

CASE ANALYSIS

**INFERRING NECESSARY CONDITIONS: THE ENDURING
PARADOX OF THE ‘BUT FOR’ TEST IN FACTUAL
CAUSATION**

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I INTRODUCTION

Despite its unavoidably delayed and slightly erratic evolution, an undeniable virtue of the common law has always been the ability to adapt, as times require, to societal and economic change. Adapting to liability scenarios permeated by structural scientific uncertainty – that is, uncertainty inextricably linked to the nature of the matter at hand, as opposed to merely circumstantial – has been a long lasting and ongoing puzzle across common law jurisdictions. In particular, the issue of causation in hard cases has produced fascinating reasoning matched by equally sophisticated commentary.¹ In what is a bit of an oddity for the common law world, the Australian civil liability legislation, borne out of the Ipp Report,² has crystallised the law of negligence (at least as regards breach and causation). This includes the ‘but for’ test of factual causation, a product of inductive reasoning stemming from factual scenarios that lent themselves to clear cut methodologies (take, for example, the imaginative removal of a truck from the middle of the road in the scene of a car crash as in *March v Stramare*).³ The legislation has restated the test into the more modern formula of the ‘necessary condition’, which features in s 5C(1)(a) of the *Civil Liability Act 2002* (WA) (‘CLA’). Substantively, the two remain one and the same.

This legislative setting is potentially limiting for Australian courts facing difficult cases, prompting them to engage in creative interpretations of what is in

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¹ See for example: Gemma Turton, *Evidential Uncertainty in Causation in Negligence* (Hart Publishing, 2016); Sarah Green, *Causation in Negligence* (Hart Publishing, 2015); Sandy Steel, *Proof of Causation in Tort Law* (Cambridge University Press, 2015); Miquel Martín-Casals and Diego M. Papayannis (eds), *Uncertain Causation in Tort law* (Cambridge University Press, 2015); Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011).

² *Review of the Law of Negligence* (Final Report, September 2002) (‘Ipp Report’).

³ *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 (‘March’); *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 2 WLR 422; *Rogers v Whitacker* (1992) 175 CLR 479.

theory a neatly logical exercise. Indeed, the provisions are designed to strictly limit judicial margin of manoeuvre in fact finding exercises – with all normative considerations seemingly confined to the second limb of the causal inquiry: the scope of liability.⁴ Yet, in cases involving scientific uncertainty, where the question of factual causation cannot be reduced to the imaginative exercise of hypothetically removing a truck from the middle of the road, decisions will invariably (and inevitably) attract a significant measure of judgment. This creates a tension, as the presence of the strictly factual ‘necessary condition’ requirement enshrined in the legislation puts the onus on both claimants and judges to engage in complex reasoning, the ultimate result of which is disguising a normative choice by presenting it as fact, or (more modestly) extrapolating factual conclusions from incomplete or inconclusive pieces of evidence. This is the case when courts make use of inferences in proof of causation in complex cases – ie the practice of proving a fact for which there is no direct evidence by relying on a set of established underlying facts.⁵

The Court of Appeal of Western Australia engaged with the issue of factual causation recently in *East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis)* (*‘Ellis’*).⁶ Quinlan CJ, Mitchell and Beech JJA took the opportunity to reaffirm the arguably paradoxical proposition that, in a situation of structural scientific uncertainty, it is possible to infer a causal link on the balance of probabilities in order to demonstrate that the breach is a ‘necessary condition’ of the harm per s 5C(1)(a).

This commentary sketches the facts and main findings of the Court in *Ellis* to highlight this paradox and call for a revision of what is a largely obsolescent provision.

II BACKGROUND AND DECISION

The respondent, Cooper Ellis, was born on 24 August 2009 at Bentley Hospital (‘Hospital’).⁷ The appellant, East Metropolitan Health Service, was the legal entity responsible for the medical care provided by the Hospital, including that of the obstetrician who managed the respondent’s birth (Dr Amira).⁸ The

⁴ *Civil Liability Act 2002* (WA) s 5C(1)(b).

⁵ *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

⁶ [2020] WASCA 147 (*‘Ellis’*).

⁷ *Ibid* [1].

⁸ *Ibid*.

respondent suffered a number of significant injuries as a result of a prolonged and difficult birth, during which Dr Amira ‘made a number of unsuccessful attempts to deliver the respondent’ using a type of instrumental delivery.⁹ Using a combination of methods, the respondent was ultimately delivered but was not breathing or moving and ‘showed poor muscle tone’.¹⁰ It was not in dispute at the trial or on appeal that the respondent suffered from periods of perinatal asphyxia, a condition in which a baby’s brain does not receive enough oxygen during the birth process.¹¹ The respondent claimed that the injuries he incurred as a result of the birth process were caused by the negligence of Dr Amira.¹² The respondent also claimed that the appellant was liable in negligence for impairments consequential upon the injuries he suffered during his birth. It was not in issue at trial or on appeal that the appellant was vicariously liable for Dr Amira’s actions.¹³

At trial, Gething DCJ found the appellant liable in negligence for both the respondent’s ‘Birth Injuries’, as well as his ‘Developmental and Cognitive Impairments’, on the basis that the latter were ‘sequelae’ of the respondent’s Birth Injuries, and that the appellant’s fault was a ‘necessary condition’ of the occurrence of both the respondent’s Birth Injuries and Developmental and Cognitive Impairments.¹⁴ In order to reach the conclusion that the respondent’s Developmental and Cognitive Impairments were consequential upon his Birth Injuries, Gething DCJ had to make an inference from all the facts and circumstances and the evidence of several experts. There was no challenge on appeal to the trial judge’s assessment of damages (in the sum of \$5,231,149).¹⁵ The specific details of Dr Amira’s negligence during the birth process were also not challenged on appeal.¹⁶ Gething DCJ found that, but for Dr Amira’s various breaches,

the respondent would either have been safely delivered by the use of instruments or, if that did not occur after three pulls of a correctly placed instrument, safely delivered by caesarean section. In either case, the

⁹ Ibid [2].

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid [3].

¹³ Ibid.

¹⁴ *Ellis v East Metropolitan Health Service* [2018] WADC 36, [941].

¹⁵ Ibid [4].

¹⁶ Ibid [6].

respondent would not have suffered the periods of perinatal asphyxia that he did.¹⁷

That the respondent suffered the Birth Injuries, including injury to his brain, was not in issue in the appeal.¹⁸ Rather, the appellant challenged the trial judge's findings as to causation of the respondent's Developmental and Cognitive Impairments, contending that they were not 'caused by the injuries to his brain suffered in or as a consequence of the birth process.'¹⁹ The question of whether the respondent's Developmental and Cognitive Impairments were caused by the appellant's fault was a question of fact to be established on the balance of probabilities.²⁰ Gething DCJ found that this fact was established to the requisite standard but did not specify which precise physiological mechanism, of a number of separate and distinct possible mechanisms, formed the necessary causal link between the appellant's negligence and the respondent's impairments.²¹

The primary challenge, broken down into 18 separate grounds of appeal, was to 'the learned trial judge's finding of factual causation pursuant to s 5C(1)(a) of the *CLA*; namely that the appellant's fault was a necessary condition of the occurrence of the respondent's Birth Injuries and his Developmental and Cognitive Impairments.'²² The further four grounds of appeal are irrelevant for the purposes of this commentary. The relevant 18 grounds largely identified purported errors of law regarding how the trial judge treated the various possible causes of the respondent's impairments and errors of fact in finding certain injuries had been proven. Many of these alleged errors were grounded in the trial judge's treatment of the expert evidence.

The Court of Appeal upheld one of the 22 grounds of appeal, relating to the trial judge's application of s 5C(2) of the *CLA*. However, the ground did not strictly need to be determined as it related to Gething DCJ's alternative conclusion as to causation based on material contribution to harm, the Court of Appeal having dismissed the appellant's grounds challenging the trial judge's ultimate finding as to factual causation under s 5C(1)(a) of the *CLA*.²³

¹⁷ Ibid [7]; *Ellis v East Metropolitan Health Service* (n 14) [735].

¹⁸ *Ellis* (n 6) [13].

¹⁹ Ibid [15].

²⁰ Ibid [16].

²¹ Ibid [313].

²² Ibid [584].

²³ Ibid [587].

III CAUSATION AND MEDICAL LIABILITY

A *The use of inference in proof of causation: scientific versus legal reasoning*

The necessity to rely on scientific evidence in complex cases (including medical liability ones) has required courts to engage with the substantive difference that exists between methods of truth production in the scientific and medical field as opposed to the adversarial setting of litigation.²⁴ Several distinctions exist. First, scientists are teleologically driven by the pursuit of exact and objective findings based on experimental data that they themselves gather and/or replicate (for instance in a laboratory). By contrast, judges seek to resolve disputes based on the best approximation of objective truth arising from the evidence that parties to a dispute have presented. This fundamental difference in teleological drives has many implications, one of which being that judges are unable to (nor are they asked to) eliminate scientific uncertainty. Where a scientist might require or decide to collect further data in the face of ambiguity, judges are required to make findings of fact on the sole basis of the information presented to them in court.²⁵ In *Ellis*, the appellant argued that a plaintiff is required ‘to prove by expert evidence the mechanism by which a breach, or its immediate consequence, caused the damage claimed by the plaintiff, at least if there is expert evidence suggesting a lack of association’.²⁶ This was based on Dixon J’s comments in *Adelaide Stevedoring Co Ltd v Forst*,²⁷ which were cited with approval by the plurality in *Amaca Pty Ltd v Booth* (‘*Amaca*’):²⁸

[U]pon question of fact of a medical or scientific description, a court can only say that the burden of proof has not been discharged where, upon the evidence, it appears that the present state of knowledge does not admit of an affirmative answer and that competent and trustworthy expert opinion regards an affirmative answer as lacking justification, either as a probable inference or as an accepted hypothesis.

The appellant alleged error in this regard on the basis that the trial judge failed to identify injury to a particular part of the respondent’s brain and a ‘scientific

²⁴ The literature is vast, see for example Carl Cranor, *Toxic Torts* (2nd ed CUP, 2016); Phoebe C Ellsworth, ‘Legal Reasoning and Scientific Reasoning’ (2011) 63(4) *Alabama Law Review* 895, 895.

²⁵ Ellsworth (n 24) 907 - 908.

²⁶ *Ellis* (n 6) [268].

²⁷ (1940) 64 CLR 538, 569.

²⁸ (2011) 246 CLR 36, [69] (‘*Amaca*’).

explanation as to how injury to that part of the brain results in cognitive or other mental deficits'.²⁹ In this way, according to the appellant, the primary judge found liability based on the *possibility* of a causal link between the appellant's breach and the respondent's Birth Injuries and his Developmental and Cognitive Impairments.³⁰ The Court rejected the appellant's argument, stating that courts are only 'positively precluded' from dismissing an inference by reason of expert evidence if such opinion regards it as 'unjustified as a probable inference'.³¹ The Court took care, however, to emphasise the importance of expert medical evidence in a case that involves difficult and complicated facts that are outside the realm of common knowledge and experience.³² Expert medical evidence plays a vital role in medical liability cases characterised by a degree of scientific uncertainty. However, the Court adopted the reasoning of Spiegelman CJ in *Seltsam Pty Ltd v McGuinness*,³³ where his Honour, with specific reference to the use of epidemiological evidence, affirmed that such evidence:

must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn'.³⁴

The Court therefore regarded 'evidence of possibility' as circumstantial evidence 'which may, alone or in combination with other evidence, establish causation in a specific case'.³⁵ Adopting the analogy of primary facts being strands in a cable rather than essential links in a chain, the Court determined that the primary judge found certain primary facts to be possible (i.e. 'strands in a cable of circumstances'),³⁶ which in combination led to his Honour's ultimate finding that causation had been proven on the balance of probabilities.³⁷ The metaphor of the cable can be read in contrast with the language of the criminal law, specifically the words of McLure P in *Austic v The State of Western Australia*³⁸ and Dawson J in *Shepherd v The Queen*³⁹ referred to the dilemma of

²⁹ *Ellis* (n 6) [268].

³⁰ *Ibid* [28].

³¹ *Ibid* [269].

³² *Ibid* [276]; *Amaca* (n 28) [67].

³³ (2000) 49 NSWLR 262.

³⁴ *Ibid* [79]; *Ellis* (n 6) [279].

³⁵ *Ellis* (n 6) [280].

³⁶ *Ibid* [341].

³⁷ *Ibid* [286].

³⁸ [2010] WASCA 110, [2]-[4] ('*Austic*').

³⁹ (1990) 170 CLR 573, 581.

‘[w]hether or not an intermediate fact is an indispensable link in a chain of reasoning towards guilt’.⁴⁰ The Court found that this was not a case in which the precise mechanism that gave rise to the injury was crucial, largely because whichever of the mechanisms actually caused the respondent’s injury, the appellant’s negligence was to blame.⁴¹ This distinguished the case from *Amaca Pty Ltd v Ellis*,⁴² where only one of the two possible causes of the respondent’s lung cancer was actionable.⁴³ The Court in that case had to be satisfied that the actionable mechanism was more probable than the other in order to draw a causal link between the appellant’s negligence and the respondent’s injury.⁴⁴ Conversely, in the present case, it was sufficient that the primary facts supported a ‘reasonable and definite inference’, as opposed to a possible inference, that there was a causal link between the appellant’s negligence and the respondent’s Developmental and Cognitive Impairments.⁴⁵ The primary judge’s reference to a ‘reasonable and definite inference’ echoes a long line of case law establishing that ‘where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference’⁴⁶ as distinct from conjecture.⁴⁷ Therefore, the Court was satisfied that the primary judge had not found, as the appellant alleged, that the mere possibility of a causal link was sufficient to prove factual causation under s 5C(1) of the *CLA*.⁴⁸

B The role of material contribution to harm in cases of scientific uncertainty

While it was unnecessary to deal with the ground of appeal challenging the primary judge’s findings regarding s 5C(2) (his Honour’s findings in relation to factual causation having been left undisturbed), the Court dealt with it in their reasons as it was fully argued and concerned s 5C(2)’s proper construction.⁴⁹ Courts have long grappled with the material contribution to harm test under s

⁴⁰ *Austic* (n 38) [2].

⁴¹ *Ellis* (n 6) [314].

⁴² (2010) 240 CLR 111.

⁴³ *Ibid* [70]; *Ellis* (n 6) [315].

⁴⁴ *Ellis* (n 6) [315].

⁴⁵ *Ibid* [316].

⁴⁶ *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar, Kitto JJ); *Chamberlain v The Queen* (No 2) (1984) 153 CLR 521, 536 (Gibbs CJ and Mason J); *Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085* [2017] WASCA 190 [47]; *Fazio v Fazio* [2012] WASCA 72 [48] (Murphy JA, with whom Pullin and Newnes JJA agreed).

⁴⁷ *Fazio v Fazio* [2012] WASCA 72 [50] (Murphy JA).

⁴⁸ *Ellis* (n 6) [318].

⁴⁹ *Ibid* [589].

5C(2) of the *CLA* and its interaction with factual causation, particularly in the context of medical liability cases characterised by a degree of scientific uncertainty. The material contribution test under s 5C(2) is to be used in an appropriate case where the ‘but for’ test implicit in s 5C(1)(a) cannot be applied. In such cases, the negligence of a defendant cannot be said to be a necessary condition of the harm, but a material contribution to the necessary condition.⁵⁰ Section 5C(2) bridges the evidential gap in an ‘appropriate case in which by reason of the particular circumstances fault cannot be established as a necessary condition’.⁵¹ In this context, the Court reasons, s 5C(2) is concerned with cases where there literally cannot be evidence supporting a finding of a necessary condition because of the nature of the case.⁵² Such cases include the now well-known instances of mesothelioma and pneumoconiosis as a result of exposure to asbestos and silica dust respectively.⁵³

As is exposed in the obiter comments of the Court, there is a distinction to be made between such cases and those in which the plaintiff is only able to prove that the defendant’s fault *may* have caused the harm – a situation akin to the ‘material increase in risk’ described in *Fairchild* – that being a mere failure to meet the onus of proof under s 5C(1)(a).⁵⁴ The Court commented that a material contribution to harm test, brought in under the catch-all provision of s 5C(2), had ‘no role to play’ in the factual scenario of *Ellis*, as had the plaintiff failed to establish factual causation under s 5C(1)(a), the proper course would have been to dismiss the claim.⁵⁵ The circumstances of the case presented a stark dichotomy - ‘the respondent either established factual causation under s 5C(1)(a) or he did not’.⁵⁶ If the respondent failed to do so, the facts did not give rise to a need to consider the application of s 5C(2).⁵⁷ As such, while scientific uncertainty may give rise to a consideration of s 5C(2), the words ‘appropriate case’ have a lot of work to do.⁵⁸

⁵⁰ Ibid [604].

⁵¹ Ibid [604], [606].

⁵² Ibid [606].

⁵³ Ibid [604], [609]; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *McGhee v National Coal Board* [1973] 1 WLR 1; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32.

⁵⁴ *Ellis* (n 6) [611].

⁵⁵ Ibid [613].

⁵⁶ Ibid [612].

⁵⁷ Ibid.

⁵⁸ Generally, on the difficulties of designing a clear and practical method of identifying material contributions to harm see the works of Jane Stapleton, ‘Factual Causation’ (2010) 38 *Federal Law Review* 468, and ‘Unnecessary Causes’ (2013) 129 *Law Quarterly Review* 39 – in which the author,

It is worth, as a side note, highlighting the distance between this approach and the more permissive one adopted by the UK House of Lords in *Fairchild v Glenhaven Funeral Services*,⁵⁹ where the Court concluded that a material increase in risk may be sufficient to attract liability. This remains true even in cases where multiple sources of risk coexist, and defendants are only accountable for some of it, as specified in *Sienkiewicz v Greif*,⁶⁰ and in contrast with the Australian position enshrined in *Amaca Pty Ltd v Ellis*.⁶¹ To date, the High Court is yet to settle whether a material increase in risk is sufficient, or the more demanding material contribution to harm is necessary. So far, the pendulum has swung towards the more restrictive approach, and the 'appropriate case' requirement has functioned as a powerful limiting factor.⁶²

C *Is there an enduring purpose to the 'but for' language?*

Whilst indubitably of assistance to future claimants and decision makers confronted with uncertain causation in WA, the decision in *Ellis* is a good illustration of the paradox we referred to in the introduction. Proving, *on the balance of probabilities*, that the defendant's fault was a *necessary condition* of the plaintiff's harm where the facts only allow *inferential reasoning* sounds very much like a *contradictio in terminis*. This is not to say that there is anything wrong with drawing inferences for the purpose of resolving otherwise insolvable disputes. Rather, we question the logical strictness of the 'but for' approach, and the language of necessity enshrined in the legislation, both of which provide an impression of mathematical rigour that does not sit well with the flexibility required in hard cases. Indeed, the tort of negligence and its elements are ontologically incapable of reduction to algebraic formulas. Australian courts have been alive to the fictitious nature of any parallel with mathematics. As famously stated by Gleeson CJ and Kirby J in *Mulligan v Coffs Harbour*⁶³ with regard to breach of duty:

amongst other things, discusses the normative implications for the factual causation test of the divisible or indivisible nature of the injury at stake.

⁵⁹ [2002] 1 AC 32.

⁶⁰ [2011] UKSC 10.

⁶¹ (2010) 240 CLR 111.

⁶² See Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2nd ed, 2018) 85-90; *McKew v Holland & Hannen & Cubitts Ltd* [1969] 3 All ER 1621; *Paul v Cooke* [2012] NSWSC 840.

⁶³ (2005) 223 CLR 486 ('*Mulligan*').

A calculus is a method of calculation. What is involved in the process to which Mason J was referring [in *Wyong Shire Council v Shirt*]⁶⁴ is not a calculation; it is a judgment ... Moreover, depending upon what may be involved in the concept of conflicting responsibilities, in some contexts... to treat what was said in *Shirt* as an inflexible formula could produce a distinctly unreasonable result.⁶⁵

Similar reasoning applies to scenarios where, like in *Ellis*, uncertainty permeates the chain of events leading to the plaintiff's harm. Medical scenarios are especially prone to this type of uncertainty. Indeed, the *CLA* itself expressly makes room for a divergence of opinions and practices in the context of establishing the standard of care and breach of duty by health professionals in s 5PB.⁶⁶ What is more, the section and its exculpatory function have been interpreted as only applicable in the restricted scenario of a widely accepted practice, understood as a specific course of conduct at the time of the event, as opposed to an ex-post appreciation of that conduct by a peer.⁶⁷ This implies that, in any case involving uncertainty and non-widely accepted practices, the analysis of breach will focus on the standard set by s 5B, which raises the broader question of whether a reasonable person in the defendant's position would have taken precautions against a foreseeable and not insignificant risk. The concessions made by the parliament with respect to the standard of care of health professionals, the possibility of uncertainty encapsulated in the provisions making room for divergent views and practices under s 5PB(3) and (5), and the reliance on the broader norm of s 5B in complex cases stand in stark contrast to the semantic rigidity of the 'necessary condition' test of factual causation in s 5C(1)(a).

Once again it is important to reiterate that the argument is not that using inferences is wrong. The point is rather that the enduring purpose of the 'but for' fiction is unclear. In *Amaca*, French CJ famously rejected the notion that a 'mere possibility' or 'real chance' of an event occurring as a consequence of another

⁶⁴ (1980) 146 CLR 40, 47-48.

⁶⁵ *Mulligan* (n 63) [2].

⁶⁶ See in particular s 5PB(3), which makes room for other widely accepted practices to differ or even conflict with the one followed by the health professional in the specific case; and s 5PB(5), which more broadly explains that a widely accepted practice does not need to be universally accepted.

⁶⁷ Marco Rizzi, 'Health Professionals' Standard of Care and Breach of Duty in Western Australia: A requiem for the 'peer professional' test at a time of uncertainty' (2020) 26 *Torts Law Journal* 179; *Child and Adolescent Health Service v Sunday John Mabior by next friend Mary Keley* [2019] WASCA 151; *Sparks v Hobson* (2018) 361 ALR 115.

may establish factual causation. Rather, he described the process of inference permissible in the context of factual causation as follows:

However, if the association between two events is shown to have a causal explanation, then the conclusion may be open, if the second event should occur, that the first event has been at least a contributing cause of that occurrence. An after-the-event inference of causal connection may be reached on the civil standard of proof, namely, balance of probabilities, notwithstanding that the statistical correlation between the first event and the second event indicated, prospectively, no more than a "mere possibility" or "real chance" that the second event would occur given the first event.⁶⁸

This appears to be a tempered version of the causal inquiry developed in the American context of toxic tort litigation, where plaintiffs are required to separately demonstrate general and specific causation. In that context, general causation is understood as proof that a certain product (e.g. a chemical or a pharmaceutical) *can* demonstrably cause a certain event (e.g. an adverse reaction), whereas specific causation is proof that in the actual circumstances of the case, that product in fact *did* cause the harm. US scholarship has produced thorough analysis of the excessive hurdles posed by the so-called *Daubert* trilogy of cases for plaintiffs dealing with uncertain causation scenarios (especially in the absence of settled scientific consensus on general causation).⁶⁹ From a normative perspective, the *Amaca* take on the relationship between general and specific causation, restated by the Court in *Ellis*, is eminently sensible. It allows plaintiffs to rely on evidence that a certain event or conduct *can* provoke a certain reaction (or harm) and opens the possibility of reasonable inferences founding liability, without the rigidity of the American division of cumulative evidentiary hurdles. But whilst perfectly sensible from a normative perspective, this type of reliance on inferential reasoning begs the question: is the necessary condition test still necessary? In *Wallace v Kam*,⁷⁰ a unanimous High Court (referring to the NSW equivalent of the *CLA*) held that:

A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E.
A determination in accordance with s 5D(1)(b) that it is appropriate for the

⁶⁸ *Amaca* (n 28) [43].

⁶⁹ See Cranor (n 24) 360.

⁷⁰ (2013) 250 CLR 375.

scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (amongst other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.⁷¹

Yet, where inference of factual causation, understood as the negligence of the defendant being a necessary condition of the harm, is permissible on the basis of 'strands in a cable of circumstances', as per the Court in *Ellis*, one is left to wonder: what differentiates factual causation from the subsequent question of scope of liability? More than establishing a necessary chain of factual causality, the type of recourse to inferences described in *Amaca* and restated in the context of medical liability in *Ellis* sounds more akin to a form of consideration as to 'whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor'.⁷²

D *Alternatives to 'but for': 'factors', 'elements' and the role of corrective justice*

Criticism of the 'but for' test and its inevitable normative drive disguised as purely factual inquiry is not new. In their article on statutory causation in cases of misleading conduct,⁷³ Elise Bant and Jeannie Marie Paterson raise a possible alternative to the 'but for' test, one that 'asks whether, as a matter of fact, a certain event played some role (was 'a factor' in) in the historical process that led to the result that in fact occurred'.⁷⁴ This test of factual causation is much more akin to the notion of establishing factual causation via inference drawn from strands in a cable of factual circumstances than the old school 'but for' test, or its statutory restatement as 'necessary condition'. Bant and Paterson further submit that this formulation is preferable as it avoids invoking the normative judgments necessary when the language of materiality is used.⁷⁵ In this way, and in view of the strict limitations that have been placed on the material contribution test under s 5C(2), the 'a factor' test provides a meaningful alternative to the 'but for' test in cases that involve 'causatively pertinent events'.⁷⁶ The test can be particularly useful where it is not impossible in the

⁷¹ Ibid [14].

⁷² *Civil Liability Act 2002* (WA) s 5C(1)(b).

⁷³ Elise Bant and Jeannie Marie Paterson, 'Statutory causation in cases of misleading conduct: Lessons from and for the common law' (2017) 24 *Torts Law Journal* 1.

⁷⁴ Ibid 15.

⁷⁵ Ibid 16.

⁷⁶ Ibid.

abstract to use the 'but for' test in the type of case in question. Rather the issue is that the 'but for' test cannot function in the specific case at hand. As with what Bant and Paterson refer to as decision causation, the use of inferential reasoning is not only common but necessary in cases like *Ellis*.⁷⁷ In this sense, should the formal distinction between a factual and a normative limb in the causal inquiry retain its attractiveness as a matter of policy, cases permeated by uncertain causation would be much better dealt with using the 'a factor' test than the 'but for' test, with normative enquiries left to questions of scope.⁷⁸

A second alternative was recently advanced by Gemma Turton in her monograph *Evidential Uncertainty in Causation in Negligence*.⁷⁹ Turton's alternative approach is grounded on the overarching theoretical premise of corrective justice, which sees the primary purpose of negligence as repairing losses wrongfully caused to another. Turton characterises causation as 'a central feature of corrective-justice based interpersonal responsibility' - indeed, causation 'connects the claimant and defendant as parties to an interaction'.⁸⁰ In redressing inter-personal wrongs, Turton recommends the adoption of Richard Wright's test of 'a Necessary Element in a Sufficient Set' (NESS).⁸¹ The test broadens the factual causation inquiry beyond the 'but for' or 'necessary condition' inquiry by including factors that were necessary elements 'of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence'.⁸² This is advantageous from the plaintiff's perspective, and aligned with an approach that puts the emphasis on corrective justice - since at the causation stage of a case a breach of duty, and thus a fault, has been established. However, the NESS test arguably falls short of addressing the complexity of situations characterised by evidentiary gaps, as highlighted by Turton herself. Indeed, in in these cases 'the claimant faces the prior problem that the state of scientific uncertainty prevents the definition of a sufficient set of conditions from the harm that [he or] she has incurred'⁸³ - a situation not entirely dissimilar to that of plaintiffs in American toxic torts litigation described above.

⁷⁷ Ibid 22.

⁷⁸ Ibid 27.

⁷⁹ Turton (n 1)

⁸⁰ Ibid 20.

⁸¹ Richard Wright, 'Causation in Tort Law' (1985) 73 *California Law Review* 1735.

⁸² Ibid 1790.

⁸³ Turton (n 1) 164. See also Craig Purshouse, 'Gemma Turton, Evidential Uncertainty in Causation in Negligence' (2017) 25(3) *Medical Law Review* 511.

Justice cannot possibly be done to the complexity of the topic in the space of a short case commentary. Yet, the general point of interest is rather simple. Wherever there is an evidentiary gap, and particularly where such a gap is the product of scientific uncertainty, a measure of normative judgment in the factual inquiry is not only unavoidable but desirable. The alternative being that any case where a breach is established but factual causation suffers from evidentiary gaps would be automatically dismissed. But if this much is implicitly accepted by established case law and litigation practice, one is left wondering whether requiring courts to shoe-horn complex facts into the ‘but for’ fiction, necessitating convoluted reasoning, remains truly necessary.

This is of course not to say that any reference to factual causation should be jettisoned altogether. The point is rather that different approaches to causation are better suited to achieve the overarching purpose of the law of negligence depending on the specific context of application.⁸⁴ Indeed, where the context is characterised by unavoidable uncertainty (as medical negligence often is), courts already engage in *de facto* normative decision-making as to what the appropriate test of causation should be. The Court’s reference, in *Ellis*, to facts as ‘strands in a cable of circumstances’ for the purpose of satisfying the ‘necessary condition’ test is a proverbial case in point.

IV CONCLUSION

With the applicability of s 5C(2) and the principles of material contribution to harm limited to the confined (though somewhat ill-defined) perimeter of appropriate cases, courts are left to confront a reality that often presents uncertainty-ridden factual scenarios with only the blunt instrument of the ‘but for’ or ‘necessary condition’ inquiry in their toolbox. The test was borne out of cases that lent themselves to a neat comparison between ‘what we know *did happen* with the state of affairs that we imagine *would have happened* in a parallel factual universe where we keep everything the same, except the single fact of the defendant’s wrongdoing.’⁸⁵ That neat comparison is often impossible, not only in appropriate cases that open the door to s 5C(2), but also in cases like

⁸⁴ For a recent discussion see Henry Cooney, ‘Factual causation in cases of market-based causation’ (2021) 27(1) *Torts Law Journal* 51. Note however that Edelman J has strenuously argued the inevitability of the ‘but for’ test in factual causation, see Justice James Edelman, ‘Unnecessary Causation’ (2015) 89(1) *Australian Law Journal* 20.

⁸⁵ Julia Davis, Marco Rizzi and Kate Offer, *Connecting with Tort Law* 2nd ed, OUP 2020, 449.

Ellis where plaintiffs remain nonetheless stuck with s 5C(1)(a) of the *CLA*. As the twentieth anniversary of the *CLA* approaches, it may be time to review the legislation and in particular define a clearer role for normative considerations under s 5C(1)(b) and (4). The mixing of factual and normative considerations was abandoned with the adoption of the *CLA*, in a form of late adherence to the cautionary words of McHugh J in *March v Stramare*:

Directions to use commonsense notions of causation to find the “proximate”, “real”, “efficient” or “substantial” cause of an occurrence are invitations to use subjective, unexpressed and undefined extra-legal values to determine legal liability.⁸⁶

Despite the greater degree of technicality carried by judicial reference to notions of inference and probabilistic reasoning as opposed to common sense, a measure of such unexpressed and undefined extra-legal values inevitably permeates decision-making in situations of uncertainty. Rather than maintaining the obsolescent fiction that is the ‘necessary condition’ test, it may be more fruitful to recognise this inevitability, and confront it through more appropriate means - namely an alternative test seeking to identify causal ‘factors’, or by giving greater centrality to the normative limb of the causal inquiry: the scope of the defendant’s liability.

⁸⁶ *March* (n 3) [20].