence was not the sole cause of Cherry's death. That is, the court found that even though it was foreseeable that someone would come to the assistance of the stricken motorist, that in itself was not enough to establish a causal connection:

> In effect, the argument of [Hearse] proceeded upon the basis that if the ultimate damage was 'reasonably foreseeable' that circumstance would conclude this aspect of the matter against [Chapman]...As we understand the term 'reasonably foreseeable' is not, in itself, a test of causation; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act.[61]

The court's analysis reveals the role of foreseeability as being one essentially concerned with the question of remoteness of damage rather than causation proper. Notwithstanding what was said above, the court has considered it appropriate to consider the question of reasonable foreseeability with regards to

[59] (1985) 156 CLR 522, 529 (Gibbs CJ, Mason , Wilson , Brennan and Dawson JJ).
[60] (1961) 106 CLR 112.
[61] (1961) 106 CLR 112, 122 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ).

determining the issue of culpability. So, in *March v Stramare Pty Ltd*,[62] the High Court held that the plaintiff's own negligence in driving into the back of the parked truck was not a *novus actus interveniens*:

> ...As a matter of both logic and common sense, it makes no sense to regard the negligence of the defendant or a third party as a superseding cause or *novus actus interveniens* when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things.[63]

Hence, where the subsequent event is the very thing that the defendant should have taken reasonable care to guard against, it would make no sense to hold that that subsequent event should be regarded as the sole cause of the plaintiff's injuries once it eventuates. Where, however, the event is not of the type that the defendant should have guarded against, the court will adopt a 'common sense' approach. This much is revealed by a consideration of the case of *Bennett v Minister for Community Welfare*.[64] Having negligently failed to provide independent legal advice to a ward in its care, the Minister denied responsibility for the plaintiff's right to sue being statute barred. Claiming that in fact it was subsequent legal advice received when no longer a ward, that caused the plaintiff not to pursue the matter, the Minister denied liability. The argument was rejected by the High Court who pressed for a 'common sense' approach on the issue:

> ...[T]he plaintiff sought and obtained independent advice because , and only because , the defendant was in breach of his duty of care. That circumstance makes it difficult, if not impossible, to conclude that, in the situation described, the [later] advice superseded the defendant's breach of duty as the sole cause of the subsequent loss.[65]

It may be remarked that the Court in this instance is essentially applying the 'but for' test, asking what would have happened if the defendant had not been negligent and had obtained independent legal advice for the plaintiff. On the strength of this reasoning the Court held that the first event was a cause of the plaintiff's loss.

Common Sense Causation and the High Court:

The High Court has advocated a firm commitment to the notion of 'common sense ' notions of causation on at least two occasions that will be analysed below.

March v Stramare Pty Ltd (1991) 171 CLR 506

March, the appellant, was seriously injured while driving intoxicated in the early hours of the morning from a collision with a grocery truck parked by the second respondent. The truck was parked in the centre of a six -lane highway in Adelaide whilst unloading fruit and vegetables. The trial judge held that the second respondent and his employer owed a duty of care to all drivers including those intoxicated. Given the appellant's drunkenness however, his Honour apportioned responsibility for the accident: 70 per cent to the appellant and 30 per cent to the

62 (1991) 171 CLR 506.
63 (1991) 25 NSWLR 500, 519 (Mason with whom Toohey and Gaudron JJ agreed).
64 (1992) 176 CLR 408.
65 (1991) 25 NSWLR 500, 514 (Mason CJ, Deane and Toohey JJ).

respondents. The Full Court of the South Australian Supreme Court, (Bollen and Prior JJ, White J dissenting), reversed the decision. The majority held that while the second respondent had been negligent, it was the appellant's own negligence which was the sole effective and 'real' cause, of the accident. Prior J held:

> ...The use of the truck in the middle of the road is merely an incident which precedes in the history or narrative of events...In my view there was not a sufficiently close or direct relationship between the acts of the defendants and the injuries sustained by the plaintiff to justify the finding made [by the trial judge]. Causal proximity was not established.[66]

The High Court unanimously allowed the driver's appeal. Yet the reasons given reflected a divergence of opinion on the bench. The majority, Mason CJ, (with whom Toohey and Gaudron JJ agreed), and Deane J, advocated the utilization of commonsense notions. McHugh J, preferred the traditional common law 'causa sine qua non' formulation. We will consider firstly the arguments proposed by the majority before turning to the views of McHugh J.

Mason CJ began with an examination of the inherent deficiencies in the 'but for' test, before quoting approvingly *Fitzgerald v Penn* per Dixon, Fullagar and Kitto JJ: 'it is all a matter of common sense ...and in truth the conception in question [i.e. causation] is not susceptible of reduction to a satisfactory formula'.[67] His Honour rejected the bifurcation of the causal question into issues of factual and legal ascription. In so doing the court fell in line with English authority which has repeatedly branded as futile any search for an all-embracing formula.[68] His Honour also rejected any attempt to employ theories borrowed from other disciplines to perform the legal task of ascribing responsibility. His Honour expressly rejected John Stuart Mill's 'sum of conditions' theory, according to which the cause of an event can be defined as the sum of the conditions which in combination are sufficient to produce it: '...at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage'.[69]

It may be noted that in the instance where multiple sufficient events bring about a result, a good case could be made for calling all the events that brought about the result, causes. A way of justifying this would be to apply the NESS test. Under this test the event will count as a cause if it was a necessary element in a set of conditions that were together sufficient to bring about the complained of consequence. Yet, as Mason CJ's remarks make clear, Australian courts prefer to pick one or more of the factual causes to which legal responsibility is attributed.[70] His Honour went on to hold, that it was the attempt to limit liability, and hence the confusion of questions of remoteness of damage with causal issues, that undermine the clarity of the arguments. Language such as 'direct', 'natural' and 'probable', have obfuscated the causal analysis to the law's disadvantage. His Honour acknowledged that it was the 'total defence' nature of contributory

66 (1989) SASR 588, 611.

67 (1954) 91 CLR 268, 277.

68 Cf; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691, 706 (Lord Wright); *Stapley v Gypsum Mines Ltd* [1953] AC 663 (Lord Reid)..

69 (1991) 171 CLR 506, 509.

70 Trindade and Cane above n 8, 476-7; Cf: *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691,706 (Lord Wright): 'The question always is what is the cause not what is a cause'.

negligence that had created a need in the courts to adopt a view of causation attributing events to a single 'effective cause'. This manifested itself in the adoption of the rule known as 'the last opportunity'. Relief was granted, despite the negligence on the part of the claimant, if the defendant had the last chance to avoid causing loss to him or her but failed to do so due to a lack of care. Yet with the implementation of apportionment legislation, the need to find such an isolated cause proved unnecessary.

His Honour's analysis of the deficiencies in the 'but for' test highlighted in particular the test's inability to respond to the demands of multiple, successive or intervening causes. Unable to accept the conclusion that, in the instance of multiple conditions, neither act is a cause as neither is a necessary condition of the injury suffered, the courts temper such conclusions with often implicit policy considerations. Where the deficiencies are acknowledged however, the test does have a role to play, albeit as a negative criterion of causation. Deane J observed that, in particular, the test operated as a filter of extraneous conditions by posing the counterfactual question of whether the injury would have occurred but for the defendant's act. It was only when applied as a comprehensive test that problems ensued. In fact, it was on the very basis of the test that the court held for the plaintiff in the instant case. Upon recognising that the duty of care extended to drunk drivers, it was held that the plaintiff's negligence could not sever the causal link between their act and the resultant damage. For were this to be regarded as an intervening act it would be to hold that the very risk of injury resulting from the plaintiff's negligence in the ordinary course of things broke the chain of causation. Deane J concluded by holding that, because an act constitutes an essential condition of an occurrence this does not mean that, for purposes of ascribing responsibility, it is properly to be seen, as a matter of ordinary language or common sense as a cause of that occurrence.[71] We now turn to a consideration of the dissenting opinion of McHugh J.

His Honour, in the instant case, departed from the position he adopted in the New South Wales Court of Appeal case of *Nader v Urban Transit Authority of NSW*. There it was argued that, '[c]ausation in fact is to be determined, not according to scientific or philosophical theories of causation, but by "common sense" principles'.[72]

The position now held was that, except in two circumstances, 'but for' should be the exclusive causative test in negligence, with any value judgement as to the apportionment of responsibility confined to the question of remoteness. The exceptions were, the 'unusual' case where damage results from the simultaneous operation of two or more separate and independent events, each sufficient to produce the result, and the doctrine of '*novus actus interveniens*' (which necessarily involves value judgements). The criticisms leveled against 'common sense' by his Honour, centre on the view that the notion of 'common sense' allows the imposition of idiosyncratic values. For the vagueness of the criterion is prone to conceal policy considerations masquerading under the guise of principle. In fact, resorts to common sense were: 'invitations to use subjective, unexpressed and undefined extra-legal values to determine legal liability ...[it] does not justify

[71] (1991) 171 CLR 506, 523.
[72] *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501, 530.

the use of vague rules which permit liability to be determined by subjective, unexpressed and undefined values'.[73] Moreover, it may very well be doubted that there is in fact any consistent common sense notion of what constitutes a 'cause'. Research reveals that:

> [J]udgments of causes and responsibility [by the man in the street] are reached by an active , constructive process which goes beyond the information given and is therefore subject to various forms of error and bias: are structured by as well as expressed in language ; and are influenced by the motives, values, experiences, and other characteristics of the judger, the specific context, and the anticipated consequences.[74]

The question of what constitutes a cause will be answered according to the context of the enquiry. Differing outcomes will result depending on the forum of the discussion. In particular, expert evidence will render common sense notions relatively meaningless or, result in findings which, would not be expected of an ordinary person who had not been instructed. Further, it may reasonably be assumed that an ordinary person's concern with the ascription of causal connections reflects that person's preoccupation with explanatory, rather than allocative, issues. That is, an ordinary person will be more concerned with answering the question of, 'why and how an event came about', rather than answering the question of, 'who is responsible'. Patrick Atiyah has remarked that:

> There is a long history of courts saying that issues of legal causation should be resolved on the basis of 'common sense'; but is this the commonsense of judges or of non-lawyers? [for] although legal concepts of causation and responsibility are based on non-legal ideas, they are and need to be much more detailed and complex than their non-legal counterparts. An important reason for this arises out of the point... that concepts of cause and responsibility serve a variety of different purposes.[75]

Mullany,[76] put forward the view that common sense notions of causation are neither uniform nor normative concepts. Humans are infinitely diverse; any attempt to make a benchmark of such a vague and subjective criterion as 'common sense' would be to open the law up to a range of idiosyncratic judgments. Further, courts will determine like cases in dissimilar ways, leading the law into uncertainty: 'the application of 'but for' in single cause cases and overt enunciation of policy when confronted by multiple causes is preferable to a purportedly consistent utilization of an infinitely varying mental process'.[77] It may very well be the case that, in the instance where there are multiple sufficient causes, to treat each wrongful act as an independent cause for legal purposes, may be the most suitable course.[78]

73 (1991) 171 CLR 506, 533.
74 S Lloyd-Bostock, 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' (1979) 42 *Modern Law Review* 143, 167.
75 Craven, above n 3, 101-2.
76 NJ Mullany 'Common Sense Causation - An Australian View' (1992) 12 *Oxford Journal of Legal Studies* 431.
77 Ibid 439.
78 (1991) 171 CLR 506, 534 (McHugh J); Compare with Trindade and Cane above n 8, 489, 491.

Bennett v Minister of Community Welfare (1992) 107 ALR 617

In the instant case, McHugh J joined the majority from *March v Stramare* in deciding that 'common sense' notions were in fact to be applied in the law of negligence. As such, the orthodox position now, as understood in Australia, is that of the majority in *March v Stramare* and the unanimous decision of the Court in *Bennett v Minister*.[79] As a ward of the state, the plaintiff in 1973 had the fingers of his left hand amputated as a result of the vicarious negligence of the Minister. It was subsequently claimed that the Director was in breach of his duty in failing to provide the plaintiff with independent legal advice. As a result, the plaintiff's right to sue the Minister for breach of duty (vicarious) was statute barred in 1979. The defendant, while not denying that the duty had been breached, denied that the breach had caused the plaintiff's loss. It was contended that firstly, the 'but for' test had not been satisfied. For, in stating the requisite counterfactual, there was no way of establishing that, had the advice been given, the plaintiff would have proceeded with an action. That is, the loss may very well have been sustained even where the plaintiff had been given such advice. Hence it cannot be said that the breach of the duty was in any real sense a cause of the loss.

Secondly, in 1976 the plaintiff had received independent, but erroneous, advice from a barrister informing him that there was no right of action. It was established at the trial, that the plaintiff had not taken steps to act on his claim on the basis of this advice. On the strength of this, the defendant claimed that his actions had been superseded by the actions of the barrister. The High Court held unanimously, that the defendant's breach of duty was a cause of the plaintiff's loss. All members of the Court adopted the 'common sense' approach to the question of causation. Mason CJ, Deane and Toohey JJ held:

> In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense. In resolving that question, the 'but for' test, applied as a negative criterion of causation, has an important role to play but is not a comprehensive and exclusive test of causation; value judgements and policy considerations necessarily intrude.[80]

Gaudron J agreed with this position while McHugh J held:

> 'the existence of the causal connection is to be determined in accordance with common sense notions of causation and not in accordance with any philosophical or scientific theory of causation or any modification or adaption of such a theory for legal purposes'.[81]

While unanimous in rejecting the defendant's arguments, the Court differed as to its reasons. McHugh J held, that the 'but for' test would be satisfied on the balance of probabilities alone, for, the question of causation is one of fact to be decided on the balance of probabilities.[82] A simple but highly effective response to the question at hand, it was not repeated by the other members of the Court. Of these, the most explicitly reasoned was that of Gaudron J:

[79] See, *Medlin v State Government Insurance Commission* (1995) 182 CLR 1,20 (McHugh J); *Chappel v Hart* (1988) 156 ALR 517, 533 (Kirby J); *Naxakis v Western General Hospital* [1999] HCA 22 (Unreproted Kirby J, 13 May 1999) .

[80] (1992) 107 ALR 617, 619.

[81] (1992) 107 ALR 617, 631.

[82] (1992) 107 ALR 617, 631.

> ...[I]f an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect, or that the injury would have occurred even if the duty had been performed , it will be taken that the breach of the common law duty caused or materially contributed to the injury.[83]

In effect, the Court held that evidence of the breach provides the basis for an inference as to causation. In this fashion, as noted above, the Court shifts the evidential burden of the causation issue on to the defendant. Having failed to lead evidence as to how a breach of a duty to take positive precautions was not the cause of the plaintiff's loss, the defendant's action will be taken to have been the cause. The proviso, however, is that the damage was of the very sort the duty was intended to avert. This would seem to follow from the proposition that, questions of the sufficiency of the precaution are inevitably subsumed in the finding that there was a duty. A precaution would be classified as reasonable only where its performance would, in the ordinary course of events, avert the risk that called it into existence.[84] The High Court has not made explicit what precisely grounds the concept of the 'very risk to of injury' against which it is the duty of the defendant to safeguard the plaintiff. The initial formulation of the wrongful conduct as the basis of the tortfeasor's liability could, it is suggested, be rationalised on either corrective, or distributive justice grounds. These are considered below.

Palmer[85] has questioned the truth of the underlying logic which would hold that the law only imposes a duty to take positive precautions against a particular risk if the adoption of those precautions would, on the balance of probabilities, avert or eliminate that risk. For, 'sometimes the law requires a person to take precautions which would merely reduce, rather than eliminate, a particular risk'.[86] A case in point is that of *McGhee v National Coal Board*,[87] where the plaintiff contracted dermatitis after coming into contact with brick dust at work. The employer, while conceding negligence in not providing on-site washing facilities, so that employees could wash before leaving the work place, was found not to be negligent in allowing them to be covered while at work. Evidence was led to show that while greater exposure increased the risk of contracting disease, it did not have a cumulative effect. To this degree it is not true to say that the reasonable precaution of providing washing facilities would have averted the risk of the plaintiff contracting dermatitis; it would only have reduced that risk. The remaining members of the Court, Mason CJ, Deane and Toohey JJ specifically declined to consider whether there was any distinction between breach of duty and causation, and whether a failure to take steps which would bring about a material reduction of the risk amounts to a material contribution to the injury.[88]

We turn now to a consideration of the second difficulty. The subsequent advice received constituted an intervening act between the Director's breach and the plaintiff's failure to seek legal redress. In addressing the issue McHugh J put forward the view that:

83 (1992) 107 ALR 617, 625.
84 (1992) 107 ALR 617, 626 (Gaudron J).
85 A Palmer 'Causation in the High Court' (1993) *Torts Law Journal 9.*
86 Ibid 21.
87 [1972] 3All ER 1008.
88 (1992) 107 ALR 617, 622.

> The causal connection between a defendant's negligence and the plaintiff's damage is negatived by the subsequent conduct of another person only when that conduct is the 'free deliberate and informed act or omission of a human being, intended to exploit the situation created by the defendant.[89]

However, where the subsequent conduct is a cause, but is unrelated to the situation created by the earlier negligence, the subsequent conduct and the earlier negligence are treated as separate and independent causes of the damage. On this analysis, the advice received and the breach were both separate and independent causes of the plaintiff's loss. The issue may, however, be somewhat more involved than this. There is authority for the view that negligent conduct of a person, not intending to exploit a situation created by the defendant's negligence, may constitute an intervening act. Hence, in the case of *McKew v Holland and Hannen and Cubbits (Scotland) Ltd*,[90] the appellant had been injured as a result of a workplace accident. The employer had been held negligent. As a result of the injury, the appellant's leg was prone to give way. While descending a flight of stairs without a handrail, the appellant was forced to jump so as to avoid injury. As a result, the appellant broke an ankle. The House of Lords held that the employer was not liable for the injury - the unreasonable conduct of the appellant in descending without supervision constituted an intervening act.[91] It would seem that the principle advocated by McHugh J is too narrow, as there may be cases where negligent conduct by a defendant does in fact constitute a *novus actus interveniens*.

Equally so, there are cases where the subsequent conduct of either a third party, or a plaintiff, breaks the chain of causation. Conversely, the principle may also be seen as being too broad.[92] It fails to point out that liability sometimes arises precisely because a third person has deliberately exploited the situation created by the defendant's negligence. In such cases the subsequent conduct does not negative the causal connection between the defendant's negligence and the plaintiff's loss. Consider, for example, the case of *Home Office v Dorset Yacht Co Ltd*.[93] The escape of the juvenile charges leading to property damage, was held to be the responsibility of the Home Office. The failure to guard the youths was seen to provide the stage for the ensuing damage. We may decide whether the subsequent conduct constitutes an intervening act, by focusing on the content of the defendant's duty of care, rather than its nature. So, we would ask whether the defendant was under a duty not to expose the plaintiff to the risk that eventuated. In *Chapman v Hearse*,[94] Chapman's negligence partly consisted in exposing a rescuer such as Cherry to the risk of being injured by a negligent driver such as Hearse. Hearse's negligence did not relieve Chapman of liability for Cherry's injuries. Mason CJ in *March v Stramare*,[95] held that it was the exposing of negligent drivers to the very risk of injury which eventuated, that constituted the

89 (1992) 107 ALR 617, 631, quoting HLA Hart and Tony Honore, *Causation In the Law* (2nd ed, 1985) 122.
90 [1969] 3 All ER 1621.
91 [1969] 3 All ER 1621, 1623 (Lord Reid); see also: *The 'Oropesa'* [1943] 1 All ER 211.
92 This analysis owes much to A. Palmer 'Causation in the High Court' (1993) *Torts Law Journal* 9, 15.
93 [1970] AC 1004; compare *Smith v Leurs* (1945) 70 CLR 256.
94 (1961) 106 CLR 112.
95 (1991) 171 CLR 506, 518.

negligence of the defendant. The subsequent event will be the 'very risk of injury', if it was the risk of that sort of thing happening, which showed the defendant's actions to have been negligent.[96] When the subsequent event is the 'very risk' against which it was the duty of the defendant to safeguard the plaintiff then, whatever the nature of the event, it will not constitute an intervening act. Yet, consider the case of *Mahony v J Kruschich (Demolitions) Pty Ltd*,[97] where an injury caused by the negligence of the defendant had allegedly been exacerbated by negligent medical treatment. The Court unanimously held that 'negligence in the administration of the treatment need not be regarded as a *novus actus interveniens* which relieves the first tortfeasor of liability for the plaintiff's subsequent condition'.[98] It would only be gross negligent medical treatment that would constitute an intervening act. In such a situation it would be artificial to hold that negligent medical treatment was the very risk against which it was the duty of the employer to safeguard its employee. The 'very risk' was the original injury. The Court in such situations will consider whether in fact the conduct fell outside of the 'ordinary course of things'. This is not to suggest that the test be based on foreseeability, which relates not to causation but rather to the question of remoteness of damage.[99] For, negligence on the part of others is always foreseeable. Rather, the decision will be 'very much a matter of circumstance and degree'.[100] The test, however, leaves considerable scope for the use of subjective, ill-defined values to determine legal liability. A problem with the 'risk theory' is the ability to define the risk with some precision. This is particularly the case where a wrong such as negligence, vaguely defined, is involved. In such instances, the judge is called upon to determine the limits of the rule's scope. Risk theorists employ the notion of 'normal incident' in their attempt to define the risk. Hence, where the main risk created by the tortfeasor was that of bodily injury in a road accident, a normal incident of the risk might include the danger of mistaken medical treatment. Any medical treatment shown to be grossly negligent may thereby be excluded as falling outside of the risk for which the tortfeasor is held liable. Nevertheless, the problem of defining the 'normal incident' remains. We have already noted above that Hart and Honore propose their definition of 'voluntariness' to be a more practical criterion. Yet they then proceed to make so many concessions as to render the test indistinguishable from that of foreseeability. It would seem to be the case that policy judgements do in fact inform decisions no matter how courts or theorists attempt to rationalise decisions on principled grounds.

We may draw the following conclusions from our reading of the High Court cases:[101]

(a) the 'but for' test is to be applied as a negative, exclusionary test in all cases except those involving 'multiple sufficient causes';

(b) a defendant's breach of duty is a cause of a plaintiff's loss when it also satisfies a 'common sense' test of causation. This test involves the making of value judgements and the appreciation of policy considerations;

96 Palmer above n 85, 17.
97 (1985) 156 CLR 522.
98 (1985) 156 CLR 522 (Headnote).
99 *Chapman v Hearse* (1961) 106 CLR 112, 122.
100 (1961) 106 CLR 112, 122.
101 Palmer, above n 85, 22-3.

(c) where it is suggested that there has been a *novus actus interveniens*, the court should ask whether there are any reasons in common sense, logic or policy for refusing to regard the defendant's negligence as a cause of the plaintiff's loss;
(d) where a third party's conduct is a 'free, deliberate and informed act or omission, intended to exploit the situation created by the defendant', the causal connection between the defendant's act and the plaintiff's injury is broken. The causal connection may also be broken by the negligent or unreasonable conduct of the plaintiff;
(e) if, however, the possibility of such conduct was the 'very risk of injury' against which it was the duty of the defendant to safeguard the plaintiff, then the causal connection will not be negatived;
(f) even if the subsequent conduct was not of this sort and was in, the ordinary course of things, the very kind of thing which was likely to happen, the causal connection will not be negatived.

Causation and Responsibility

Crisis in modern Tort Theory

Moral Responsibility and Social Utility

The law of torts has been conditioned historically by the 'tension between two basic interests of individuals - the interest in security and the interest in freedom of action'.[102] The first finds expression in faultless causation - the plaintiff to be compensated regardless of the defendant's motivation and purpose. The latter demands 'fault' or 'culpability'- the defendant's liability relates to their intentional wrongfulness or lack of concern with others wellbeing.

The early laws, which limited causes of action, show the system to have been one of no liability, rather than pervasive liability without fault.[103] Through the impetus of equitable principles, there was a corresponding move towards moral culpability as an appropriate basis of tort. With the advent of the Industrial Revolution and the philosophy of individualism, with its economic corollary of laissez-faire, the courts espoused freedom of action in the guise of 'no liability without fault'. The security of individuals was seconded to the interests of industry. 'Fault alone was deemed to justify a shifting of loss, because the function of tort remedies was seen as primarily, admonitory or deterrent'.[104] Faultless causation was considered inhibiting, as it imposed on the individual liability regardless of care.

It is now recognised that 'accidents' represent an inevitable feature of modern society. The vast majority of accidents occur in traffic and work environments. These are due less to the participants than to the actual activity involved. They are, in effect, a by-product of a technological society - the price of progress. The expense, it is argued, is better paid for by the industry benefiting from the activity,

[102] Fleming n 23, 8.
[103] P H Winfield 'The History of Negligence in Tort' (1926) 164 *Law Quarterly Review* 184.
[104] Fleming n 23, 10; a contrasting view to that of courts retrenching liability for political purposes, has been put forward by the American scholar GT Schwartz, 'The Ethics and the Economics of Tort Liability Insurance' (1990) 75 *Cornell Law Review* 313.

rather than the victim.[105] A case in point, reflecting this distribution of costs amongst those who benefit from the activity, is that of worker's compensation. Compulsory insurance by the employer allows liability for compensation to be placed squarely on the shoulders of the industry, regardless of worker's negligence.

Dissociated from individual culpability, compensation has been viewed along instrumentalist lines by legal economists. Efficiency amounts to a reduction of costs. This is achieved by reducing the number of accidents. Means by which to effect this are either, 'specific deterrence'- safety measures enforced by fines, or 'general deterrence'- the operation of market forces. The price of the product will inevitably reflect the cost of the accidents. In this fashion, the internalisation of the accident costs is seen to lead to the efficient allocation of resources. On this reasoning, the legal economists seek to 'view the role of tort law as being to influence human conduct ex ante rather than as correcting ex post a disturbed equilibrium'.[106]

The developments outlined above, leading to the notion of liability without fault, failed to expunge the deep-rooted sentiment that the proper basis of a tort was moral culpability. The current preoccupation with social and economic policies of loss allocation is seen to undermine the traditional 'corrective' justice approach of tort law. In its place, we have a rationale of 'distributive' justice. In the former case, my striking you will be treated as a tort committed by me against you, and my payment to you of damages as restoring the equality disturbed by my wrong. In the latter case, the same incident will be treated as activating a compensation scheme, shifting resources among members of a pool of contributors and recipients, in accordance with a distributive criterion. The two notions of moral responsibility and social utility underlying these two policies have been held to constitute a polarity. In relation to the ascription of responsibility, the imposition of liability on grounds of social utility has been held to be contrary to a moral theory of tort law.[107] In the light of such seeming intransigence well may we ask why do law and economics scholars, such as Posner, support the fault-basis of the negligence tort?[108] Posner begins with the economic principle of wealth maximisation as the utilitarian principle underlying Anglo-American case law. Traditional rules of tort liability are, as such, approximations to the overriding principle of wealth maximisation. Yet Posner then contends that this principle is grounded upon ethical foundations, the principle being in conformity in fact with moral postulates. The imposition of liability on the defendant, in furtherance of the aggregate welfare of society, is in the nature of a moral responsibility. It may be argued that for such economically minded scholars it is the principle of efficiency that is relied upon in order to supply the ethical justification of the individual person's responsibility. In this sense moral responsibility is reduced to a mere descriptive term for 'moral blameworthiness', rather than fault as normally understood.

[105] Craven above n 2, 20.
[106] Fleming, above n 23, 14.
[107] I Englard, *The Philosophy of Tort Law* (1993) 7.
[108] R A Posner, *The Economics of Justice* (1981); 'Conventionalism; The Key to Law as an Autonomous Discipline' (1988) 38 *University of Toronto Law Journal* 333.

Corrective Justice and Distributive Justice:

Both of these concepts are of a formal nature requiring supplementation by extrinsic substantive criteria. Thus, distributive justice may settle for various standards of distribution, depending on the deciding authority's moral and political philosophy. Corrective justice, on the other hand, seeks to redress an imbalance between parties. Yet, the criterion for the idea of wrong, embodied in the principle of justice, must be claimed from a moral philosophy. It is argued that, the conversion of the tort dispute into a medium for furthering social goals has led to a blurring of the issues of corrective and distributive justice. For many tort scholars begin with the assumption that tort law should be grounded exclusively on principles of corrective justice. It is argued that, distributive justice considerations disrupt tort laws inner coherence. With its emphasis on *ex ante* considerations the distribution criteria is viewed as independent of the damage causing circumstances. Liability could therefore be imposed irrespective of a causal connection between the liable person's conduct and the damage. So viewed, a system based on distributive justice principles, for example compensation by a social security fund, falls outside of the moral framework of tort law. For, it fails to take account of the bilateral relationship between the injured party and a private defendant.[109] To the same extent, distributive justice is also likely to violate the moral foundations of personal responsibility. Yet to what degree is this true? For is not the 'deep pocket' principle, imposing liability upon a person because of their relative wealth compared with the victims, grounded ultimately on that person's duty of beneficence in relation to the victims? Yet, the moral duty does not translate into a legal duty. As a matter of an exclusively internal nature, it may be said to lie beyond the reach of positive law.[110]

Causation as a basis of Responsibility

The critical question is, how to ascribe liability to a person whose conduct, or its consequence, is outside their control. Peter Cane has employed the philosophical notion of 'moral luck' to analyse this problem.[111] The idea relates to the fact that many aspects of a person's conduct, and the circumstances in which that conduct occurs and takes effect, are to a greater or lesser extent, outside their control. The author argues that such a phenomenon does not, by itself, undermine attributions of responsibility. For, taking responsibility for conduct and outcomes, even those outside our control, is essential to having a sense of ourselves as moral agents, rather than mere victims of fate. The starting point for any analysis is that, human agents must take the world around them as they find it, if things turn out badly, and may take it as found, if things turn out well. Cane contends that agent responsibility is predicated on basic ideas about relationships between individuals, and between persons and the world around us. Taking responsibility is important to having a secure sense of others and ourselves as moral agents, whose conduct can have effects in the world. Were we to refuse to accept and make judgements of our behaviour, which ignore luck, we would threaten our

[109] Englard n 107, 13.

[110] This of course underpins the rationale behind the lack of legal liability for cases of the 'Good Samaritan' type.

[111] P Cane, 'Retribution, Proportionality and Moral Luck' in P Cane and J Stapleton (eds), *The Law of Obligations* (1998) 141.

sense of selfhood, and our ability to act purposively. 'To the extent that we view human conduct or its effects as a matters of luck, we see humans as victims (or passive beneficiaries) of fate'.[112]

It is better to see responsibility as the price of having a sense of ourselves as agents and not victims rather than as the outcome of a bet, forced on us by the nature of the world. The author nevertheless contends that tort law contains certain principles, which clarify, and give concrete content to vague and unexpressed moral intuitions. These relate to when a person should be relieved of responsibility for their moral luck. Three such principles are outlined. Firstly, the author contends, not all the effects of our actions will be taken into account. For, if people were held responsible for all the consequences of their actions, they would lose any sense of being able to act purposively and to influence events. Some judgement must be made about when pleas of 'lack of control' should and should not succeed. One such determining device is the distinction between ordinary and extraordinary. Hence, in tort law, we may ask whether the person was faced with an emergency (extraordinarily demanding circumstances).

This, of course, is an application of the more general principle in tort law, that a person should not be held liable for the unforeseeable. Equally, it relates to the notion advocated by Hart and Honore, under the rubric of 'abnormal', which they define as 'unforeseeable', and as such 'involuntary'.[113] While foreseeability is currently accepted as a criterion for determining the extent of liability, it has not always been so.[114] Yet, as a qualitative criterion concerned with culpability, foreseeability is a very common pre-condition of liability for harm. Consider the case of a pre-existing condition, whereby V contracts cancer, due to his susceptibility to the defendant employer's work place conditions. The susceptibility will be irrelevant if V can point to a trauma, (for example a scratch), which triggered the cancer, and which the employer should have guarded against. Hence, liability will depend on the fortuitousness of there being a foreseeable, even if minor, wound.[115] In fact, there can be no tort liability for harm, unless some of the harm, or at least the type of harm, said to flow from the conduct of the alleged tortfeasor, was foreseeable.

Secondly, the scope of moral luck is further delimited by recourse to the notion of causation. The distinction between, legal cause (effective cause), and factual cause (necessary condition), is the distinction between agents, and the background against which their conduct occurs and takes effect. As indicated by Hart and Honore, the paradigmatic case of causing harm will be severed if there is an abnormal or extraordinary event in the background. Some such idea underlies the notion of an 'act of God'.[116]

The third notion is that of remoteness, holding that a defendant will not be liable for harm caused by a tort, if the harm was of an unforeseeable type. The significance of the principle is most apparent in the instance of the 'thin skull rule'. In this context the tortfeasor, takes his victim as he finds him. Liability is extended to the results of interaction between the tortious conduct and the

[112] Ibid 152.
[113] Hart and Honore, above n 11,163; Cf: text at n 89.
[114] Contrast *Overseas Tankership Ltd v The Miller Steamship Co Ltd* [1961] AC .388 with *Re Polemis* [1921] 3 KB 560.
[115] J Stapleton, 'Law,m Causation and Common Sense' (1998) *Oxford Journal of Legal Studies* 111, 131.
[116] Hart and Honore, above n 6, 162.

plaintiff's pre-existing susceptibilities, which may not have been foreseeable. The plaintiff is to be compensated for all the harm they suffer, as a result of the tort, depending on their earning capacity.[117] In such a situation moral luck, in terms of circumstantial luck, is no bar to liability being imposed. Yet, in deciding the standard of care, the rule is that the defendant will be liable for failure to take precautions to protect an abnormally sensitive person from injury, only if those precautions would have been necessary to protect a normal person from injury.[118] In this regard, the tortfeasor is not required to take the risk of abnormality into account. Thus, by combining the two principles, the law distributes the luck between the tortfeasor and the victim.

So, we may hold that circumstantial luck is an ineradicable and pervasive feature of the human condition, which does not stand in the way of attributing responsibility to individuals. Yet, there are principles extant in the law of torts that operate to temper any injustice through the application of moral intuitions.

Conclusion

This article has sought to analyse the High Court's view concerning the way in which the Law seeks to pick out of a group of antecedent factual conditions the effective cause. The High Court's reliance on a 'common sense' view of causation, as though this were a normative concept rather than a varying one, leaves the Law open to the imposition of 'vague rules which permit liability to be determined by subjective, unexpressed and undefined values'.[119] The wholesale use of the 'but for' test, while acceptable in the instance of single cause situations, is obviously problematic in the case of multiple sufficient causes. It is in such cases that the courts are required to temper absurd results by the deployment of 'value judgements' and 'policy considerations'. Yet appeals to 'common sense' notions seem to be a particularly ambivalent route by which to rationalise what is obvious to the ordinary person in the street. That is that the court employs reasons, the validity of which cannot be articulated fully, in the sense of their being demonstrated beyond argument. 'For such reasons may depend upon value judgements or even, in the end, upon a judicial *ipse dixit*'.

It is submitted that the reasons for the relative failure of this approach lie in its reluctance to acknowledge the truth that our ascription of responsibility is predicated on concepts beyond the reach of positive law. These are ideas centred upon the notion of 'personhood' giving meaning to any sense we may have of moral or legal culpability. Attempts to somehow put such intuitions on a reasoned, fully argued footing, are bound to failure as they expose us to the 'grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon'.[121]

[117] *The Arpad* [1934] P 189, 202 ('the shabby millionaire').
[118] *Jaensch v Coffey* (1984) 155 CLR 549; *Morgan v Tame* (2000) NSWLR 21.
[119] *March v Stramare* (1991) 171 CLR 506, 533 (McHugh J).
[120] *Nader v Urban Transport Authority of NSW* (1988) 2 NSWLR 501, 515 (Mahoney JA).
[121] *Overseas Tankership Ltd v The Miller Steamship Co Ltd* [1961] AC 388, 392 (Viscount Simonds).