

## INTRODUCTION BY GUEST EDITORS

### CAUSATION IN THE LAW

ELISE BANT AND HENRY COONEY

Despite decades of analysis by astute legal minds, causation continues to be recognised as ‘one of the most difficult [fields of debate] in the law’.<sup>1</sup> Such is the challenging nature of the topic that, according to the High Court of Australia, causation is a subject ‘about which abstract discussion is seldom valuable’.<sup>2</sup> The law is not alone in wrestling with basic questions concerning causation. Divergent views on the fundamental nature of causation have been held by scientists and philosophers for centuries—indeed, David Hume’s writings on causation continue to fascinate to this day. Ludwig Wittgenstein, writing many years after Hume, declared belief in the causal nexus to be ‘superstition’. But unlike these metaphysicians, the lawyer cannot afford to take a sceptical or indifferent position when it comes to causation. Causation is one of the basic pillars of private and criminal law. It is a topic with which all good academics, practitioners and judges must be familiar. Yet, as demonstrated by several contributors, much remains unclear and contested, even amongst experts in the field. This special edition of the *University of Western Australia Law Review* (UWALR) on causation in the law is thus both timely and necessary.

A theme cutting across the special edition, as it does the authorities, is the contested nature of ‘causation’ itself. Many contributors endorse a divide between factual (historical, scientific) causation and issues going to defendant responsibility, or scope of liability (sometimes termed ‘legal’ causation). Unsurprisingly, several contributions to this special edition focus upon the meaning of factual causation. Professor Richard Wright, in ‘Causation (Contribution) and the ‘No Worse Off’ Limitation on Liability’, elaborates upon and defends his influential ‘NESS’ theory of contributory-condition causation. This includes assessment of the poorly understood concepts of necessity and sufficiency and the complex role of negative conditions (omissions) in causal relations. Against that background, Professor Wright examines in depth the ‘no worse off’ limitation on liability, which to date has been under-explored and, accordingly, mischaracterised by most courts and commentators as causal in nature. Yuval Abrams, in ‘Omissive Overdetermination: Why the Act-Omission Distinction Makes a

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<sup>1</sup> *ACQ Pty Ltd v Cook* (2009) 237 CLR 656, 661 [14] (French CJ, Gummow, Heydon, Crennan and Bell JJ).

<sup>2</sup> *Ibid.*

Difference for Causal Analysis', also explores the distinction between causative acts and omissions, particularly in how they differ in cases of duplicative causation. Abrams argues that omissions are not truly causal, and that liability attaches to omissions in a very different way when compared to liability for causative acts. Johannes Hygen Meyer, in 'Three Categories of Causation in Tort Law', presents a theoretical framework of causation inspired by the work of Norwegian scholar Nils Nygaard. Meyer argues that there are three types of causal inquiries within the law: causal explanations of actual events, negative counterfactual hypotheses, and positive counterfactual hypotheses.

A number of the contributions to this special edition focus upon causal issues that arise at the intersection of science, law, and technology. Justice Jonathan Beach, in 'Causation: The Interface Between the Scientific and Legal Methods', provides the perspective of a senior trial judge on the role of scientific evidence as proof of causation. Justice Beach identifies and reflects upon several thorny issues concerning causation and science, including issues relating to the scientific method, artificial intelligence, and COVID-19 vaccines. Per Laleng and Charles Feeny, in 'Law and Epidemiological Evidence: Double, Toil and Trouble', focus upon the use of epidemiological evidence in court. The authors develop a novel, structured approach to the use of risk-based epidemiological evidence in litigation for proof of causation. Finally, Sara Golru, in 'The Challenge of Proving Toxic Tort Causation: Genetic Markers as the Solution?', presents a comparative analysis of the role of genetic marker evidence in toxic tort cases throughout Australia and the United States. Golru identifies inconsistencies in the approach of Australian courts to genetic evidence of causation, and considers how developments in the US can inform toxic tort litigation in Australia.

Another theme that runs through this special edition is the law's approach to 'decision causation'—that is, factual patterns in which an individual's decision-making is the focus of causal analysis. Justice Julie Ward and Stephen Puttick, in 'Willpower Has No Voltage: Problems with Causation in Equitable Estoppel', identify and explore three causal enquiries that arise in the context of equitable estoppel, and consider the appropriate test of causation within each stage. As their analysis reveals, some of these 'causal' steps harbor discrete normative inquiries into the parties' respective responsibility for the detriment factually caused by the representation. Their analysis seeks to make these distinctive issues transparent to aid more coherent application, and development, of the law. Henry Cooney, in 'Causation and Contributory Negligence: The Use and Misuse of Causal Concepts in Cases of Misleading Conduct', examines the role of causal concepts when liability is apportioned between a plaintiff and defendant owing to the plaintiff's contributory negligence. Cooney argues that confusion over the nature of different causal tests, and the concept of 'causal potency', has led to

incoherence with the law of contributory negligence. Cooney suggests that understanding the nature and role of causation within the doctrine of contributory negligence will go a long way in remedying this problem.

Though most of the contributions to this special edition focus upon the private law, causation is also a foundational concept within the criminal law. Professor Ingeborg Puppe and Dr Thomas Gross-Wilde, in 'A NESS Causation Based Concept for Imputation of Harm in Criminal Law', develop a NESS-based theory of causation of harm within the criminal law. In the first part, the authors build upon the earlier work of Professors Puppe and Wright to develop a theory of causation that overcomes problems of pre-emption and overdetermination; problems that have the potential to wreak havoc within the criminal law (as within the private law). In the second part, the authors demonstrate that the NESS test realises its full analytical power when applied not to an act 'as a whole', but to the act's wrongful aspects. The authors argue that these wrongful aspects are connected to the relevant harm by a chain of unlawful states of affairs (the so called 'continuity requirement'). These states are instantiated in the real world, and do not require recourse to counterfactual speculation about what might have happened in a different possible world. Professors Meredith Blake and Stella Tarrant, in 'Causation in Homicide, 'Fright, Escape or Self-Preservation' Cases: *Yarran v The State of Western Australia*', consider the 'causation-deeming' provisions of the *Western Australian Criminal Code Act Compilation Act 1913* against the backdrop of a recent decision of the Western Australian Court of Appeal. The analysis provides a timely and cogent reminder that 'causation' for legal purposes is highly context-specific: in the context of criminal statutes, 'transplanted' understandings from the general law may operate to contradict or confuse the statutory enquiry. Adopting the requisite 'internal' perspective, the authors argue that there is sufficient uncertainty surrounding the operation of these provisions to warrant further consideration of the meaning and scope of causal criminal responsibility in Western Australia.

The prevalence and complexity of issues of causation within commercial disputes is well demonstrated by two of the contributions to this special edition. In 'The Causal Effect of Hypothetical Events Upon Contractual Damages', Joshua Thomson SC and Madeleine Durand enter the heartland of contract law. Here, there is no neat separation between factual causation and responsibility: the loss which must be compensated when a contract is broken reflects a normative order obliging contractual performance. The authors identify and explore two stages in the loss-measurement enquiry. The first stage concerns characterisation of the nature of the contractual interest infringed by the breach. The second stage involves measuring the innocent party's loss against this interest. The authors explore how and why assessment at this second stage may be

affected by hypothetical supervening events, which could mean that the expected contractual performance would have been lost, or diminished, in any event. Zamir Golestani, in ‘*TPT Patrol Pty Ltd v Myer Holdings Limited: Why Shareholders Can Rely on Market-Based Causation*’, explores the emerging concept of ‘market-based causation’ in the aftermath of the Federal Court’s decision in *TPT Patrol v Myer*. Golestani argues that the availability of a market-based theory of causation in shareholder class actions represents a positive development in Australian law.

Alongside these papers addressing causation in contract and commercial law are several papers that examine ongoing and contentious questions in tort. These intersect with, and provide valuable contrasting views to, the more theoretical analyses of Wright, Adams and Meyer. Professor Neil Foster, in ‘Material Contribution in *Bonnington*: Not an Exception To ‘But For’ Causation’, examines the ‘material contribution to risk’ test of causation as formulated by Lord Reid in *Bonnington Castings v Wardlaw*. Foster argues that, contrary to widespread assumptions, the material contribution test of causation is an example of, not an exception to, the ‘but for’ test of causation. Nithya Narayanan, in ‘Simply Unpredictable’: Establishing Causation for Claims of Police Negligence in Domestic Violence Cases’, interrogates the appropriate test of causation in tort when police negligently fail to prevent domestic violence. Connecting with, and providing a powerful illustration of the practical importance of, these discussions is Marco Rizzi and Amy Thomasson, ‘Inferring Necessary Conditions: The Enduring Paradox of the ‘But For’ Test in Factual Causation’. The authors critically examine the use of inference when applying the but for test of causation, framing their analysis against a recent decision of the Western Australian Court of Appeal, *East Metropolitan Health Service v Ellis* [2020] WASCA 147. Their observations demand better recognition of the proper roles of tests of contribution, and more transparent normative reasoning, in private law treatments of causal and liability enquiries.

This special edition has a long and complex genesis, and would have remained merely an idea were it not for the tireless efforts of many. We are grateful for the financial and administrative assistance provided by the UWA Law School, and we are indebted to Professor Natalie Skead, Dean of the Law School, and Professor Michael Blakeney, Winthrop Professor of Law and staff editor of the UWALR, for their continued support and advice. We are particularly thankful to the anonymous reviewers, whose careful assessments and thoughtful feedback have enriched the special edition in a myriad of ways. We were also assisted by the UWALR student editorial team. Special thanks must go to Emma Young, Kate Koh, and Zamir Golestani for their meticulous editing. Finally, we must thank the authors who contributed to the special edition. It has been a privilege to work with them on this project.