In what circumstances will Australian courts depart from the "but for" approach to causation in negligence cases?

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INTRODUCTION

1. The field of debate surrounding causation "is one of the most difficult in the law."[1] The role and application of the "but for" approach has contributed to that difficulty.

2. As will be seen, the "but for" approach is an extremely important element in the common sense approach to causation currently adopted at common law in Australia. It is also an essential aspect of the causation enquiry required in negligence cases to which the Civil Liability legislation ("the CLA") applies. The CLA is in force in all Australian jurisdictions except the Northern Territory.[2]

3. The fact that Australian courts (other than in the Northern Territory) have to determine causation issues in some negligence cases using the common sense approach and in others using the CLA approach also has the potential to create difficulty but, as will be developed below, this difficulty seems more apparent than real. This paper hopes to demonstrate that in substance the common law approach to causation and the statutory one will yield the same results in similar factual scenarios.

4. The main thrust of this paper, however, is to confirm the central and very important part that the "but for" approach plays in determining causation both at common law and under the CLA regime and to identify the situations in which it will be departed from in exceptional cases – which are almost always situations where there are multiple factors, including the defendant's act or omission, which may have played a part in the particular harm suffered by a victim.

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1 *ACQ Pty Limited v Cook* [2009] HCA 28; 237 CLR 656 at 661 [14].

2 The relevant causation provisions in the various statutes are:
s.45 *Civil Law Wrongs Act 2002 (ACT);* s.5D *Civil Liability Act 2002 (NSW);* s.11 *Civil Liability Act 2003 (QLD);* s.34 *Civil Liability Act 1936 (S.A.);* s.13 *Civil Liability Act 2002 (Tas);* s.51 *Wrongs Act 1958 (VIC);* s.5C *Civil Liability Act 2002 (W.A.).*

5. As summarised in pars 48 – 50 below, the short answer to the question posed in this paper's title is that both under the common law and under the CLA regime an Australian court will only depart from the "but for" approach where there is causal overdetermination, causal underdetermination or evidentiary gaps and difficulties but, with the exception of the ACT and South Australia (and then only if the CLA regime applies to a case) not where all that the plaintiff can prove is that the defendant's conduct materially increased the risk of the harm suffered by the plaintiff.

What is the "But For" approach?

6. The test under this approach is simply whether the harm that in fact occurred would not have occurred absent the negligence.[3]

The place of the "But For" approach under Australian Common Law

7. In other common law jurisdictions such as the United Kingdom[4] and Canada[5] the "but for" test generally remains the required threshold for proving factual causation in negligence. A plaintiff must prove that but for the defendant's negligence the injury it has suffered would not have occurred.

8. In Australia, however, at least since the decision in *March v Stramare Pty Limited*[6] the "but for" approach has been displaced by the "common sense" approach. But the "but for" approach remains an important component of the common sense approach as explained in the joint judgment of Mason

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3 *Wallace v Kam* (2013) 250 CLR 375 at [16]; *Adeels Palace Pty Limited v Moubarak* (2009) 239 CLR 420 at [45], [53], [55].

4 *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32 at [8], [37], [57], [124]; *Barnett v Chelsea and Kensington Hospital* [1969] 1 QB 428.

5 *Clements v Clements* [2012] 2 SCR 181 at [5], [8], [13].

6 (1991) 171 CLR 506.

CJ, Deane and Toohey JJ in *Bennett v Minister of Community Welfare* where their Honours observed:[7]

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

9. The reason why value judgments and policy considerations intrude is because, at law, causation is part of the function of attribution of responsibility. As stated in the judgment of the Court in *Wallace v Kam*:[8]

> "The common law of negligence requires determination of causation for the purpose of attributing legal responsibility. Such a determination inevitably involves two questions: a question of historical fact as to how a particular harm occurred; and a normative question as to whether legal responsibility for the particular harm occurring in that particular way should be attributed to a particular person …"

10. The normative question mentioned in this quote is where value judgments and policy considerations come into play in the process of exercising common sense.

11. The common sense approach has its strident critics[9] but also its supporters.[10] But this paper is about what the law is, not what it should be, so it is generally beyond its scope to evaluate the views of commentators except to the extent such material illuminates or explains the present law. That the common sense approach remains the law in Australia is illustrated

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7 (1992) 176 CLR 408 at 412-413; see also *Dean v Pope* (2022) 110 NSWLR 398 at 429 [153].

8 N.3 above at 381 [11]. Attribution of responsibility is the determination of how the costs of injuries and deaths should be allocated – see fn. 46 below.

9 See, e.g., Stapleton *"Factual Causation"* (2010) 38 Fed Law Rev. 467 at 468, 484; Stapleton *"Reflections on Common Sense Causation in Australia*" in Degeling et al (ed) *"Torts in Commercial Law"* (2011) Chapter 14 at pp.331, 350; Cooney *"Risk and Causation in Negligence"* (2022) 96 ALJ 558 at 559-560.

10 See, e.g., Allsop "*Causation in Commercial Law*" in Degeling et al (ed), n.9 above, Chapter 13 at pp.329-330.

by the recent judgment of Allsop CJ in *Minister for the Environment v Sharma* where his Honour observed:[11]

> "… causation in the field of negligence is essentially a question of fact to be answered by reference to common sense and experience and into which considerations of policy and value judgments necessarily enter and the 'but for' test is not definitive …"

The problems with the "But For" approach and the law's response

12. As the passages quoted above reveal,[12] the "but for" test, whilst having an important part to play in the causation analysis, is not a comprehensive, exclusive or definitive test.

13. The role and limitations of the "but for" approach in Australia has been accurately summarised this way:[13]

> "While the 'but for' test is an integral part of the causal enquiry, common sense may classify an event as causative when it would not be under the 'but for' test and vice versa."

14. The reason for this is that, particularly in cases where there are multiple factors involved or potentially involved in the causal analysis, the courts have recognised that a strict and exclusive application of the "but for" test could produce anomalous unfair or unreasonable (even absurd) results.

15. Three main problem areas have been identified:

    (a) Where there are multiple causes of harm each sufficient by itself to have completely caused the plaintiff's harm ("causal overdetermination");

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11 (2022) 291 FCR 311 at 405 [305]; see also *Dean v Pope*, note 7 above at 428 [153].
12 See paragraphs 8 and 11 above.
13 Barnett and Harder, *"Remedies in Australian Private Law",* 2nd ed. (2018) at 75 [3.9].

(b) Where there are multiple independent events contributing to the harm but none of which was sufficient by itself to have caused the particular harm ("causal underdetermination");

(c) Overlapping with (b) where there are evidentiary difficulties, uncertainties or gaps beyond a plaintiff's control so that whilst the plaintiff may be able to show that the defendant's conduct had an effect on the outcome it is not possible to determine the extent of that effect and it is thus not possible to prove that "but for" the defendant's conduct the harm would not have occurred. Often this problem arises in workplace situations where a worker contracts a disease as a result of multiple, cumulative or consecutive exposures by different employers to a noxious substance. But the problem is not confined to such cases. It exists also, for instance, in negligent misstatement cases (or related wrongs such as deceit or misleading conduct under the Australian Consumer Law). In such cases a plaintiff often makes an investment or expends money as a result not only of the defendant's negligent statement but also as a result of advice or the like given by others or after having taken into account considerations unrelated to the defendant. In such cases it will sometimes not be possible for an honest plaintiff to say that "but for" the defendant's negligent statement he or she would not have made the investment or spent the money ("evidentiary difficulty cases").

16. Despite the overlap between categories (b) and (c) it is convenient to discuss each of these categories separately.

Causal overdetermination

17. This situation has been defined above.[14] There are two types of causal overdetermination – duplicative and pre-exemptive. Duplicative causation exists where both the defendant's conduct and another event were each sufficient to bring about the harm and each event duplicated or reinforced the effect of the other. Pre-emptive causation exists where each of two factors was sufficient, or would have been, to bring about the harm but one factor pre-empts the effect of the other factor.[15] However, since the law's response is significantly the same in each case and for space reasons I shall not deal with them separately. But two different types of scenario must be addressed. First, where each of the two or more acts or omissions by different persons is a negligent one and secondly where only one of the acts (that is the act of the defendant) is a negligent one.

18. Where each of the acts is a negligent one, but sufficient in itself to have caused the harm, strict application of the "but for" test would enable each defendant to escape liability. Such an outcome offends common sense and the value judgments and policy considerations inherent therein. Australian courts have firmly rejected permitting such an outcome and "it is well settled principle" that each sufficient condition is treated as an independent cause of the plaintiff's injury with the result that the plaintiff may recover from any of the wrongdoers or from all of them.[16]

19. An example of this situation which is commonly used is the "two hunters two hits" situation where A and B independently shoot at and hit C and each hit was sufficient by itself to kill C. Such a case is one where "the goals of tort law and the underlying theory of corrective justice" requires the defendant

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14 See paragraph 15(a) above; see also Barnett and Harder, n.13 above, at 81 [3.26].

15 Wright "*Causation in Tort Law"* (1985) 73 Calif. Law Rev. 1735 at 1775; Barnett and Harder, n.13 above, 82-85 [3.35]–[3.48].

16 Per McHugh J in *Bennett v Minister of Community Welfare*", n.7 above, at 429; *Strong v Woolworths Limited* (2012) 246 CLR 182 at 194-195 [28]; see also the same case at [18]; see also *March v Stramare*, n.6 above, at 516, 523, 524, 525 and 534.

not be permitted to escape liability by pointing the finger at another wrongdoer.[17]

20. Where, however, each of the defendant's wrong and a non-wrongful act, omission or event involving someone else is sufficient in itself to cause the plaintiff's harm then the defendant will not be liable. In such a situation the "but for" test is applied.[18]

Causal underdetermination

21. This exists where there are multiple reasons for an outcome that, taken singularly, are not sufficient to produce the particular harm but suffice when combined in one or more ways.[19] It raises similar difficulties or uncertainties to the problems created in evidentiary difficulty cases and some situations such as negligent misstatement could be dealt with under either heading.

22. A commonly used example is that of where there are 10 small fires (only one of which is negligently lit by the defendant) none of which was sufficient independently to burn a building down but which suffice, when combined in one or more ways, to destroy the building even though none of the fires, by itself, would satisfy the "but for" test.

23. This type of situation arises also in what have been called "decision causation" cases where a person makes a decision to invest or the like following a negligent, misleading or even fraudulent misrepresentation.[20]

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17 To adopt the language of McLachlin CJ in *Clements v Clements*, n.5 above, at [15].

18 See, e.g., *K-Mart Australia Limited v McCann* [2004] NSWCA 282 at [49]-[54] and, generally, Barnett and Harder, n.13 above, 82-85 [3.36]-[3.40], 100-101 [3.100]-[3.102]; as stated by Edelman J in *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 247 [161] "… if the defendant's act made no difference to the outcome because 'but for' the act of the defendant the loss would have occurred lawfully, then the defendant's act was not a cause of the loss." Thus, in *Tomasetti v Brailey* (2012) 274 FLR 248; [2012] NSWCA 399 at [58]-[59] the NSW Court of Appeal observed that if a person would have proceeded with an investment even if the advice had not been given, then causation was not established.

19 Bant and Paterson, *"Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law*" (2017) 24 Torts Law Journal 1 at 15.

20 Ibid at 10.

Such cases could also be discussed under the heading "Evidentiary difficulty cases" because of the impossibility for a court of enquiring into the contribution to a person's mind[21] and because honest plaintiffs, years after the event and who may have received advices from multiple sources, may not be able to honestly say that "but for" the negligent advice of the defendant they would not have made the investment.

24. Australian courts have determined that in this situation causation is established by proving that the negligent statement was *a* cause of the loss, as opposed to being *the* cause. As will be seen below, this seems to be saying, in effect, that the statement *materially contributed* to the harm suffered by the plaintiff. This is one of the various (and confusing) ways in which the concept of "material contribution" is sometimes discussed in causation law. In this context "material contribution" is more commonly understood as a synonym for the principle that the defendant's negligence need only be *a* cause and not *the* cause, of the plaintiff's injury.[22]

25. In *Henville v Walker*, a misleading conduct case, the members of the court applied or were guided by common law causation principles. The High Court unanimously confirmed that it was sufficient if the defendant's conduct was a cause of the loss not the cause.[23] The High Court has confirmed subsequently that a wrongful act may be a cause in this sense even if it plays some part, albeit only a minor part, in the outcome.[24]

26. Gaudron J in *Henville v Walker* accurately and succinctly summarised the Australian position and highlighted that an act which is a cause of the harm (or which makes a material contribution to the harm) is sufficient to establish causation even if the "but for" test is not satisfied in these terms:[25]

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21 Edelman, "*Unnecessary Causation"* (2015) 89 ALJ 20 at 27 and the cases there cited.

22 *East Metropolitan Health Service v Evans* (2020) WASCA 147 at [597]; *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Limited* (2013) 247 CLR 613 at 635 [45].

23 *Henville v Walker* (2001) 206 CLR 459 at 469 [14]-[15], [60], [107]-[109], [153], [163]; see also *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109 at 128 [57], 137 [90].

24 *Hunt & Hunt Lawyers*, n.22 above, at 635 [45].

25 *Henville v Walker*, n.23 above, at 480 [59]-[61].

> "[59] There is nothing novel in the idea that, on occasions, loss or injury is the result of two or more events, neither of which is sufficient of itself to bring about the result …
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> [60] For the purpose of the law of negligence, where two or more events combine to bring about the result in question, the issue of causation is resolved on the basis that an act is legally causative if it *materially contributes* to the result …
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> [61] … The *common sense approach* requires no more than the act or event *materially contributed* to the loss or injury suffered …" (emphasis added).

27. Further, the sufficiency of being "a cause" not "the cause" is not confined to decision causation cases. It extends to all other areas of negligence including personal injury situations[26] and professional negligence ones.[27]

28. As stated, one thing which makes causation issues difficult is the variety of ways in which the expression "material contribution to harm" has been used. The first of these ways has just been described. But arguably, used in this way, a "material contribution to harm" is not an extension to or departure from the "but for" test. To take the small fires example in paragraph 22 above, all 10 fires were necessary to complete a set of conditions that were jointly sufficient to account for the harm (the burning of the building). The High Court has opined that in such a case the "but for" test is satisfied.[28]

29. However, in the very same case, the High Court indicated that there can be "material contributions to harm" that do not satisfy the "but for" test but which may nevertheless be causative under established principles of Australian common law.[29] Contributions of this kind are discussed under the next heading.

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26 E.g., *Amaca Pty Limited v Ellis* (2009) 240 CLR 111 at 123 [13].
27 *Hunt & Hunt Lawyers*, n.22 above, at [45].
28 *Strong v Woolworths Limited* (2012) 246 CLR 182 at 191-192 [20].
29 Ibid at 194 [26]; see also per Mason CJ in *March v Stramare*, n.6 above, at 514.

Evidentiary difficulty cases

30. As observed by Mason CJ in *March v Stramare* it is often extremely difficult to demonstrate what would have happened in the absence of a defendant's negligent conduct.[30]

31. Common law courts in various jurisdictions have employed at least four different techniques to achieve what they perceived to be just outcomes in evidentiary difficulty cases. They are:

    (a) Making findings or inferences of fact in a "robust and pragmatic way"[31]

    (b) By developing an extension or exception to the "but for" test, especially in multiple event situations, to the effect that causation will be established if the defendant's conduct *materially contributed* to the plaintiff's harm.

    (c) By developing a further exception or extension to the "but for" test, namely that causation may be established if a plaintiff proves that the defendant's conduct materially increased the risk of the occurrence of the harm even if it cannot be proved that the harm would not have occurred but for the defendant's conduct and even though it cannot be proved that the defendant's conduct materially contributed to the harm.

    (d) By reversing the onus of proof.[32]

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30 *March v Stramare*, n.6 above, at 514.

31 *Bendix Mintex Pty Limited v Barnes* (1997) 42 NSWLR 307 at 314 (also 311, 317); *Wilsher v Essex Area Health Authority* [1988] AC 1074 at 1090; *Clements v Clements*, n.5 above, at [9].

32 See the discussion of reversal of onus by Allsop CJ in *Minister for Environment v Sharma*, n.11 above, at 406-407 [312]-[313]. This has been done in Canada and the USA in the "two hunters one hit" scenario – see *Cook v Lewis* [1951] SCR 830; *Summers v Tice* 199 P.2d 1 (1948). It was also the preferred approach of Lord Hutton in *Fairchild*, n.4 above, at [110]. But it is not yet part of Australian law.

32. In the light of the topic of this paper, the techniques of drawing inferences pragmatically and robustly or reversing the onus of proof of causation need not be explored in more detail because each technique is designed to achieve a factual outcome that conforms with the "but for" approach rather than departs from it. Thus, what follows will focus on material contribution to harm and materially increasing the risk of harm.

Material contribution to harm[33]

33. In *Amaca Pty Limited v Booth*, Gummow, Hayne and Crennan JJ explain how this concept became part of the common law causal test as a departure from the "troublesome" "but for" test especially in cases where the development of a particular medical condition was the result of multiple conjunctive causal factors. In such cases, their Honours noted that it may be unclear as to the extent to which each of those factors contributed to the state of affairs and further opined that such situations were addressed by the proposition that:[34]

> "It is sufficient that the plaintiff prove that the negligence of the defendant '*caused or materially contributed to* the injury'." (emphasis added).

This suggests that, unlike in the negligent misstatement cases where the expression "material contribution" is being used synonymously with the concept of "cause", the expression "material contribution" has another meaning – namely something which is less than a "cause".

34. Given the statements of the High Court referred to in paragraphs 29 and 33 above, it may be accepted that an event which "materially contributes" to the injury to the plaintiff satisfies the common law factual test irrespective of

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33 See also paragraphs 23-29 above.

34 *Amaca v Booth* (2011) 246 CLR 36 at 62 [70]; see also *March v Stramare*, n.6 above, at 514.

whether it satisfies the "but for" test and hence represents a departure from that test.

35. A problem is, however, what is meant by, or constitutes, a material contribution to harm? In *Strong v Woolworths Limited* the court noted that the expression has been used in a variety of ways.[35] Indeed, one commentator has identified, largely by reference to United Kingdom case law, that there are at least six different variants.[36]

36. It is unnecessary to explore each of these variants herein. Where the defendant's conduct cannot be seen to be a necessary condition of the plaintiff's harm (and thus to satisfy the "but for" test)[37] nevertheless if it materially contributes to the actual harm suffered by a plaintiff, especially if that harm is indivisible, but it is not possible to determine the extent of the contribution nor to say the harm would not have occurred without the conduct, a court is entitled to hold that factual causation is proved at common law.[38]

37. But what is meant by "material" in this context? It is well settled in Australia that a contribution is "material" if it plays some part, even a minor part, in contributing to the injury.[39] In England[40] and, it seems, Australia[41] any contribution which is not "*de minimis*" suffices.

38. Yet, whilst the test for proving the necessary degree of contribution is undemanding, there is still the need for a plaintiff to prove that the defendant's conduct in fact contributed to the harm suffered. There has to be a connection between the negligent act and the ultimate injury suffered.

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35 *Strong v Woolworths*, n.28 above, at [22]-[26].
36 Bailey "*'Material contribution' after Williams v The Bermuda Hospital Board*" Legal Studies (2019) Vol 38, 411 at 427 and fn.131 thereto.
37 See paragraph 28 above.
38 See paragraphs 26, 29 and 33 above.
39 *Hunt & Hunt Lawyers*, n.22 above, at [45]; *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 248 [152] per Edelman J.
40 *Bonnington Casting v Wardlaw* [1956] AC 613 at 621 per Lord Reid.
41 *Minister for Environment v Sharma*, n.11 above, at 405 [305] per Allsop CJ.

This requirement is illustrated by the reasoning and decision of the High Court in *Amaca Pty Limited v Ellis*.[42] There, the victim died of lung cancer. That could have been caused by the victim being negligently exposed to asbestos fibres alone or by his long-term smoking habit alone or by a combination of both factors. It could not be proved which of these possibilities was causally connected to the victim's lung cancer. No argument was addressed to the High Court of Australia along the lines of a "material increase to risk" analysis as discussed below. The defendant succeeded in the High Court with the High Court observing:[43]

> "Questions of material contribution arise only if a connection between (the victim's) inhaling asbestos and his developing cancer was established. Knowing that inhaling *can* cause cancer does not entail that in this case it *probably* did."

Material increase in risk

39. Problems for a plaintiff as illustrated by the case just discussed have led in the United Kingdom[44] and Canada[45] to the adoption of what is commonly called the *Fairchild* principle (named after the decision of the House of Lords in *Fairchild v Glenhaven*).

40. In *Fairchild*, the plaintiff developed mesothelioma as a result of exposure to asbestos dust at work. The plaintiff was exposed to asbestos dust during periods of employment with more than one employer. Each employer breached its duty to protect the employee from the inhalation of asbestos dust. However, the accepted expert evidence at the time (now discredited) was that the condition might be triggered by inhalation of a single fibre of asbestos, and that once caused, the condition was not aggravated by further exposure to asbestos dust. Thus, the plaintiff's condition may have

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42 n.26 above.

43 Ibid at [68] (emphasis in original); see also [65] as to the necessity for a "connection".

44 *Fairchild v Glenhaven Funeral Services*, n.4 above.

45 *Clements v Clements*, n.5 above, there are differences between the precise principles and their extent as between the United Kingdom and Canada but it is unnecessary to discuss those here.

been caused by inhalation of the dust whilst employed by employer A or it may have been caused by inhalation of the dust whilst employed by employer B but the plaintiff could not prove which inhalation of dust in fact triggered the condition. The facts in *Fairchild* were, therefore, analogous to the well-known "two hunters one hit" example often given in academic writings, *viz*, where two hunters negligently fire at the same time and only one bullet hits the victim but it cannot be proved which hunter's bullet it was. In such a situation obviously the "but for" test is not satisfied and there is no contribution to the actual harm suffered by the victim by each of the negligent hunters. This is because only one of the bullets struck so the other bullet, axomatically, could not, and did not, contribute to the victim's harm.

41. The House of Lords and the Supreme Court of Canada obviously concerned by the injustice which would result in the innocent victim having no remedy against either negligent defendant and conscious of causation's role in apportioning responsibility (that is, how the costs of injuries and deaths should be allocated[46]) came up with a principle which departs from the "but for" approach and the material contribution to harm extension.

42. That approach, in its more conservative and evolved Canadian form, is summarised in the leading judgment of McLachlin CJ in *Clements v Clements*[47] where her Honour notes that although the "but for" approach should generally apply:

> "*Exceptionally*, the plaintiff may succeed by showing that the defendant's conduct *materially contributed to the risks of the plaintiff's injury* where (a) the plaintiff has established that her loss would not have occurred 'but for' the negligence *of two or more* tortfeasors, each *possibly* in part responsible for the loss and (b) the plaintiff, *through no fault of her own*, is unable to show that any of the possible tortfeasors in fact was the necessary or 'but for' cause of her injury, defeating a finding of causation on a balance of probabilities against anyone." (Emphasis added).[48]

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46 See Review of the Law of Negligence, Final Report, September 2002 ("the Ipp Report"), p.111 [7.33].

47 See n.5 above.

48 Ibid at [46] (2).

43. However, the *Fairchild* principle has not yet been adopted in Australia and, indeed, at intermediate appellate court level in this country seems to have even been rejected as part of Australian law.

44. In Australia, the High Court has expressly left open the question of whether the *Fairchild* principle represents part of a common law of Australia.[49] Moreover, individual judges of the High Court and Australian intermediate courts of appeal have rejected the *Fairchild* principle as representing Australian law.[50] This means, because of the rules of precedent summarised in the next paragraph (which are also relevant to the discussion on the CLA regime which follows) the *Fairchild* principle cannot at present be recognised in Australia as a legitimate departure from the "but for" approach to causation.

The rules of precedent

45. Perhaps surprisingly in a paper on this topic, it is necessary to bear in mind the rules of a precedent applicable to all Australian courts. Relevantly they may be briefly summarised as follows:

    (a) There is only one common law of Australia and that is declared by the High Court. All courts in Australia are bound by that law.[51]

    (b) Indeed, lower courts are bound even by seriously considered dicta of a majority of the High Court based on long established authority.[52]

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49 See, e.g., *Strong v Woolworths*, n.28 above, at [26]; *Alcan Gove Pty Limited v Zabic* (2015) 257 CLR 1 at [15].

50 See Barnett and Harder, n.13 above, at 91 and the cases cited therein at fn.109-110; more recently see *Minister for Immigration v Sharma*, n.11 above, at [436] per Beach J; *Mt Pleasant Stud Farm Pty Limited v McCormick* [2022] NSWCA 181 at [83]. Even one of the architects of the *Fairchild* principle, Lord Hoffman subsequently said, extra curially, that the court got it wrong in *Fairchild* – see Edelman, n.21 above, at 30.3.

51 *Esso Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [23].

52 *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at 151 [134].

(c) Where (a) and (b) do not apply, that is, there is no declaration of the law by the High Court or no seriously considered dicta of the relevant type but where there have been decisions by Australian intermediate courts of appeal on the subject then other Australian courts (other than the High Court) should follow those intermediate court of appeal decisions unless they are "plainly wrong".[53]

(d) As to the authority of judgments of "foreign courts" even ones as eminent as the Supreme Court of the United Kingdom (or its predecessor, the House of Lords), such decisions are useful only to the degree of the persuasiveness of their reasoning.[54]

Summary of response where the common law applies to this question

46. Where the common law applies to a case, the common sense test of causation will be applied in all Australian jurisdictions.[55]

47. Although the "but for" approach is an important, integral aspect of the common sense approach it is not a comprehensive, exclusive or definitive test of causation. Normative considerations such as value judgments and policy considerations also intrude and may justify a departure from the "but for" approach.[56]

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53 Ibid, at 152 [135]. Indeed, the High Court has gone as far as to say that although intermediate appellate courts and trial judges are not bound to follow obiter dicta of other intermediate appellate courts, they would ordinarily be expected to give great weight to them – see *Hill v Zuda Pty Ltd* (2022) 96 ALJR 540; [2022] HCA 21 at [26]. This is so even where the High Court allows an appeal in respect of a decision of the intermediate appellate court. In such a circumstance such parts of the decision not overturned by the High Court remain dicta which may be extremely persuasive – *Dean v Pope*, n.7 above at 448 [263].

54 See, e.g., Herzfeld and Prince, *"Interpretation"*, 2nd ed. (2020) at 706-707 [33.470] and the cases there cited.

55 See paragraphs 8-11 above.

56 See paragraphs 8-13 above.

48. Applying common sense and taking into account the requisite normative considerations when approaching a causation issue in a case governed by the common law a court will depart from the "but for" approach in at least three types of case each of which almost invariably involves a number of acts or events, including at least one negligent act by a defendant, all of which had or may have had an effect on the outcome, that is the actual harm suffered by a plaintiff. Those three types of cases are:

(a) Where there is causal overdetermination as defined in paragraph 15(a) above.[57]

(b) Where there is causal underdetermination as defined in paragraph 21 above.[58]

(c) Where there are cases with evidentiary difficulties or gaps beyond the plaintiff's control and typically where those difficulties or gaps are caused by a lack of medical or scientific knowledge and evidence in which case the "but for" approach will be displaced if one of the multiple actual contributors to a plaintiff's harm is the negligence of the defendant and the plaintiff can prove that the negligence materially contributed to his/her harm even though it may only have played a minor part.[59]

49. However, unlike the situation in the United Kingdom and Canada, an Australian court will not depart, at least at present, from the "but for" approach where all the plaintiff can prove is that the defendant's conduct materially increased the risk of his/her injury occurring.[60]

50. One possible exception to the proposition stated in paragraph 49 above is where the plaintiff can show some causal connection between the

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57 See paragraphs 17-20 above.
58 See paragraphs 21-29 above.
59 See paragraphs 33-38 above.
60 See paragraphs 39-44 above.

defendant's conduct which led to the increased risk of harm and the harm to the plaintiff which actually and eventually came home. But this is not because of the *Fairchild* principle, it is because in such circumstances the plaintiff will also have proved a material contribution to his harm.[61]

51. However, with the exception of the Northern Territory, common law principles do not apply to the causation issues involved in all negligence cases in Australia. Rather, there are many negligence cases in all jurisdictions (other than the Northern Territory) to which the CLA causation regime applies and it is to that which attention must now be addressed.

The position under the CLA regime

Scope of operation

52. Australian courts still have to apply the common law in determining causation issues in many negligence cases notwithstanding the enactment of the CLA legislation. This is because the CLA legislation expressly excludes from its ambit many important and common types of negligence cases.[62] Without being exhaustive, and because there are differences between jurisdictions, generally speaking the CLA causation regime does not apply to negligence cases relating to dust diseases, injuries resulting from smoking, motor accidents and workplace injuries.[63]

53. But, if a case falls within the CLA legislation it is the causation regime set out in that legislation and that alone which must be applied. The common law approach, at least directly, cannot be applied.[64] But is there really likely

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61 *Amaca v Ellis*, n.26 above, at [68], also [65], [157]; *Amaca v Booth*, n.34 above, at [63]-[64]; *Bendix Mintex*, n.31 above, at 317.

62 See, e.g., section 3B(1) of the NSW Act which is substantially replicated in other jurisdictions.

63 See Barnett and Harder, n.13 above, 77-78 [3.15]-[3.16]; *Powney v Kerang and District Health* [2014] VSCA 31, 43 VR 506 at [63].

64 See, e.g., *Adeels Palace*, n.3 above, at [44].

to be a difference in outcome depending on whether the common law is applied directly on the one hand or the CLA regime is applied on the other?

Is there a likely difference in outcome depending on whether the common law or the CLA regime is applied?

54. For the reasons developed below it is submitted that this sub-question should be answered in the negative.

55. The CLA regime was introduced as a result of the Ipp Report.[65] According to the Hon David Ipp, the Chair of the Panel which prepared that Report and its recommendations, what became s.5D of the NSW Act and its counterparts in other jurisdictions embodies principles in regard to causation that are in accordance with the common law.[66] Further, intermediate appellate courts, especially the NSW Court of Appeal, have said the same thing many times.[67]

56. The High Court, however, has expressly left open the question whether there is a difference in approach to causation under the CLA regime as compared to the common law.[68] Notwithstanding this reservation of opinion it is likely that the High Court will also come to the view that there is no significant difference in the approaches. For instance, in *Wallace v Kam* which was decided after *Adeels Palace* and *Strong v Woolworths*, the court's judgment summarised the common law approach as quoted in paragraph 9 above and distinguished between that approach and the statutory approach solely by reference to the fact that the common law test tended to overlook the distinct nature of the two questions which the statutes now require to be kept distinct and considered separately.[69]

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65 See n.46 above.
66 Per Ipp JA in *Ruddock v Taylor* (2003) 58 NSWLR 269 at 286 [89].
67 Villa, *Annotated Civil Liability Act 2002 (NSW)* 3rd ed. (2018) at 151 and the cases cited at fn. 32 thereof.
68 *Adeels Palace*, n.3 above, at [43]-[44]; *Strong v Woolworths*, n.28 above, at [19], [28].
69 *Wallace v Kam*, n.3 above, at 381-382 [11]-[12].

57. One of the criticisms of the common law approach, perhaps being alluded to in *Wallace v Kam*, is that it hides the court's true process of reasoning either consciously or unconsciously.[70] Whilst this may be true, it is also true, hidden or not, that the two regimes, properly applied, each require the same questions to be asked and answered. While it may equally be true that the two questions are wrapped up together in the common law test under the "empty slogan" of common sense[71] nevertheless the facts remains it is the exact two questions which must be answered by reference to the same considerations under both regimes.

58. Unless and until the High Court determines otherwise and in accordance with the rules of precedent[72] all other courts should follow the chain of intermediate appellate courts authority referred to in paragraph 55 above which cannot be said to be "plainly wrong".

59. Thus, on the current state of the law, there is no substantial difference between the two regimes although the CLA regime spells out in more elaborate detail the manner in which the causal determination should be made and expressed. It is necessary to look at the CLA regime in a little more detail to support these views.

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70 Allsop "*Causation in Commercial Law*", n.10 above at 277; Edelman *"Unnecessary Causation*", n.21 above, at 20, 24-25, 30.

71 Stapleton, "*Reflections on Common Sense Causation in Australia*", n.9 above, at 331, 350. Given this similarity it is possible that the common law test may evolve in future so as to be expressed in substantially the same terms as the CLA test. As persuasively argued by Sir Anthony Mason, writing extra curially, "Where, in a non-Federal jurisdiction, a statute clearly expresses a general policy and applies it in a particular field of law, why is not that an appropriate basis on which to modify the common law in that or a related field so that it is consistent with the statutory policy?" – see Mason "A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law" in Robertson and Tilbury (ed), The Common Law of Obligations – Divergence and Unity, Hart (2018) pp.119-134, esp. at 129. Such a change would be compatible also with the law's strive for coherence – see paragraph 85 below.

72 See paragraph 45 above.

The causation scheme in the CLA

60. This scheme is set out in s.5D of the NSW Act "which is substantially replicated in each other Australian State and the Australian Capital Territory".[73] A copy of s.5D is attached hereto.

Factual causation and the scope of liability

61. Section 5D(1) sets out the two questions. In paragraph (a) the test of factual causation is set out – namely whether the negligence was a necessary condition of the occurrence of the harm. It is beyond dispute that the answer to this question is determined solely by the "but for" test.[74]

62. Paragraph (b) poses the normative questions defined as "scope of liability". It is plain that question involves making the same value judgments and taking into account the same policy considerations which are present but perhaps "hidden" in the label "common sense". It is true that the sub-paragraph requires consideration of factors such as remoteness to be taken into account also but the common law requires that too.[75]

63. If each of the determinations required by paragraphs (a) and (b) of s.5D(1) is made in the affirmative then causation is proved under the statute. But if one of the determinations is in the negative (typically the "but for" determination) then a plaintiff needs to look elsewhere in the CLA to attempt to prove causation.

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73 *Wallace v Kam*, n.3 above, at 382 [12].

74 *Adeels Palace*, n.3 above, at [45]; *Wallace v Kam*, n.3 above, at [16]; *Tapp v Australian Bushmen's Campdraft and Rodeo Association Limited* [2022] HCA 11; 96 ALJR 337 at [101].

75 See Allsop "*Causation at Common Law*", n.10 above, at 329.

Exceptions to the need to prove "but for" causation under the CLA

Causal overdetermination – multiple sufficient causes

64. As noted above, at common law courts depart from the "but for" approach where there are multiple sufficient causes.

65. As pointed out by Macfarlan JA in *Nominal Defendant v Bacon*[76] it is apparent the authors of the Ipp Report assumed that what has become s.5D of the NSW Act would not prevent the continued application of the common law rules for dealing with cases where the plaintiff's injury resulted from more than one sufficient condition. His Honour went on to say, correctly:

> "Such cases are exceptional cases of the type contemplated by the opening words of s.5D(2) and the application of the common law would result in a determination of those cases, using the next words in s.5D(2) "in accordance with established principles."[77]

66. Thus, it is clear that the same causal outcome will be achieved under the CLA regime in respect of causal overdetermination cases as would be achieved applying the common law.

Causal underdetermination and evidentiary difficulty cases

67. The authors of the Ipp Report recognised the inadequacies of the "but for" approach as an exclusive and comprehensive causation test also in cases of causal underdetermination and where there were evidentiary gaps or difficulties.[78] Accordingly, they recommended the enactment of provisions which became s.5D(2) of the NSW Act and its analogues in the other jurisdictions. These provisions enable causation to be established even if the "but for" test in s.5D(1) cannot be met.

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76 [2014] NSWCA 275 at [36].
77 Ibid.
78 See the Ipp Report, n.46 above, 109-112 [7.26]-[7.36].

68. The Ipp Report appears to assume that a provision such as section 5D(2) was necessary to enable a court to deal with the type of "material contribution to harm" issue arising on the facts in *Bonnington Castings* and the "material increase in risk" issue arising on the facts ventilated in *Fairchild*. Whilst this view is justified in respect of *Fairchild* it is doubtful whether in Australia a plaintiff confronted with the same factual situation as occurred in *Bonnington* would need to have resort to a provision such as section 5D(2). This is because, on the facts of that case, as powerfully and persuasively argued by Associate Professor Neil Foster, when the factual findings actually made in *Bonnington* are closely examined they reveal that the "but for" test was satisfied on those facts.[79]

69. But whatever the merits of Professor Foster's view it probably does not matter because, as already noted, the High Court has recognised that there may be "material contribution to harm" situations which do not satisfy the "but for" test so that in the legislative scheme they would need to be considered under s.5D(2).[80]

70. But in the "two hunters one hit" type of situation exemplified by the facts in *Fairchild* and discussed in *Clements v Clements*, it is strongly to be doubted whether, except in South Australia and the ACT, s.5D(2) and its analogues elsewhere could be availed of to establish causation in departure from the "but for" approach.

71. It is a threshold requirement of all the legislative regimes (except in South Australia and the ACT), that the case be an "exceptional" or "appropriate" one in accordance with "established principles". Established principles mean those established under the common law of Australia not the common law of other jurisdictions.[81]

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79 Foster "*Material Contributions in Bonnington: Not an exception to 'but for' causation"* (2022) 49 UWA Law Rev, 404 at 404, 408, 409-410, 412-413; see also *Williams v The Bermuda Hospital Board* [2016] AC 888 at [29].

80 *Strong v Woolworths*, n.28 above, at 194 [26].

81 Ibid, at [26].

72. As noted, the common law of Australia has not yet recognised the *Fairchild* principle and, so far, it has in fact been rejected.[82]

73. Accordingly, despite the apparent intentions of the authors of the Ipp Report, a provision such as s.5D(2), on the current state of the law, would not permit a finding of causation as a departure from the "but for" test in a case of a defendant's conduct which merely increases the risk of harm to the victim such as in the "two hunters one hit" example.

74. But the situation is different in South Australia and the ACT. In those jurisdictions the analogues of section 5D(2) are worded substantially differently.[83] They are clearly intended to enshrine the *Fairchild* principle and, indeed, the South Australian provision refers to *Fairchild* in a footnote. If a situation similar to the "two hunters one hit" example arose in those jurisdictions, it is highly likely a court would find causation proved against each "hunter".

A further potential difficulty with the language of section 5D(2) and its equivalents

75. The threshold to establishing a right to depart from the "but for" approach by utilising s.5D(2) is that the case be an "exceptional" or an "appropriate" one in accordance with established principles. For unexplained reasons, Victoria and Western Australia employed the language "appropriate" case[84] whilst NSW, Queensland and Tasmania use the language "exceptional" case.[85]

76. As a matter of ordinary usage "exceptional" and "appropriate" do not appear to be synonyms. The Ipp Report recommended that provisions such as

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82 See paragraphs 43 - 44 above.
83 s.45(2) *Civil Law (Wrongs) Act (ACT)*; s.34(2) *Civil Liability Act 1936 (SA).*
84 s.51(2) *Wrongs Act 1958 (Vic);* s.5C(2) *Civil Liability Act 2003 (WA).*
85 s.5D(2) *Civil Liability Act 2002 (NSW)*; s.11(2) *Civil Liability Act 2003 (Qld)*; s.13(2) *Civil Liability Act 2002 (Tas).*

s.5D(2) be applied in "appropriate" cases.[86] The common law, however, has always taken the view that it requires an "exceptional" case to justify departure from the "but for" approach.[87]

77. The little judicial guidance that has been given to date indicates that it is likely that a court will attach the same meaning to "appropriate" in this context as it would to "exceptional". Thus, in *Powney v Kerang and District Hospital,* the Victorian Court of Appeal determined that an "appropriate" case had to be one "quite out of the ordinary".[88] This seems remarkably similar to "exceptional". If this is correct, the problem with the use of the different language is more apparent than real.

78. It is to be noted, however, that the legislature has otherwise given no guidance, by definition or otherwise, to what may constitute an exceptional or appropriate case.[89] It ought to be presumed that the legislature knows the common law and that the intention was that such cases are ones in which the courts applying common law concepts of causation have deemed it justified or necessary to depart from the "but for" test. The courts have assisted a little by giving illustrations of what is not such a case, namely a "simple" one where a plaintiff simply cannot prove his or her causation case and that inability is not the result of lack of medical or scientific knowledge about the mechanism by which a harm was suffered.[90]

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86 See Recommendation 29(d) p.11, p.110 [7.31].

87 See, e.g., per Edelman in *Lewis v ACT*, n.39 above, at 247 [152]; see also the quoted passage in par 42 above.

88 n.63 above, at [96].

89 *Adeels Palace*, n.3 above, at [54] – [55].

90 *Powney v Kerang and District Hospital*, n.63 above, at [98]; *East Metropolitan Health Service v Evans*, n.22 above, at [609] – [611].

An important caveat about the use and application of s.5D(2) of the NSW Act and its analogues

79. Not only must the linguistic infelicities of the language of s.5D(2) be borne in mind as just discussed but also there is an important factor apparent in the actual language which requires consideration.

80. The concluding words of the subsection compel a court "to consider … whether or not and why responsibility for the harm should be imposed on the negligence party". This means that even if the case is "an exceptional one in accordance with established principles" nevertheless the exact same normative judgment has to be made as is required under s.5D(1) when the "but for" requirement of s.5D(1) is met (the identity is evident when one looks at s.5D(4) which the court must take into account when making the scope of liability determination under s.5D(1)(b)).

81. Thus, even if a plaintiff, having failed the "but for" test, nevertheless can show its case is truly an exceptional one in accordance with established principles, nevertheless to establish causation under s.5D(2) it needs also to satisfy the court, as a matter of value judgment and policy, that responsibility should be imposed on the defendant.

82. As discussed above[91], even though the authors of the Ipp Report assumed that the factual scenario in *Bonnington* would not have satisfied the "but for" test this is probably an erroneous assumption.

83. It is true, as noted above[92], that the High Court has stated that in material contribution to harm situations where the "but for" requirement is not satisfied resort can be had to s.5D(2). But whilst obviously that is so that does not mean in such a situation the plaintiff does not also have to satisfy

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91 See paragraph 68.
92 See paragraph 69.

the court of the normative question posed by the concluding words of the subsection.

84. Without expressing a concluded view on this aspect, there is a real question as to why a person who cannot establish "but for" causation should be able to establish causation by the alternative s.5D(2) route. That is a question which has not yet been considered by any Australian court and one about which there is a division of academic opinion. But s.5D(2) would be an empty vessel if it could not be used in some circumstances to establish causation even where the "but for" test is not satisfied.

85. My present view is that a court would be loathe to deny a remedy to a plaintiff on normative grounds in circumstances where the plaintiff has otherwise established "an exceptional case in accordance with established principles". As has been seen, at least in decision causation cases, the High Court, for common law purposes, has eschewed strict satisfaction of the "but for" requirement by finding that it is sufficient that the negligent misstatement is merely "a" cause of harm rather than "the" cause.[93] The courts should strive for coherence in the law and its application.[94] It would be incoherent if causation is established in negligent misstatement cases by a statement which materially contributes to a decision but does not satisfy the "but for" test however that causation is not established in a physical injury situation where a defendant's acts or omissions, although not satisfying the "but for" test, nevertheless materially contributed to the harm.

86. Further, such an outcome would also seem inconsistent with the cases referred to in fn. 61 above.[95]

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93 See, e.g., paragraph 26 above.

94 See *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21 at [17]. Two laws cohere where one sits compatibly alongside the other without incongruity, contrariety or inconsistency – see, e.g., *Sharma v Minister for Environment* (2021) 391 ALR 1 at [322].

95 See also the *Mt Pleasant Stud Farm* case – fn. 50 above at [82] – [83].

Summary of the CLA position

87. Leaving aside the position in South Australia or the ACT,[96] as the law currently stands, a court applying the CLA causation regime is only likely to depart from the "but for" approach in causation determinations in the same circumstances as a court would do applying the common law test and which is summarised in pars 48 – 50 above.

CONCLUSION

88. The "but for" approach is an integral and very important part of the causal inquiry both at common law and under statute. A highly authorative commentator has even suggested that the "but for" test should be readopted at common law in place of the common sense test.[97] Whether or not that happens, under the current common law and also under the statutory regimes in place in most Australian jurisdictions a court will only depart from the "but for" approach to causation in negligence cases in the circumstances summarised in pars 48 – 50 above.

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96 As to which see par 74 above.

97 Edelman J, n.21 above, at [20].

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