WILLPOWER HAS NO VOLTAGE: PROBLEMS WITH CAUSATION IN EQUITABLE ESTOPPEL

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In Yeoman's Row Management Ltd v Cobbe, Lord Walker opined that '… equitable estoppel is a flexible doctrine which the court can use … to prevent injustice caused by the vagaries and inconsistency of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side'. Such colourful descriptions of equitable estoppel are not difficult to find. Professor Birks once described estoppel as a 'volcano in the law … destabilised and which is seeking a new stability'. This article seeks to identify, clarify, and explore the three forms of causal questions that inform equitable estoppel. The discussion is significant because causal issues arise across the estoppel inquiry. Causation operates as a brake on liability which demarcates reparative responsibility and in so doing performs important normative work.

I INTRODUCTION

In *Campbell v Griffin*,[1] Robert Walker LJ (as his Lordship then was) observed that reliance is 'really an issue of causation'.[2] This is significant because equitable estoppel is, at base, concerned with reliance and providing a remedy, in certain circumstances, for detrimental reliance. So too, equitable estoppel, like much of tort, is 'remarkably open-textured' which compounds difficult, though important, causation issues.[3] Alike, in the context of misleading and deceptive conduct, one might note the judgments in *Henville v Walker*.[4] Causal questions carry also normative connotations, including about trust and vulnerability. Such concerns are often acute in equitable estoppel cases, many of which concern familial relationships. To a large extent, it is causation that allocates and demarcates reparative responsibility.

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[1] [2001] All ER (D) 294; (2001) 82 P & CR D 43; [2001] EWCA Civ 990.

[2] Ibid [19].

[3] Jane Stapleton, 'Reflections on Common Sense Causation in Australia' in Simone Degeling and James Edelman (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 331, 331–2.

[4] (2001) 206 CLR 459. See also, eg, Elise Bant and Jeannie Marie Paterson, 'Statutory Causation in Cases in Misleading Conduct: Lessons from and for the Common Law' (2017) 24(1) *Torts Law Journal* 1.

Peter says to Paul, "I will leave to you my farm when I die, if you come and farm it for me." Paul comes to expect that he will inherit Peter's farm if he goes to farm it, and he later moves in with Peter and farms. Peter dies, leaving the farm to his daughter. Paul sues Peter's estate, claiming an inchoate equitable interest in the farm. Causation is ubiquitous across this inquiry. There is a question as to whether Peter's statement to Paul that he will leave to him the farm, alone or with other conduct, *caused* Paul to come to expect that he will inherit it. There is also a question as to whether that expectation *caused* Paul to go and start farming. Perhaps, instead, Paul went to farm because he enjoys farming and had a great fondness for Peter. Maybe Paul had decided that he wanted to escape his dull corporate job and that this was all rather a convenient opportunity to explore his farming passions. There is also the matter of what loss, or *detriment*, Peter has suffered and will suffer. Maybe, in leaving his tedious corporate job, Peter left behind the opportunity to become a partner and accumulate a great fortune; or, perhaps instead, Peter was not very good at his job, was likely soon to be retrenched, and would inevitably have ended up farming for Peter, even for a small wage and without the promise of inheritance. As may be observed, there are no less than three causal issues here: first, a causal inquiry into inducement of expectation; second, a causal inquiry into conduct or inaction in reliance thereon; and, third, perhaps also, a causal inquiry in relation to the extent of remedy.[5]

To compound these difficulties, equitable estoppel disputes are often factually complex, involving conduct in personal relationships over an extended period of many years. Much of the evidence is based on conversations, and not documents. Some of it is probably self-serving, albeit perhaps not intentionally so. It is the very nature of such a claim that memory — '… the degree of fallibility [of which] increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said…'[6] — is usually critical, in the sense of, evidentially, supplying the key factual integers by which some legal conclusion must be reached. As adverted to, too, claims are, of course, most commonly familial, and oftentimes acrimonious. The stuff of *Hamlet*, or perhaps even *Cymbeline*.

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[5] As to the first two, see particularly Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000) 93–96, 105–11.

[6] *Watson v Foxman* (1995) 49 NSWLR 315, 318 (McLelland CJ in Eq, as his Honour then was).

In this article, two, related issues are explored. Part III discusses the three causal inquiries in an estoppel claim. One might choose to refer to these as 'elements'. Part IV then turns to discuss the causative 'test' applied at each of those 'links'. Before turning to the first of these matters, it is convenient to outline some context for the discussion which then follows.

II Background And Framework

As noted above, causal and related questions arise at two, or possibly three, key junctures in the equitable estoppel inquiry. These are as follows: one, inducement of expectation (that is, causation in the mind); two, and following, inducement of action or inaction in (detrimental) reliance on that expectation induced (that is, causation in conduct); and three, potentially, a causal or like limitation then on remedy. Each of these issues, or 'elements', are explored further here. The authors suggest that the first two issues are central to an estoppel claim (and, indeed, perhaps all estoppels by conduct), while the third, at least in some manifestations propounded in the cases, is not.

Pausing here, it is to be appreciated that inducement of expectation and inducement of conduct are two aspects of 'reliance'. However, for reasons developed below, the authors suggest the desirability of treating each as a discrete component of that more general concept. These two aspects of reliance have been analysed in detail by Professor Cooke.[7] As Cooke has persuasively argued, causation in human decision making — as in estoppel — involves these two steps in the causal chain, and the plaintiff must establish both in order to succeed. As developed further here, these two 'hurdles' operate together as an important causal limitation on the estoppel, and which also accommodate normative concerns.

To develop this framework still further, it is also important to appreciate that within each of these 'elements' there are two more specific issues, which again are related but also preferably kept distinct. The first is that of 'factual causation': did X cause Y? The second is more normative (essentially about scope of liability): should X be considered legally responsible for Y? As suggested, it is desirable also to keep these aspects of the inquiries distinct. Scope of liability issues perform critical normative work in estoppel, with the 'reasonableness' standard a criterion for legal attribution and, therefore, liability. It is at that point

[7] See particularly Cooke (n 5) 88–96.

that the underlying purposes of the law's prohibition or relief become front and centre.

Sidhu v Van Dyke remains a leading authority on causation in proprietary estoppel.[8] It is convenient here, albeit briefly, to consider this case.

In 1996, a married couple, who were the owners as joint tenants of a rural property, allowed another married couple to occupy a cottage on an unsubdivided part of their property. Around a year later, the husband of the landowning couple, Mr Sidhu, commenced a sexual relationship with the wife of the occupying couple, Ms Van Dyke (his then sister-in-law). Then, in January 1998, Mr Sidhu told Ms Van Dyke that he wanted her to have a home with him, that he planned to subdivide the property, and that he would then see that the cottage in which she was living was put into her name. Specifically, he said:[9]

> I love you and can tell you love me too. I want you to have a home here with me. I am planning to subdivide Burra Station. As soon as this is done, I will make sure the Oaks [scil, Oaks Cottage] is put into your name … Using my Indian family money to buy this place means I can make my own decisions as to what I do with it, and I want you to have it because I love you. You need a home of your own to raise [your child] in. I can provide it.

Mr Van Dyke then learned of this amour and separated from his wife. The couple later divorced. Around this time, Ms Van Dyke said to Mr Sidhu (who was himself a lawyer) that she needed a lawyer to help with the divorce and a property settlement, to which Mr Sidhu replied, "you have the Oaks you do not need a settlement from him. You can do the divorce yourself, you don't need a lawyer".[10] Ms Van Dyke did not later seek a property settlement and continued to live in the cottage. In about September 1998, she asked Mr Sidhu if she should stop paying rent, "now that the Oaks is my property", to which he replied: "How about you continue to pay what you can as this will help keep things low key with [his wife]".[11] Ms Van Dyke paid rent at less than the prevailing market rate and performed unpaid maintenance and renovation work on the cottage and the homestead.[12] She was also employed part-time elsewhere, but did not seek full-

[8] See also, eg, *Giumelli v Giumelli* (1999) 196 CLR 101.
[9] See *Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769, [17] ('*Van Dyke v Sidhu Court of Appeal*').
[10] See *Van Dyke v Sidhu* [2012] NSWSC 118, [31] ('*Van Dyke v Sidhu First Instance*').
[11] Ibid [34].
[12] Ibid [34]–[35].

time employment.[13] In 2000, Mr Sidhu had given to Ms Van Dyke, in response to expressions of concern by her as to the security of her position, a note confirming that, during 1996 to 2000, he had expressed to her that he was willing to gift the cottage to her.[14] In mid-2005, Mr Sidhu, after Ms Van Dyke had again pressed him about the matter, sent an email to her proposing terms for a transfer of the property "at a price based on valuation by agent[s]" but with he and his wife agreeing to bear the financial burden of defraying that price.[15] In October 2005, the council approved the subdivision, conditional on the construction of access roads. That condition was never satisfied. Then, the cottage burnt down and Ms Van Dyke moved into a vacant relocatable cottage on the homestead block.[16] In May 2006, Mr Sidhu gave to Ms Van Dyke a handwritten statement confirming that his wife agreed that, when the destroyed cottage was rebuilt and it was possible to transfer the lot on which it was to be rebuilt, it would be done.[17] Later, Mr Sidhu and his wife refused to sell the relocatable cottage on the basis that they did not own the land on which it was located and, on the very same day, Ms Van Dyke left the property and her relationship with Mr Sidhu came to an end.[18] The homestead block was never subdivided so as to enable the cottage land to be transferred to Ms Van Dyke.

Ms Van Dyke later sued Mr Sidhu seeking a declaration that he was estopped from denying an assumption on her part that the cottage was her home and that he would procure the transfer of title into her name, an order that he take all necessary steps to procure that, and an order that he pay equitable compensation reflecting the value of the cottage which had been destroyed by fire. Alternatively, she claimed a declaration that the interest in the cottage was held on constructive trust for her or subject to an equitable charge in her favour, or, in the further alternative, equitable compensation.

At first instance, the claim was dismissed on the basis that the plaintiff had failed to prove that she had, in fact, acted in detrimental reliance on Mr Sidhu's assurances, other than by failing to seek a property settlement from her former husband, and which reliance was unreasonable.[19] Relevantly, Ms Van Dyke's evidence included the following:

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[13] See *Van Dyke v Sidhu Court of Appeal* (n 9) [103]–[104].
[14] *Van Dyke v Sidhu First Instance* (n 10) [51].
[15] Ibid [68]–[76].
[16] Ibid [78].
[17] Ibid [80]–[94].
[18] *Van Dyke v Sidhu Court of Appeal* (n 9) [15].
[19] See *Van Dyke v Sidhu First Instance* (n 10) [195], [220].

Q. Isn't this the case, you would have stayed living at The Oaks cottage for the [eight] or [nine] years that you lived there regardless of any promise that Mr Sidhu made to you, wouldn't you?
A. Not necessarily.
Q. What does "not necessarily" mean?
A. Well, because I believed I was in a long-term relationship and that I would have a home transferred to me and I believed that the, that there was a continuation of that and if I had not been told certain things, those things by the defendant, I may have been, I may have looked at other options for myself and my son.
[…]
Q. Now, would you answer the question. You expected that for as long as he lived there, you would live there didn't you?
A. I may have made other decisions if I did not have.
[…]
Q. Regardless of the promise, because you were so in love with him you would have stayed living at The Oaks property whilst ever he loved on Burra Station for as long as you could, couldn't you?
A. It is hard, it is hard to dissect that.
[…]
Q. Because of those expectations [that their love and the relationship would last forever], you would have stayed living there regardless of the promises? Wouldn't you?
A. Not necessarily.
Q. What does not necessarily mean?
A. I may have made other decisions too, if the defendant hadn't made representations to me that the Oaks property was my home, I may have thought about making decisions to develop some security for me and my son.
[…]
Q. You might have?
A. I might have.
Q. But you might not have?
A. It is hard to say. [20]

Relevantly, too, Ms Van Dyke also accepted that she had begun doing work on the properties before Mr Sidhu had made his promises. Indeed, in response to a question suggesting that she would probably have continued doing the work that she did on the properties, even absent Mr Sidhu's promises, she answered:

[20] Ibid [197]–[198].

> A. … I would have helped [keeping the property in tip top condition] but I think the work I did do after the representation was made to me was way above what I would have done if I were just a tenant on the property.
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> Q. That is not the other scenario, is it, you would have still been having an affair with [the landowning husband] and living on a property that you loved and that he loved, that is the other universe we have to think about, isn't it?
>
> A. I agree with what you are saying, that the relationship, it is very hard for me to dissect what I would have done had I not had the representation made to me, however I believe that I did the work that I did because I felt I had a future security in the home or I had security at the time but I also had future security that could have gone on for 20 plus years and so my work on the property was in that I was grateful for that security.[21]

The conclusion at first instance was, in essence, that reliance was not established because Ms Van Dyke accepted that she might have done all that she had done without the promise of the cottage. Specifically, then, the evidence excerpted above raises quite squarely the causal elements outlined in the preceding Part. The following may be developed here. First, there is whether Mr Sidhu had induced in Ms Van Dyke the subjective belief that the property would be transferred).[22] Secondly, there arises a question as to whether that assumption was reasonably formed. Each of these go to 'causation in the mind'. Thirdly, there is whether it could (or needed to) be shown that Mr Sidhu knew or intended that Ms Van Dyke had or would so rely, which was inferred in this case.[23] Fourthly, there is whether Ms Van Dyke had, in fact, acted or abstained *in reliance on* the expectation induced. Here, it was found at first instance that this had not been proven, except in relation to giving up the opportunity to seek a property settlement ("Not necessarily"; "… if I had not been told certain things, those things by the defendant, I may have been, I may have looked at other options…"; "… I may have made other decisions"; "… It is hard, it is hard to dissect that… I might have … But you might not have?")[24] Fifthly, there is also whether, to the extent Ms Van Dyje had relied, that reliance — by action or abstention — is, or was, reasonable. Again, here, Ms Van Dyke failed at first instance,[25] having not

[21] Ibid [199].
[22] See particularly ibid [188].
[23] See particularly ibid [209].
[24] Ibid [217].
[25] Ibid [220].

proven factual reliance in relation to her conduct other than not pursuing a property settlement and it being found that detrimental reliance in not pursuing a settlement was unreasonable. Each of these two aspects go to 'causation in conduct'. Other challenging causal difficulties also arise, including the extent of the counterfactual analysis to be undertaken within the detrimental reliance enquiry. This was not pursued in the case, but the following hypotheticals may be posited.

Assume it could be shown on the balance of probabilities that, more probably than not, Ms Van Dyke would not have been successful in a contested property settlement. That would mean that, even if her choice — made in reliance on Mr Sidhu's assurance — not to pursue a property settlement *was reasonable*, arguably, the estoppel claim ought still to fail (or the remedy be reduced to nothing) because, when this further counterfactual analysis is undertaken, there might have been 'no loss': all that has been lost in detrimental reliance is the opportunity to pursue a property settlement, but the pursuit of which would, on the balance of probabilities, not have succeeded. Relatedly, as was found at first instance, each of the relevant promises was conditional on the subdivision, which was conditional on the construction of road access and required the consent of Mrs Sidhu and the availability of finance.[26] How is an equitable estoppel claim to be determined when promises and reliance are all conditional (noting once more the distinctively human experiences typically involved)? Of course, these, and other, problems are not unique to equitable estoppel. In the context of misleading and deceptive conduct, one might note, only as an example, the judgments in *Henville v Walker*.[27]

Ms Van Dyke appealed, including in relation to the finding that she had not relied other than in relation to not seeking a property settlement. The principal judgment in the Court of Appeal was delivered by Barrett JA, with whom Basten JA and Tobias AJA agreed.[28] Relevantly, his Honour rejected application of the 'but for' test to causation: 'Proof of detrimental reliance does not mean that the plaintiff must go to the extent of proving that 'but for' the promise he or she would not have acted or abstained from acting in the way he or she did.'[29] Furthermore, his Honour observed that, '[s]uch a requirement denies the

[26] Ibid [182].
[27] (2001) 206 CLR 459. See also, eg, Bant and Paterson (n 4).
[28] *Van Dyke v Sidhu Court of Appeal* (n 9).
[29] Ibid [78].

plaintiff the benefit of the "presumption of reliance"'.[30] His Honour, citing Brooking JA in *Flinn v Flinn*,[31] held that, where inducement by the promise may be inferred, then 'the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise…'.[32] Whether the 'but for' or 'contributing cause' test should apply at each of the hurdles in the estoppel inquiry is picked up later.

On appeal to the High Court, a plurality comprising French CJ, Kiefel, Bell, and Keane JJ held that reliance could not be presumed but substituted findings of fact, finding that Ms Van Dyke was induced (by Mr Sidhu's promises) to remain at the property and to continue working for Mr Sidhu and his wife.[33] That is, it was found that her detrimental reliance extended beyond only her choice not to seek a property settlement. In this way, reasonableness of reliance in relation to the property settlement was not then dispositive of the claim (as has been held at first instance). As to the reasoning of the Court of Appeal in relation to the onus, the joint judgment accepted that the Court of Appeal had effectively reversed the legal onus,[34] and that so to do was 'wrong in principle and contrary to authority'.[35] Gageler J agreed, at least with this aspect of the joint judgment.[36] The Court rejected the presumption of reliance, but the plurality accepted that reliance could be inferred or concluded from the natural experiences of human life.

III CAUSAL NEXUS AND CAUSATIVE HURDLES

As outlined above, causal questions are prominent across equitable estoppel. In *Walsh v Walsh*,[37] Meagher JA observed that, 'the action or abstaining from action in reliance upon the assumption or expectation encouraged is what invites the intervention of equity.'[38] In this Part, the authors explore further of these various stages in the estoppel claim. Specifically, again, there is the following. One, inducement of expectation, and the overlaying reasonableness limitation. Two, through the expectation nexus, inducement of reliance (again, either action

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[30] Ibid.
[31] [1999] 3 VR 712.
[32] *Van Dyke v Sidhu Court of Appeal* (n 9) [83].
[33] See particularly *Sidhu v Van Dyke* (2014) 251 CLR 505, [78] (*'Sidhu v Van Dyke High Court'*).
[34] Ibid [50].
[35] Ibid [61].
[36] Ibid [89].
[37] [2012] NSWCA 57.
[38] Ibid [13], citing *Riches v Hogben* [1985] 2 Qd R 292, 300 (McPherson J).

or abstention), again overlaid with a reasonableness limitation. As will be developed, these two functions are closely related.[39] Together they operate as a significant limit on the scope of equitable estoppel as well as a key justification for imposing, or denying, liability.[40] There is also, three, being the extent to which this nexus then intrudes on the remedy, which was a point not so squarely raised on the facts in *Sidhu v Van Dyke*.[41] The other issues adverted to above, in relation to various counterfactual analyses and otherwise, are not the focus here. In the next Part, the authors then consider the applicable causal 'test' (that is, 'but for' or 'contributing cause').

A *Expectation and Reasonableness?*

Turning then first to inducement of expectation and reasonableness, as emphasised above, this is a discrete (albeit closely related) question to detrimental conduct: *expectation* looks to causation in the mind, whereas *conduct* focuses upon the causally later issue of what action or inaction is then induced by the expectation. The term "reliance" is here avoided because both *expectation* and *conduct* relate to the plaintiff's *reliance*. It is illustrative here to consider the more recent decision of the High Court in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*.[42]

In 2005, Crown Melbourne Ltd and two existing tenants were negotiating new leases. The new leases negotiated were for further five year terms and did not contain options to renew. The tenants were also obliged under the leases to undertake costly refurbishments. The tenants, concerned about those costs, sought commitments from Crown that they would be permitted to trade at the premises for another five years after these leases expired. Crown refused to include any further term. Subsequently, and despite their concerns, the tenants executed the lease agreements. Later, in 2009, Crown gave notice, pursuant to the leases, to vacate. The tenants commenced proceedings alleging that, during the 2005 negotiations, Crown had promised to offer further leases (that is, promises to offer a further term beyond the five years under the leases negotiated in 2005).

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[39] See also, eg, Cooke (n 5) 88–99; discussed in Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 30–40. See also, eg, Bant and Paterson (n 4) 11.

[40] Consider also, eg, Elise Bant, 'Causation and Scope of Liability in Unjust Enrichment' (2009) 17 *Restitution Law Review* 60.

[41] See the preceding discussion.

[42] (2016) 260 CLR 1 ('*Crown Melbourne High Court*'). This decision is also significant for the estoppel's remedial operation.

The claim was run in collateral contract and, alternatively, as an estoppel preventing Crown from denying that obligation.[43] Relevantly for present purposes, the Victorian Civil and Administrative Tribunal made a specific finding that Crown had not expressly stated that it would renew the leases; and, instead, that Crown had promised only that, subject to the standard of refurbishments, the tenants would be "looked after at renewal time".[44] This promise formed the basis for the claim. The case was ultimately appealed to the High Court.[45]

The (promissory) estoppel claim was considered in three judgments – a joint judgment of French CJ, Kiefel, and Bell JJ, a separate judgment of Keane J, and a separate judgment of Nettle J. Gordon J in dissent, with whom Gageler J substantially agreed, did not consider the promissory estoppel claim because each of their Honours found that the promise gave rise to a collateral contract requiring Crown to make an offer for a new lease, albeit one that left it for Crown to determine the precise terms of the offer.[46] Ultimately, Crown's appeal was allowed, with the Court holding, by majority, that the Court of Appeal had erred in finding that the estoppel claim was made out, though correct to conclude that there was no collateral contract.

A focus in the judgments of the plurality, Keane J, and Nettle J was on the requirement of certainty of the promise. The joint judgment and Keane J articulated the 'test' of certainty in much the same terms: the promise must be clear, precise, and unambiguous though may be open to different interpretations.[47] More specifically, in considering the 'precise and unambiguous' requirement from *Low v Bouverie*,[48] French CJ, Kiefel, and Bell JJ made two important observations: one, that the words used in the promise may be open to different interpretations; but two, that those words '*must be able to be understood in a particular sense* by the person to whom the words are

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[43] Ibid [4]–[8].

[44] Ibid [12]–[13], citing *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225, [40], [69]–[70], [83]–[84], [134].

[45] VCAT found a collateral contract, and alternatively, that Crown was estopped from denying a collateral contract. Crown succeeded on appeal. Hargrave J found that the promise was too illusory and uncertain to found a collateral contract. Similarly, that it lacked the certainty required to found a promissory estoppel. The tenants appealed. The Court of Appeal dismissed the collateral contract case but found an estoppel: see *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771.

[46] See *Crown Melbourne High Court* (n 42) [64] (Gageler J), [233], [266] (Gordon J).

[47] Ibid [35] (French CJ, Kiefel and Bell JJ), 47 [151]–[153] (Keane J).

[48] [1891] 3 Ch 82, 106, cited at ibid [35].

addressed'.[49] Their Honours then stated the limit that the promise 'must be *capable of misleading a reasonable person* in the way that the … [promisee] claims he or she has been misled'.[50] Keane J also emphasised this limit, observing '[t]he representor is not acting contrary to good conscience in refusing to conform … to the predicament produced by the *representee's unreasonable misunderstanding* …'.[51] Nettle J indicated similarly.[52]

Pausing here, Kay LJ, in *Low v Bouverie* itself, had likewise indicated that the promisee must demonstrate 'that the statement … *would have misled any reasonable man*, and that the plaintiff was misled by it'.[53] Isaacs ACJ cited this dicta with approval in *Western Australian Insurance Co Ltd v Dayton*.[54] Relevantly, Mason CJ and Wilson J in *Waltons Stores (Interstate) Ltd v Maher* rejected a common law estoppel by representation because an assumption that contracts *had already been exchanged* 'could scarcely be described as a *reasonable belief*'.[55] Meanwhile, their Honours found that it *was reasonable* to expect from the promise that the contracts *would be* exchanged thus providing the basis for a promissory estoppel.[56]

The decision of the New South Wales Court of Appeal in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*,[57] is also illuminating. There, Austotel argued that at all times an anticipated lease had still been 'subject to' formal completion. Priestley JA, rejecting those arguments, held that after Franklins had complied with requests from Austotel to provide a letter of comfort to their funders, and as negotiations neared virtual completion, it was no longer reasonable to expect that Austotel would not be bound until a formal contract was executed.[58] That is,

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[49] *Crown Melbourne High Court* (n 42) [35] (emphasis added).
[50] Ibid [35], citing *Low v Bouverie* [1891] 3 Ch 82, 113 (Kay LJ).
[51] Ibid [146] (Keane J) (emphasis added). See also at [151]–[153], quoting *Low v Bouverie* (n 50) 106 and the later observations in *Woodhouse Israel Cocoa Ltd v Nigerian Produce Marketing Board* [1972] AC 741, 756.
[52] Ibid [213]–[214], quoting *Low v Bouverie* (n 50) 106 (Bowen LJ) and *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, 54–5 (Lord Wright).
[53] At least absent an allegation of fraud: see [1891] 3 Ch 82, 113. The inclusion of '*any reasonable man*' is potentially slightly higher than the requirements articulated in *Crown Melbourne High Court* (n 42).
[54] (1924) 35 CLR 355, 375.
[55] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 397 (emphasis added) ('*Waltons Stores*').
[56] Ibid. See also, eg, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 506 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).
[57] (1989) 16 NSWLR 582.
[58] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 613 ('*Austotel*'), citing *Amalgamated Investment & Property Company v Texas Commerce International Bank Ltd* [1982] QB 84, 107 (Robert Goff J) ('*Texas Bank*').

it was reasonable in those circumstances for Franklins to interpret the promises as it did.[59] Meanwhile in the later appeal in *DHJPM Pty Ltd v Blackthorn Resources Ltd*,[60] Meagher JA observed that the negotiations were between experienced businesspersons and, therefore, they should have expected any right would have to be subject to a binding contract or at least an assurance making clear the promise was regarded as binding. That is, absent one of those two things, the expectation said to have been induced by the promises was not reasonable.[61] While one might debate the different conclusions reached here, what is important is that — in each of these cases — reasonableness of expectation is performing an important normative function within the causation nexus. The courts are determining reasonableness of the expectation against the defendant's conduct.

Indeed, as indicated by the joint judgment in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*, '[t]he *sense in which* [the promise] *may be understood provides the basis for the … expectation* upon which the person to whom they are addressed acts'.[62] This has also been noted more recently by a joint judgment of Kiefel CJ, Bell, Gageler, and Keane JJ in *Pipikos v Trayans*.[63] We can see therefore, in this way, that this reasonable expectation function is a critical, causal limit on equitable estoppel, both in fact and also in relation to normative and scope of liability concerns. It justifies denying liability where a plaintiff has interpreted the defendant's conduct (whether a promise, silence, or otherwise) unreasonably.[64] It is also — as has been adverted to above — inexorably linked to the second aspect of reasonable reliance: reasonableness of the plaintiff's *conduct*.

B *Conduct and Reasonableness?*

As has been emphasised, this aspect of reliance operates slightly differently to that of reasonable expectation. In short, detrimental conduct — whether action

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[59] *Cf* ibid 587 (Kirby P) ("it strikes me as astonishing, in a multi-million dollar transaction … that a court should step in and determine … the parties' commercial relationship as the rental to be paid…'), 621 (Rogers AJA). Though, we might observe that this, too, possibly conflates the equitable right created by the estoppel with the anticipated contract.

[60] (2011) 83 NSWLR 728.

[61] Ibid [65], citing *Waltons Stores* (n 55) 403 (Mason CJ and Wilson J) and *Baird Textile* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737, [92] (Mance LJ).

[62] *Crown Melbourne High Court* (n 42) [35] (emphasis added).

[63] [2018] HCA 39, [60].

[64] See, eg, *Salienta Pty Ltd v Clancy* [1999] NSWSC 916, [79]–[90] (Bryson J).

or abstention — must have been *in reliance* on the expectation. Again, there exists this critical nexus between that conduct in detrimental reliance, through the expectation, to the defendant's conduct itself. It seems preferable, both for normative reasons and as a matter of authority, to keep it distinct from the initial inducement of some expectation.[65]

An illustrative decision of high authority is that of Lord Eldon LC in *Dann v Spurier*.[66] There, the plaintiff spent considerable sums repairing demised premises after the landlord had told him that his tenancy was not assured. The Lord Chancellor held, 'the plaintiff has not used the degree of circumspection and caution, that the Court can act upon the latter part of the prayer of this bill, consistently with the reasonable security of the affairs of mankind'.[67] The estoppel failed because the conduct in reliance was completely unreasonable in the circumstances. As such, liability on the landlord promisor was not justified.[68] This principle has been explicitly recognised in decisions over a long period — for common law estoppel since at least *Freeman v Cooke*[69] and estoppels in equity since, at least arguably, *Maunsell v Hedges*.[70] This principle was explicitly identified and applied in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*,[71] as well as in other cases.[72]

The relationship to the reasonable expectation function must be explored further. It is essential to jurisdiction. The point is that determining the reasonableness of the conduct seems necessarily always to include assessing that conduct against the expectation induced: one, the promise is made or other such conduct is done or not done by the defendant; two, the plaintiff forms his, her, or its expectation which must be a reasonable interpretation of that promise of conduct; and then, three, this induces relying conduct which must itself also be reasonable to the expectation. In this way, the promise, through the expectation, effectively further limits what can constitute reasonable conduct. There is, therefore, a synergy between these two hurdles. Once more, a hypothetical

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[65] Consider Andrew Robertson, 'Reasonable Reliance in Estoppel by Conduct' (2000) 23(2) *University of New South Wales Law Journal* 87, 103.
[66] (1802) 7 Ves 231; [1775–1802] All ER Rep 115.
[67] Ibid 116, cited in Robertson, 'Reasonable Reliance in Estoppel by Conduct' (n 65) 95.
[68] See Robertson, 'Reasonable Reliance in Estoppel by Conduct' (n 65) 95.
[69] (1848) 2 Exch 654; [1843–60] All ER Rep 185, 663 (Parke B), citing *Pickard v Sears* (1837) 6A&E 469; 112 ER 179, 181 (Lord Denman CJ). See also, eg, *Pierson v Altrincham Urban Council* (1917) 86 KB 969, 973 (Lush J); *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 72 (Lord Esher MR).
[70] (1854) 4 HLC 1039; 10 ER 769.
[71] (1989) 16 NSWLR 582.
[72] See, eg, *Priestley v Priestley* [2016] NSWSC 1096, [155] (White J).

illustrates, and it is convenient to choose a fact pattern similar to that which transpired in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd.*[73]

Let it be said that the tenants there had instead pleaded that they interpreted "looked after at renewal time" to mean only that Crown would be obliged to make *an offer* for another lease on terms to be decided by Crown. This is, broadly, the collateral contract found by Gageler J[74] and Gordon J.[75] In this situation, the tenants might well have jumped the first causative hurdle — this is, after all, it seems, a fair and reasonable expectation to form from the promise made. Nevertheless, the tenants should have still failed on the estoppel because they would have then failed to jump the second causative hurdle: it would, it seems, have been quite unreasonable then to enter the leases and incur the substantial costs on this now very limited expectation. After all, this would be only an expectation that they would receive an offer the terms of which might have been wholly unacceptable to them. In this way, these dual reasonableness functions, again, operate in synergy to circumscribe jurisdiction through a causative nexus. Both are important because in each of these examples the tenants could jump one, but not both, causative hurdles. It is for this reason that the normative limitations operating across the stages of estoppel inquiry are of considerable significance.

This dual reasonableness function has received limited explicit judicial exposition. It was identified by Giles J in *Standard Chartered Bank Aust Ltd v Bank of China*,[76] though the relationship between the two hurdles was not developed. Meanwhile, one may observe the 'reasonable reliance' yardstick working in cognate areas of the law involving similar changes of position — across contract, unjust enrichment, and tort.[77] As in cognate areas of the law, requirements of reasonableness operate as a standard against which liability is established.[78] In this way, it allocates risk and apportions liability against what is considered to be accepted forms of conduct, both on the plaintiff and defendant side. It imposes a degree of individual responsibility on the plaintiff to take care

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[73] See *Crown Melbourne High Court* (n 42).
[74] Ibid [64].
[75] Ibid 74 [233], [266].
[76] (1991) 23 NSWLR 164, 180–1. See also, eg, *Paull v Civil Aviation Safety Authority* (Supreme Court of New South Wales, Bryson J, 16 October 1997) [15]–[16] (Bryson J).
[77] See Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *Oxford Journal of Legal Studies* 427, 433–40.
[78] See, eg, Peter Cane, *The Anatomy of Tort Law* (Hart, 1997) 42. Consider also Jules L Coleman, 'The Practice of Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 53, 69–72.

to protect himself, herself, or itself.[79] Additionally, Professor Atiyah has observed that reliance on a promise alone cannot justify liability;[80] and, if that be so, then it appears that these dual reasonableness functions provide a necessary additional justification by ensuring, 'compliance with some socially acceptable values which determine when ... [reliance is] sufficiently justifiable to give some measure of protection'.[81] The observations, referred to above, of Lord Eldon LC in *Dann v Spurier*[82] might again be noted in this context.

A final point, of amplified significance in commercial cases, is that made by Kennedy: reasonableness is a standard requiring assessment of facts against 'the purposes or social values embodied in the standard.'[83] Thus, in the commercial context where parties are ordinarily highly sophisticated and well advised, reasonableness is – and, should be — a high bar.[84] We see this in the observations of Kirby P in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*,[85] and Meagher JA in *DHJPM Pty Ltd v Blackthorn Resources Ltd*.[86]

C *Remedy and Reasonableness?*

Turning then from the 'elements' in the 'cause of action' and to the remedial response. For context, it is convenient to outline some further aspects of Nettle J's reasoning in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*.[87] His Honour, agreeing in the result, dissented on the requirement, or standard, of certainty in the impugned promise.[88] His Honour indicated that existing authority did not demand that the promise be 'objectively unambiguous', let

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[79] See generally Bant and Bryan (n 77) 429–30, 433. See further Paul D Finn, 'Commerce, the Common Law and Morality' (1989) 18(1) *Melbourne University Law Review* 87, 97–8, quoting *Denison State Bank v Madiera* 640 P 2d 1235 1243 (1982) and citing *Hawkins v Clayton* (1988) 164 CLR 539 and *Waltons Stores* (n 55).

[80] P S Atiyah, *Promises, Morals and Law* (Clarendon Press, 1981) 68, cited in Robertson, 'Reasonable Reliance in Estoppel by Conduct' (n 65) 95.

[81] Ibid.

[82] (1802) 7 Ves 231; [1775–1802] All ER Rep 115.

[83] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685, 1688. Bant and Paterson have argued that reasonableness as a standard should also be assessed by reference to overarching statutory norms that inform commercial conduct: see particularly 'Estoppel, Misleading Conduct and Equitable Fraud' (2019) 13(2) *Journal of Equity* 183.

[84] See, eg, *Thorner v Major* [2009] 3 All ER 945, [97]–[100] (Lord Neuberger), citing *Gillett v Holt* [2001] Ch 210. See also *Baird Textile* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737, [90]–[96] (Lord Mance): '… In my view, these considerations indicate that the risk fell on [the claimant] in the present situation.'

[85] (1989) 16 NSWLR 582.

[86] (2011) 83 NSWLR 728.

[87] *Crown Melbourne High Court* (n 42).

[88] His Honour also dissented on an issue concerning reliance — an issue we will confront again below.

alone more certain than that required for a contractual variation.[89] His Honour also noted the seminal decisions in *Dillwyn v Llewelyn*[90] and *Ramsden v Dyson*,[91] where it was held that proprietary estoppels do not require any 'particular degree of objective uncertainty…',[92] and further that, as Lord Scott had suggested in *Yeoman's Row Management Ltd v Cobbe*,[93] proprietary estoppel is a sub-species of promissory estoppel.[94] Following, his Honour held that, while '[t]he idea of "one overarching doctrine of estoppel rather than a series of independent rules" may not yet have "won general acceptance"', [95] to distinguish certainty requirements across these estoppels 'runs counter to principle'.[96] Additionally, however, his Honour also indicated that, while an objectively ambiguous promise may still found the estoppel, ambiguity in the promise may reduce the remedy. This is because, on Nettle J's conception, the induced expectation may be less attributable to the promisor (or, perhaps, too unreasonable).[97] In this way, ambiguity is being used as a proxy for attribution. Once more, this is, at least in part, a causal problem: to what extent is, or has, the plaintiff's actionable harm caused, or been caused, by the defendant's ambiguous promise (or other conduct)?

There are at least two matters that merit some scrutiny here. First, whether the approach propounded by Nettle J is consistent with the reliance basis for equitable estoppel; and, secondly, whether issues of evidential overdetermination, underdetermination, and uncertainty mean that such an approach would, in most cases, operate as a blunt instrument (and ought therefore not be adopted)? Some considerations that bear on each of these points are next raised, before turning in the next Part to the causal 'test' (or, indeed, 'tests') to be applied.

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[89] *Crown Melbourne High Court* (n 42) [212], citing *Australian Crime Commission v Gray* [2003] NSWCA 318, [183]–[207] (Ipp JA) and *Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd* (2015) 89 NSWLR 594, [144] (Bathurst CJ).

[90] (1862) 4 De GF & J 517; 45 ER 1285.

[91] (1866) LR 1 HL 129.

[92] *Crown Melbourne High Court* (n 42) [215], citing *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699, *Austotel* (n 58) 604 (Priestley JA), *Giumelli v Giumelli* (n 8) [35] (Gleeson CJ, McHugh, Gummow and Callinan JJ) and *Flinn v Flinn* [1999] 3 VR 712, [80]–[95] (Brooking JA).

[93] [2008] 4 All ER 713, 724.

[94] *Crown Melbourne High Court* (n 42) [215].

[95] Ibid [217], quoting *Commonwealth v Verwayen* (1990) 170 CLR 394, 410–11 (Mason CJ) and *First National Bank Plc v Thompson* [1996] Ch 231, 236 (Millett LJ).

[96] Ibid [217].

[97] Ibid [218]. See also, eg, *Jones v Watkins* (Court of Appeal — Civil Division, Slade LJ, 26 November 1987), quoted in *Gillett v Holt* [2001] Ch 210, 226 (Walker LJ).

1 *'A Fact to be Found'?*

It is here suggested that Nettle J's approach would mean that equitable estoppel will only ever satisfy the plaintiff's reasonable expectations.[98] If nothing else, as a matter of lay notions of fairness, there seems much to commend this position. Nevertheless, with unfeigned respect to his Honour, there are potential difficulties with it.

A substantial concern is that it would appear that this approach dictates that the remedy will be calibrated to a reasonable expectation, even if such an expectation was not, as a matter of fact, the expectation relied on. This cuts across both 'hurdles' in the reliance inquiry. It seems, therefore, that this would be, in effect, hypothetical reliance. This seems inconsistent with the decision in *Sidhu v Van Dyke*:[99] 'Reliance is a fact to be found, it is not to be imputed … *It is actual reliance* by the promise, and the state of affairs so created …';[100] and, accordingly, that the plaintiff at all times bears the legal burden of proving that they did *in fact* rely on the promise.[101]

This necessity of proving hypothetical reliance was acknowledged by Nettle J: 'If it were *thus established that the tenants would have been induced by that more limited assumption* or understanding to act as they did…'[102] Put differently, the question thus seemingly becomes not, as the High Court in *Sidhu v Van Dyke*[103] held that it must be, "did you in fact rely on the promise?" but instead "would you have taken the steps in reliance if you interpreted the promise in this reasonable, but more limited, way?" Again, this seems difficult to reconcile with the requirements articulated in *Sidhu v Van Dyke*[104] of actual, factual causation. This was pointed to by Keane J: 'In none of its manifestations does estoppel operate by imputing to the party asserting the estoppel an expectation or reliance

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[98] Ibid [222]–[223], citing *Gillett v Holt* (n 97) 225–6 (Robert Walker LJ), *Jennings v Rice* [2002] EWCA Civ 159, [47], [50] (Robert Walker LJ) and *Sullivan v Sullivan* [2006] NSWCA 312, [16] (Handley JA), [85] (Hodgson JA).
[99] (2014) 251 CLR 505.
[100] Ibid [58] (emphasis added).
[101] Ibid [61], citing *Holmes v Jones* (1907) 4 CLR 1692, 1706 (O'Connor J), 1710 (Isaacs J) and *Gould v Vaggelas* (1984) 157 CLR 215, 238–9 (Wilson J). *Cf Greasley v Cooke* [1980] 3 All ER 710, 713 (Lord Denning MR).
[102] *Crown Melbourne High Court* (n 42) [224].
[103] (2014) 251 CLR 505.
[104] Ibid.

which might be thought to be a proportionate or fair response to the statement of the opposite party.'[105]

Furthermore, as has been suggested above, the burden of proving actual, factual causation itself operates as a key limit on equitable estoppel: not only must the plaintiff discharge the legal burden of proof but also, it is submitted, that he, she, or it cannot plead alternative estoppel claims based on alternative reliance (both expectation and conduct). That is, either he, she, or it interpreted the particular conduct and relied on it as pleaded, or he, she, or it did not.

In amplification, two further points may be made. First, it may be observed that this attribution by ambiguity approach, in effect, conflates the remedy with the cause of action and, in so doing, might, in principle if not practice, require retrying the entire action from the beginning. Put differently, surely the plaintiff ought to be put to proof in order to demonstrate that he, she, or it would have undertaken action or abstention in reliance on what would then be a more limited expectation. It seems quite incongruous that a plaintiff could make out an equitable estoppel — and, particularly, the two causative hurdles already discussed — only for a court, in determining the remedy, then to require he, she, or it go back and do the same again based on a now hypothetical expectation. Similarly, as has been said, factual causation operates as a key normative limitation on compensable loss, and hypothetical reliance potentially undermines this. Secondly, and relatedly, this approach also might distort the detriment aspect of the claim and of the remedy. Let it be said that the tenants proved hypothetical reliance on this now very limited expectation but, in so doing, it was found that they would have conducted themselves differently — for example, perhaps, they would have demanded a lower rate of rent or completed refurbishments to a lower, but still acceptable, quality. That, then, becomes an hypothetical detriment on an hypothetical expectation, including that the remedy might be pushed down to the reasonable expectation only, potentially, then to have to be adjusted further to hypothetical detriment. This brings the discussion to the second reason for perhaps rejecting it: evidential overdetermination and underdetermination.

[105] Ibid 48–9 [158], citing *Maynard v Mosely* (1676) 3 Swans 651, 655; 36 ER 1009, 1011 and *Stern v McArthur* (1988) 165 CLR 489, 514 (Brennan J).

2 *Evidential Overdetermination and Underdetermination?*

Evidential overdetermination occurs when there are multiple reasons for a result. It occurs in two situations: first, where each reason is *independently sufficient* to produce the result; and, secondly, where each reason is *independently insufficient but together* produce the result.[106] Both only occur if a 'but for' causal test is adopted (and not where contribution or a factor test is used). Overdetermination and underdetermination is endemic in human decision-making because human motivation is infinitely complex — many factors, both the conscious and the sub-conscious, influence decision-making. The problem is also compounded by forensic uncertainty. That is, it is not yet possible scientifically to identify, let alone to quantify, all the considerations factoring into our decisions. To use the Birksian aphorism quoted in the title of this article: '… [w]ill-power has no voltage.'[107] Of course, these issues raise obvious causation problems.[108] As Robert Walker LJ observed in *Gillett v Holt*,[109] '[what the claimant might have done if not for the assurance] was entirely a matter of conjecture.'[110] As outlined above, such possibilities were the subject of sustained scrutiny in cross-examination of Ms Van Dyke and were ultimately dispositive of the claim.

Relevantly, here, this perhaps also militates against the attribution by ambiguity approach adopted by Nettle J. That is because the approach requires a court to respond in one of three ways at the remedial inquiry. First, put the plaintiff to proof on the hypothetical expectation (the problems with this have been outlined immediately above). Secondly, proceed on a factual enquiry as to the proportion of the decision to act or abstain that is attributable to the ambiguous conduct of the defendant, which inquiry courts do not routinely, if ever, proceed through, and, indeed, the science indicates that such an enquiry would not bear results.[111] There is no voltage, evidenced by answers in the cross-examination (some of which has been excerpted above). Or, thirdly, a court could instead exercise a discretion, based on the degree of ambiguity of the impugned

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[106] See Bant (n 40) 67, citing *Texas Bank* (n 58), *Edgington v Fitzmaurice* (1885) 29 Ch D 459 and *Barton v Armstrong* [1976] AC 104.
[107] Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 157.
[108] This issue is beyond the scope of the article. Though, see generally Professor Bant who argues that this is a significant reason against applying the 'but for' test to causation.
[109] [2001] Ch 210.
[110] Ibid 234–5.
[111] See, eg, Bant (n 40) 67–8.

conduct, to attribute some liability to the defendant. Given the answers suggested to the first and second options, it seems that the exercise of such a discretion could not be based upon any quantifiable, factual matter and would be rather idiosyncratic: a blunt instrument. That reality seems to militate against that approach.

IV CAUSAL TEST(S)

In *Caason Investments Pty Ltd v Cao*,[112] Edelman J (his Honour then a Judge of the Federal Court) described 'but for' causation as the 'metaphysical relationship between an event and an outcome'.[113] Several of the issues considered in the preceding Part elide also into the choice of causative 'test'. More specifically, there is debate, in the authorities and the literature, as to whether the 'but for' or 'contributing factor' test applies in equitable estoppel, and specifically at both causal hurdles, at one or the other, or neither.[114]

Many cases present few difficulties in the application of the more rigorous, 'but for' causal standard. For example, if Paul is driving down the road and Peter negligently drives out in front of him, and they crash, it is not difficult to say that 'but for' Peter's negligence, Paul would not have crashed into him. However, difficulties arise when the relevant result is brought about by a process comprising one or several decisions, which, probably always, is the case in equitable estoppel. Again, Ms Van Dyke's cross examination pays close reading. Take a hypothetical exchange of promises between three people: A, B, and C. A makes a promise to C. B also makes a promise to C. C then acts in detrimental reliance. Assume that C only so acted because both promises were made but would not have acted if one promise had not been made. Assume also that A keeps their promise but B resiles. Should reliance be attributed to A, B, or both? And, in what measure?

Meanwhile, there is the alternative, 'contributing cause' approach, which asks whether, as a matter of fact, some particular matter was a factor in the process

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[112] (2015) 236 FCR 322.

[113] Ibid [153]. See also James Edelman, 'Unnecessary Causation' (2015) 89(1) *Australian Law Journal* 20.

[114] See Bant (n 40) 63–5 *cf* Alison Silink, 'Causation in Equitable Estoppel' (2016) 43(3) *Australian Bar Review* 320. See, eg, *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825; (2015) 329 ALR 1, [776]–[779] (Edelman J) *cf Priestley v Priestley* (n 72) [137] (White J). See further Edelman, 'Unnecessary Causation' (n 114) 28; Jane Stapleton, 'Unnecessary Causes' (2013) 149(January) *Law Quarterly Review* 39, 45–6.

leading to the result that occurred. In *Bonnington Castings Ltd v Wardlaw*,[115] Lord Reid observed:[116]

> What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material.

Pausing here, there are different, if not divergent, articulations of the 'contributing cause' test. For example, in *Allianz Australia Ltd v Sim*,[117] Allsop P (as the Chief Justice then was) considered several authorities,[118] observing: 'The phrases 'material contribution' or 'materially contributes' … used in a causal sense are capable of taking on a number of meanings. Care needs to be taken in their use...'. [119] Meanwhile, Professor Stapleton has suggested that the 'contributing cause' approaches may converge on the principle that any event that made a positive, non-trivial contribution is relevantly material.[120] That is consistent with this observation of Lord Reid.

Following, then, it may be readily observed that the 'but for' approach, and the alternative 'contributing cause' approach, are substantively different thresholds. And, not least given that, as has been said, causation is fundamental to equitable estoppel, some more ought to be said about the choice of one over the other.

Before turning to discuss some normative considerations, what, as a matter of authority, applies in equitable estoppel? It has been elsewhere suggested that it is well established, as a matter of authority, that the applicable causal 'test' is that of 'contributing cause'.[121] However, this is not necessarily so, or, at least, not on the authority of *Sidhu v Van Dyke*.[122] One might note that, in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)*,[123] Edelman J observed in *obiter* that the High Court had there adopted the 'contributing cause' threshold.[124] Meanwhile, in *Priestley*

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[115] [1956] AC 613.
[116] Ibid 621, cited in Bant and Paterson (n 4) 16.
[117] [2012] NSWCA 68.
[118] Ibid. The phrases "material contribution" or "materially contributes" to a result used in a causal sense are capable of taking on a number of meanings. Care needs to be taken in their use.
" [40]–[47], cited in Bant and Paterson (n 4) 16.
[119] Ibid [40].
[120] See particularly Stapleton (n 115).
[121] See, eg, Bant and Paterson (n 4) 18, citing *Texas Bank* (n 58) 104–5 (Robert Goff J) (as affirmed on appeal); *Sidhu v Van Dyke High Court* (n 33) [71]–[74] (French CJ, Kiefel, Bell and Keane JJ).
[122] (2014) 251 CLR 505.
[123] [2015] FCA 825; (2015) 329 ALR 1.
[124] Ibid [776]–[778].

v Priestley,[125] White J (as his Honour then was) held that the High Court applied 'but for' causation. There is also the judgment of Darke J in *Stone v Stone*,[126] where his Honour observed: '…the defendant has not shown that he would have adopted a different course had such beliefs or expectations not been induced in him.'[127] There is also the judgment of Sackar J in *Raphael Shin Enterprises Pty Limited v Waterpoint Shepherds Bay Pty Limited*.[128]

Turning then, back to the judgments of the High Court, as Silink has observed,[129] the references in the joint judgment to *Newbon v City Mutual Life Assurance Society Ltd*,[130] *Gould v Vaggelas*,[131] *Steria Ltd v Hutchinson*,[132] and *Amalgamated Investment & Property Company v Texas Commerce International Bank Ltd*[133] may appear as endorsement, at least tacitly, of the lower causal threshold of 'contributing cause'.[134] However, the joint judgment went on:

> But the question here is *whether the respondent would have committed to, and remained in, the relationship with the appellant*, with all that that entailed in terms of the effect upon the material well-being of herself and her son, *had she not been given the assurances* made by the appellant... [135]

This indicates a 'but for' analysis. Likewise, earlier in the reasons, their Honours found:

> It is unlikely that she would have thrown her lot with the appellant and exerted herself as she did over a period of eight and a half years *if he had not made the promises* which he in fact made. To the contrary, it is likely that she would have sought to maximize her own income for the benefit of herself and her infant son by seeking the most gainful form of employment.[136]

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[125] [2016] NSWSC 1096.
[126] [2014] NSWSC 1655; (2014) 17 BPR 33,443.
[127] Ibid [46].
[128] [2014] NSWSC 743, both cited in Silink (n 115) 339.
[129] Ibid 336.
[130] (1935) 52 CLR 723, 735 (Rich, Dixon, and Evatt JJ).
[131] (1985) 157 CLR 215, 236 (Wilson J), 250–1 (Brennan J).
[132] [2006] EWCA Civ 1551
[133] [1982] QB 84.
[134] As observed by Edelman J (as his Honour then was) in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (n 115) [776]–[778]. See also, eg, Jessica Hudson, 'Equitable Compensation for Equitable Estoppels' in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 219.
[135] (2014) 251 CLR 505, [76] (emphasis added).
[136] Ibid [69] (emphasis added).

Meanwhile, Gageler J, agreeing, though delivering additional reasons in relation to causation, confirmed also that the plaintiff bears the legal onus of establishing causation as a contributing cause.[137] However, his Honour elaborated on this requirement in the following terms:

> *To establish that the belief* to which she was induced by the appellant's representations *was a contributing cause* to the course of action or inaction which she took, *the respondent needed to establish more than that she had the belief and took the belief into account* when she acted or refrained from acting. *She needed to establish that having the belief and taking the belief into account made a difference* to her taking the course of action or inaction: that she would not have so acted or refrained from acting if she did not have the belief.[138]

Again, this seems to run very close to a 'but for' test, particularly noting that his Honour expressly associated the causal test with the stated purpose of estoppel as propounded by Dixon J (as his Honour then was) in *Grundt v Great Boulder Pty Gold Mines*,[139] specifically observing:

> The need for the respondent to establish such a difference stems from what Dixon J described in *Grundt v Great Boulder Pty Gold Mines Ltd* as the "indispensable" condition that a party asserting an estoppel "must have so acted or abstained from acting upon the footing of the state of affairs assumed" that the party asserting the estoppel "would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption". *That is to say, "the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted." There can be no real detriment if the party asserting the estoppel would have been in the same position in any event.*[140]

And, his Honour then said:

> The question of causation is therefore ordinarily appropriately framed, as it was implicitly framed by the primary judge in the present case, as being: *"Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course* (of either action or refraining from action) to that which [the party] did had the relevant assumption not been induced?"[141]

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[137] (2014) 251 CLR 505, [90].
[138] Ibid [91], and also quoted in Silink (n 115) 337.
[139] (1937) 59 CLR 641.
[140] (2014) 251 CLR 505, [92] (emphasis added).
[141] Ibid [93], and also quoted in Silink (n 115) 338.

His Honour concluded that, '[t]he inference to be drawn from the whole of the evidence is that, *were it not for her belief* in the appellant's representations, the *respondent would not have remained* on the property and done what she had done.'[142] This is 'but for' causation, albeit from inference. In *Priestley v Priestley*,[143] White J (as his Honour then was) said: 'In my view, when properly analysed, there is no inconsistency between what was said by the plurality and what was said as to the necessary causal relationship by Gageler J. Therefore … it is necessary for [the plaintiff] to show that *he would have acted differently if* [the defendant] *had not encouraged him* in that belief.'[144]

More recently, in *E Co v Q*,[145] it was observed that, 'although the plurality were clearly rejecting a "sole inducement" test and endorsing a "contributing cause" test, the passages do not necessarily dispose of the question whether it was nonetheless necessary for the respondent, in establishing the fact of reliance, *to show that the promises made a difference to her action or inaction.*'[146] It was concluded, albeit in *obiter* that, '[t]he proposition that a plaintiff must establish that the assumption 'influenced' his or her course of action or inaction in a 'significant' or 'material' way in the sense that he or she would have acted differently had the (induced) assumption not been held reflects the basal purpose of the estoppels *in pais* … it is clear that '[t]here can be no real detriment if the party asserting the estoppel would have been in the same position in any event' …'[147]

Turning then to some normative concerns. Bant and Paterson have posited several factors why a 'contributing cause' approach may be preferred in cases involving decision causation.[148]

First, there is evidential and forensic uncertainty together with uncertain aetiology in decision-making. Bant and Paterson make the comparison between the firing of a gun and a decision to act or not to act: 'Unlike the question of whether, for example, a bullet fired by the defendant injured the plaintiff, a matter which can be scientifically tested and proven, there is no necessary answer

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[142] Ibid [95].
[143] [2016] NSWSC 1096.
[144] Ibid [137]. See also, eg, *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* [2017] NSWCA 106, [45] (Macfarlan JA).
[145] [2018] NSWSC 442.
[146] Ibid [1046].
[147] Ibid [1075], quoting *Sidhu v Van Dyke High Court* (n 33) [92] (Gageler J); *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J).
[148] Bant and Paterson (n 4) 18. See also, eg, Bant (n 40). See also Tang Hang Wu, 'Restitution for Mistaken Gifts' (2004) 20(1) *Journal of Contract Law* 1, 25.

to the question whether some particular fact or matter caused a person's decision to act or not to act'.[149] More recently, in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[150] French CJ said in relation to the change of position defence:

> Any attempt *to value the detriment suffered by the respondents would involve the consideration of more than one counterfactual with varying degrees of probability.* There are, as the plurality observed in *Sellars v Adelaide Petroleum NL* "peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts". The extent of the defence of change of position is not to be determined according to the outcome of an exercise which can only be undertaken long after demand is made and which involves an elaborate and potentially expensive process of assessment…[151]

It may immediately be accepted that peculiar difficulties arise in relation to proof and future, past, hypothetical and real counterfactual analyses. Nevertheless, one may also question the extent to which considerations underlying the defence of change of position ought to intrude on equitable estoppel. As the Chief Justice went on also to observe: '[the] kind of valuation approach[es] undertaken in an assessment of damages for loss of opportunities … are undertaken upon an entirely different basis from that which informs the change of position defence.'[152] Alike, Hayne, Crennan, Kiefel, Bell, and Keane JJ observed, '*Commonwealth v Amann Aviation Pty Ltd* and *Sellars v Adelaide Petroleum NL* … concerned the assessment of damages by way of compensation for breach of contract or statutory or common law norms of conduct predicated upon proof of loss by reason of the breach. Here, Hills and Bosch had done AFSL no wrong that gave rise to an obligation to compensate … for the loss suffered by it as a result. As Lord Goff observed in *Lipkin Gorman*, restitutionary claims are not founded upon a wrong done to the payer.'[153] Furthermore, the difficulties identified do not *ipso facto* foreclose that a particular legal rule ought not to hold, even if in application that rule may be give rise to difficulties.

It may also be accepted, as Bant and Paterson persuasively explain,[154] that relative contribution of one reason among many — both conscious and

[149] Bant and Paterson (n 4) 18–19.
[150] (2014) 253 CLR 560.
[151] Ibid [30].
[152] Ibid [30] (footnotes omitted).
[153] Ibid [83] (footnotes omitted).
[154] Bant and Paterson (n 4) 19.

subconscious — for a party's decision is not something that can readily, if at all, be scientifically measured or tested and that, even, we as humans may not be aware of all the reasons for the decisions that we make, let alone being able to calibrate and to explain the relative importance of each. It is quite true that, in this context, application of the 'but for' test invites intense speculation, and which speculation necessarily, at least in part, concerns hypotheticals that never occurred and cannot later be replicated. These difficulties are doubtlessly compounded when one appreciates that evidence in estoppel cases is very often testimonial and oftentimes self-serving.[155]

Again, however, forensic difficulties of this kind do not necessarily mean that a 'but for' causal approach should yield to a less demanding one; and, it appears, perhaps, that these concerns may be ameliorated, to a large extent, when one has in mind the specific inquiries to be undertaken and the context of the judicial function in which these matters are adjudicated. Specifically, that the relevant inquiry is a subjective one, not objective, and courts often make factual findings on the balance of probabilities, even without certainty of proof. Indeed, quite the same may be said even about determining whether something was a contributing cause: it may be impossible to prove whether it was, or was not, irrespective of whether the standard is calibrated at 'but for' or 'contributing cause'.[156]

To illustrate further, for example, the issue pursued in the cross-examination of Ms Van Dyke (again, excerpted above) was not whether, as a matter of scientific or mathematical proof, Mr Sidhu's assurances had caused her so to abstain, but instead it was to test her own perceptions of those matters. It was then from that evidence that the courts could draw inferences from the totality of the evidence about what did, or did not, impact on her decision-making processes. Indeed, this is precisely what the High Court did. As Lord Macmillan explained in the estoppel case of *Jones v Great Western Railway Co*:[157]

> ... An inference in the legal sense ... is a *deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.* The *attribution of an occurrence to a cause is, I take it, always a matter of inference.* The cogency of a legal

[155] See, eg, *Priestley v Priestley* (n 72) [140] (White J, as his Honour then was). And, in different contexts, there are other examples of the problems in using a witness's own testimony about what he, she, or it would have done in a hypothetical situation: see, eg, *Chappel v Hart* (1998) 195 CLR 232, 246 (McHugh J), 272-3 (Kirby J) and *Rosenberg v Perceval* (2001) 205 CLR 434, [26] (McHugh J), [87]–[89] (Gummow J), [158] (Kirby J), [221] (Callinan J). Indeed, it is seen as so unreliable that its use for some purposes is prohibited under the uniform evidence legislation.

[156] *Cf* Bant and Paterson (n 4) 19.

[157] (1930) 47 TLR 39.

> inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved. Indeed, as Lord Shaw said in *Marshall v Owners of SS Wild Rose*: "The facts in every case may leave here and there a hiatus which only inference can fill."[158]

These observations hold true whether one applies the 'but for' approach or a 'contributing cause' approach. This seems also to meet the concern that a strict application of a 'but for' test would dictate that, sometimes, a plaintiff, 'would be constitutionally incapable of proving causation.'[159] That seems not to be so. By way of albeit very imperfect analogy, in the criminal law, judges and juries all the time must decide whether an accused or a victim held a particular mental state, including for many offences involving a mental element in relation to some decision to do or not to do something. We would not say that the Crown is constitutionally incapable of proving guilt beyond reasonable doubt, or that an accused is constitutionally incapable, if he or she so chooses, to prove his or her innocence.

Secondly, and relatedly, there exist cognitive limitations in human decision-making.[160] That is, there is an emerging body of research suggests that individuals often experience cognitive overload when making complex decisions, instead basing a decision on a few, salient considerations and being commonly influenced by personal biases and 'rules of thumb'. Bant and Paterson, in considering causative rules for misleading and deceptive conduct, note that these psychological limitations may be manipulated by marketing strategies and are affected by the circumstances in which some transaction occurs.[161] Accordingly, it may fairly be conjectured that, if nothing else, given the normative concerns underlying the consumer statute, a 'contributing cause' factor ought there to apply. However, again, it seems that the same does not necessarily hold in relation to equitable estoppel. The relevant, specific concern of this aspect of equitable estoppel inquiry is not — putting aside, perhaps, 'reasonableness' requirements for present purposes — whether a plaintiff took into account all relevant considerations which as a matter of rationality and prudence one

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[158] Ibid 45.
[159] *Cf* Bant and Paterson (n 4).
[160] Ibid 21–2.
[161] See Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70(4) *University of Chicago Law Review* 1203; Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47(2) *Stanford Law Review* 211.

should, or applied some particular cognitive bias. Instead, this aspect of the inquiry is focused only on isolating those factors which impacted the decision, and whether one factor or another (specifically, the defendant's conduct) had an impact. So, Ms Van Dyke might well have based her decision not to seek a property settlement only on Mr Sidhu's promises, and in so doing she might have applied perceived 'rule of thumb' that one's lovers always abide their promises (though one might devise that to be the common experience in a multitude of contexts). It matters not (again, putting aside reasonableness requirements for one moment) *why* some factor contributed to the decision and whether the manner of selecting that factor was rational or prudent. Instead, it is only *what* factors so contributed. The authors respectfully do not see why because 'individual decision-making does not necessarily follow a logical and rational pattern in assessing all of the evidence at hand, as is sometimes assumed in legal contexts, [that] the "but for" test cannot logically apply.'[162] Again, also, exactly the same conditions of uncertainty bear on whether one is tasked with identifying some consideration as a 'contributing cause' as if one were asked to determine if 'but for' causation had been established.

Thirdly, there is the issue of overdetermination and underdetermination.[163] These concepts were also considered above. It is readily accepted that these issues are endemic in estoppel cases, and seem a good, potential justification for adopting the lower causal approach. However, to this, one might conjecture whether so to do dislocates the form of rule from the underlying, normative substance. To take the point quite squarely, as Lord Hoffman said in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*:[164]

> One cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule.[165]

In this respect, Lord Hoffman has also observed, extra-judicially, that the law has generally, historically taken a less rigorous approach to causation in cases of

[162] *Cf* Bant and Paterson (n 4) 21–2.
[163] Ibid 20–1.
[164] [1999] 2 AC 22.
[165] Ibid 31.

wrongdoing.[166] For example, in the seminal decision in *Reynell v Sprye*,[167] Lord Cranworth said, '[o]nce make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand…'.[168] Less than a decade later, in *Smith v Kay*,[169] Lord Chelmsford LC posed rhetorically:

> But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it to speculate upon what might have been the result if there had been a full communication of the truth?[170]

A more recent authority often proffered in the literature is the seminal duress case, *Barton v Armstrong*.[171] As Bant and Paterson observe,[172] the decision made by Mr Barton was 'overdetermined' because there may have been more than one reason independently sufficient to cause him to make the impugned decision. Lord Cross, giving the leading speech, clearly confirmed that the 'contributing cause' approach applied.[173] Lord Wilberforce and Lord Glaisdale dissented in the result, though concurred as to the approach to causation.[174] More recently, in *Taheri v Vitek*,[175] Leeming JA, with whom the Chief Justice agreed[176] and Emmett JA substantially agreed,[177] confirmed that, in both Australia and in England, it is sufficient if a fraudulent misrepresentation 'plays some part, even if only a minor part in contributing to the formation of the contract',[178] and his Honour noted that in such cases, 'it is a heavy burden to demonstrate the absence of causality.'[179] Earlier, in *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)*,[180] Lord Millet observed: 'I do not think a Court of Equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted.'[181]

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[166] See Leonard Hoffmann, 'Causation' (2005) 121(October) *Law Quarterly Review* 592.
[167] (1852) 1 De GM & G 660.
[168] Ibid 708.
[169] (1859) 7 HLC 750.
[170] Ibid 759, both cited in Silink (n 115) 322.
[171] [1973] 2 NSWLR 598.
[172] Bant and Paterson (n 4) 20
[173] [1976] AC 104, 118–19.
[174] Ibid 121.
[175] (2014) 87 NSWLR 403.
[176] Ibid [1].
[177] Ibid [26].
[178] Ibid [73]–[81].
[179] Ibid [81].
[180] [2003] 1 AC 197.
[181] Ibid [105].

Yet, the policy concern potentially underlying cases of equitable fraud does not necessarily apply in equitable estoppel where a plaintiff may succeed even absent relevant wrongdoing by the defendant. The same may be said in relation to common law estoppel by representation,[182] as well as estoppel by convention.[183] In this connection, one might observe that, at least as a starting point, the common law of negligence has applied the 'but for' approach, including for negligent misstatement.[184] In *March v Stramare*,[185] McHugh J observed, '[i]f the damage would have occurred notwithstanding the negligent act or omission, the act or omission is not a cause of the damage and there is no legal liability for it.'[186]

To return to the observations of Gageler J that, '[t]here can be no real detriment if the party asserting the estoppel would have been in the same position in any event.' As noted, his Honour referred to Dixon J (as his Honour then was) in *Grundt v Great Boulder*,[187] where his Honour observed:

> ... [T]he basal purpose of the doctrine ... is to *avoid or prevent a detriment* to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This *means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted* that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own change of position will operate as a detriment.[188]

And, Latham CJ said:

> *They were induced to act* to their detriment (by doing work and spending money) *as they would not have otherwise done*, by the facts that the company acted so as to show that it was content to regulate the relations between the tributers and itself upon the basis that the agreement applied in all respects to the ore produced from the western swing.[189]

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[182] *Cf*, eg, *Steria v Hutchison Ltd* [2006] EWCA 1551, [71] (Neuberger LJ, as his Lordship then was), cited by Silink (n 115) 324. See also, eg, Bant (n 40) 66.
[183] *Cf*, eg, *Texas Bank* (n 58) 108 (Goff J, as his Lordship then was).
[184] See particularly *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
[185] *March v (EH & M) Stramare Pty Ltd* (1991) 171 CLR 506.
[186] Ibid 530. Though, *cf*, eg, 515–17 (Mason CJ).
[187] (1937) 59 CLR 641.
[188] Ibid 674.
[189] Ibid 657 (emphasis added).

In sum, therefore, adoption of the lower causal threshold whereby a plaintiff need not demonstrate that he, she, or it would have acted any differently might unduly depart from the normative underpinnings of equitable estoppel.[190] There seem strong arguments either way in relation to which causal 'test' should be applied.

V Conclusion

This article has considered various questions about causation arising across the nexus of an equitable estoppel claim. It has also considered what causal 'test' courts might apply in answering those questions. The authors have not proffered a concluded view, instead observing only that a choice likely must be made to accommodate different and, it seems, competing rationales: on the one hand, particularly, evidential overdetermination and underdetermination; and, on the other, the fair and just allocation of reparative responsibility for harm, which, in some cases might not actually have been caused by the defendant. As to some other perceived concerns in relation to the 'but for' approach, it has been suggested that those concerns might substantially fall away having in mind the particular, specific processes of reasoning in, and the capacities of, the judicial function.

[190] See also Silink (n 115) 345–6.