

Statutory Causation in Cases of Misleading Conduct: lessons from and for the common law*

Abstract

Causation serves as the central gatekeeper to the smorgasbord of remedies offered in response to the various statutory prohibitions on misleading conduct in the *Australian Consumer Law*, *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001*. Given this role, the pervasive uncertainty surrounding the nature, scope and operation of statutory causation requirements under the Acts requires attention. This article investigates three preliminary and as yet unresolved questions of statutory causation, focusing on their operation under the Australian Consumer Law: (1) what is meant by causation under the statute; (2) the nature of the factual links in the causal enquiry; and (3) what is the applicable test of statutory causation. In addressing these questions, the paper draws on general law principles of causation, to the extent that those principles reflect and promote the aims of the statutory orders and are consistent with the statutory scheme as a whole. The analysis not only sheds light on the position under statute but suggests a number of areas in which common law concepts of causation might usefully be clarified.

1. Introduction

The statutory prohibitions on misleading conduct found in *Australian Consumer Law* (ACL)¹, *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and the *Corporations Act 2001* (Cth) now dominate the field of liability for such conduct overlaying the traditional common law actions in tort for deceit, negligent misrepresentation and passing off. The apparently straightforward language of the prohibitions belies a host of interesting but difficult questions about the interpretation and scope of the statutory regimes and the relationship between those regimes and familiar principles and doctrines from the common law torts. This article considers the question of causation, which lies as the central gatekeeper to

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¹ This prohibition was originally enacted in the Trade Practices Act 1974 (Cth) s 52 ('TPA'), now part of the Australian Consumer Law ('ACL') contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA').

the smorgasbord of remedies offered by the statutory regime, focussing on their operation under the ACL.

(a) The issue of causal incoherence

Statutory concepts of causation have been front and centre in a series of recent Federal Court and Supreme Court decisions addressing cases of misleading conduct across all of the major statutory regimes.² In relation to each prohibition, the statutes provide compensatory remedies for loss or damage suffered ‘because’ of or ‘by’ that conduct.³ In each case, courts have exposed endemic uncertainty over basic issues surrounding the causal requirements for statutory liability.⁴ Given the coverage of these acts, this degree of doubt is of considerable concern. However, the position is arguably far more complex and troubling than even this sketch suggests. Similar, and thus similarly uncertain, wording is replicated in a myriad of more specialised legislation addressing specific commercial contexts, for example pursuant to the *Superannuation Industry (Supervision) Act 1993* (Cth) and the various state *Retail Tenancies Acts*. It is very common for a significant number of these statutory provisions to be in play in the one case at the same time. In that context, the need to clarify the scope and operation of the statutory concepts of causation appears of pressing importance.

These core uncertainties in already complex statutory schemes present a real challenge to the development of a coherent law relating to misleading conduct. As noted, the meta-statutory regimes concerned with misleading conduct frequently all apply to the one set of facts, and also in conjunction with claims in tort, contract and even for breach of fiduciary duties.⁵ The various civil liability and wrongs acts⁶ may combine with these elements to introduce a further

² See eg *In the matter of HIH Insurance Limited (In Liquidation) (ACN 008 636 575) v McGrath (in his capacity as Liquidator of HIH Insurance Limited (in liquidation))* [2016] NSWSC 482, concerning misleading conduct in contravention of s 52 of the TPA (now s 18 of the ACL) and ss 995 and 999 of the Corporations Act 2001 (Cth); *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 concerning misleading conduct under s 1041H of the Corporations Act, s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth), s 9 of the Fair Trading Act 1999 (Vic) (and its cognates in other States) and the prohibition on misleading or deceptive statements in s 728 of the Corporations Act; *Brosnan v Katke* [2016] FCAFC 1 [121] concerned s 52 of the TPA; *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796 concerning s18 ACL, s12DA ASIC Act and s1041H of the Corporations Act. See also *Melbourne City Investments Pty Ltd v UGL Limited* [2015] VSC 540; *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* (No 1) [2014] FCA 437.

³ Eg s 729(1) of the Corporations Act: ‘A person who suffers loss or damage because an offer of securities under a disclosure document contravenes subsection 728(1) may recover the amount of the loss or damage...’ Cf s 82 TPA, which provided a right to compensation to a ‘person who suffers loss or damage by an act of another person’ and s 238 ACL, which confers that right on a person who ‘suffers loss or damage because of the conduct of another person’. See also Corporations Act 2001 (Cth) ss 601MA, 601XAA, 670B, 1041I and s 283F (‘because a person contravenes a provision’); Australian Securities and Investments Commission Act 2001 (Cth) s 12GF, which still uses the language of ‘by’, as opposed to loss suffered ‘as a result of’ the conduct; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29VP, 29VPA, 55(3).

⁴ See eg *Brosnan v Katke* [2016] FCAFC 1, [121]-[124] (the Court); *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94, [184]-[185] (Edelman J).

⁵ *ABN AMRO NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1.

⁶ *Civil Law (Wrongs) Act 2002* (ACT), s 45(1); *Civil Liability Act 2002* (NSW), s 5D(1); *Civil Liability Act 2003* (Qld), s 11(1); *Civil Liability Act 1936* (SA), s 34(1); *Civil Liability Act 2002* (Tas), s 13(1); *Wrongs Act 1958* (Vic), s 51(1); *Civil Liability Act 2002* (WA), s 5C(1).

degree of complication.⁷ The principle of coherence⁸ in this context requires consideration of the ‘fit’ between statutory and common law principles. It also requires consideration of how to promote coherence between our overlapping statutory frameworks. The language used to describe the required causal nexus between conduct contravening the legislation and the harm for which redress is sought is, as noted, described in similar but subtly different ways.⁹ It is as yet unclear what significance should be given to these differences, in identifying the appropriate interpretation for these concepts. To the extent possible (in view of different statutory purposes and provisions) common statutory principles underpinning the overlapping areas of operation *between statutes* should be identified and, wherever possible and appropriate, applied in such a way that promotes the coherent interpretation and evolution of these statutory schemes. Where this is not possible, statutory reform may be required to clarify and justify any differences and conflicts between statutory approaches. Unless this is taken seriously, and undertaken soon, large tracts of our commercial and consumer law run the risk of increased incoherence, presenting a serious challenge not only to the efficacy of the statutory regimes in question, but to the rule of law.

(b) Causation under the ACL

This article takes the first small steps in engaging in that much larger enquiry by focusing on one of the flagship statutory schemes concerned with misleading conduct. The ACL provides a powerful example of the extent to which causal concepts permeate and underpin the remedial schemes responding to contraventions of such statutory norms. Section 236 of the ACL allows claimants to recover damages for loss suffered ‘because of’ (or, under its predecessor s 82 *Trade Practices Act 1974*, ‘by’) misleading conduct in contravention of s 18 (formerly s 52 of the TPA). Causal concepts also determine access to the compensation orders available under ss 237 and 238 ACL in circumstances where loss or damage (again) has been suffered ‘because of’ misleading conduct. These provisions open the gate to the ‘remedial smorgasbord’ found in s 243 of the ACL. Further causal requirements are present in the apportionment provision,¹⁰ recently introduced into the Commonwealth legislation, which directs courts to consider the extent to which loss or damage was suffered ‘as [a] result’ of the claimant’s lack of care and, separately, the respective ‘responsibility’ of the claimant and defendant for that loss or damage.

Concepts of causation additionally apply to determine anterior, threshold liability issues such as whether a party’s conduct was misleading or deceptive under s 18. As the High Court stated in *ACCC v TPG Internet Pty Ltd*:¹¹ ‘Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. That is to say, there must be a sufficient causal link between the conduct and error on the part of persons exposed to it.’ Further, as Justice

⁷ Ibid; *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796 [167] (Black J).

⁸ *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ), *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498, 518 [34], 520 [38] 523 [35] (French CJ, Crennan and Kiefel JJ).

⁹ See above fn 3.

¹⁰ CCA s 137B.

¹¹ [2013] HCA 54; (2013) 250 CLR 640, [39] (‘TPG’).

Edelman has recently explained, causal questions inform the award of penalties for misleading conduct.¹² For these reasons, clarification of the causal concepts in play in claims for compensation of loss or damage caused by misleading conduct under the ACL not only is necessary to enable proper redress for consumer litigants but also is critical for the regulators and consumer advocates whose role it is to monitor proscribed conduct. Given the ubiquity of causal concepts in this regulatory scheme, judicial uncertainty as to their nature and operation has a direct impact on the capacity of the *Competition and Consumer Act* to achieve its stated purpose of consumer protection.¹³ On this analysis, it is fair to say that statutory causation operates as an essential lynchpin to achieving the legislative aim to ‘enhance the welfare of Australians through the promotion of competition and fair trading and the protection of consumers’.¹⁴

(c) Methodology

This article examines three preliminary and as yet unresolved questions of statutory causation that have been identified by courts, in the order identified by them as the necessary progression for the enquiry, which together are vital to relief for misleading conduct.¹⁵ The discussion focusses primarily on s 236 ACL but draws on other statutory frameworks where relevant. The three issues are (1) what is meant by causation under the statute, in particular clarifying what kinds of enquiries are encompassed by the statutory concepts of causation; (2) the nature of the factual links in the causal enquiry; and (3) what is the applicable test of statutory causation. This last question requires examination of the particular roles and limitations of the ‘but for’ and ‘a factor’ tests of causation and contribution. The final part of the paper considers some of the broader ramifications of that analysis for the redress provisions relating to misleading conduct.

In addressing these questions, the paper adopts a model of reasoning that starts with the particular words of the statute, interpreted in light of its purpose. General law principles of causation are then drawn upon to the extent that those principles reflect and promote the aims of the statutory orders and are consistent with the statutory scheme as a whole.¹⁶ This approach is not without risk. The High Court has repeatedly grappled with the relevance of common law analogy in interpreting private law statutes. The ACL,¹⁷ in particular s 18 relating to misleading or deceptive conduct¹⁸ and its remedial counterparts,¹⁹ has become a familiar battleground in

¹² *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, [59].

¹³ CCA s 2.

¹⁴ CCA s 2.

¹⁵ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [184]-[185] (Edelman J) and *Brosnan v Katke* [2016] FCAFC 1, [121]-[124] (the Court).

¹⁶ See also Elise Bant and Jeannie Paterson, ‘Limitations On Defendant Liability For Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement’ in Kit Barker, Ross Grantham and Warren Swan (eds), *Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Bloomsbury, 2015) 159.

¹⁷ The ACL is schedule 2 to the CCA, formerly the TPA.

¹⁸ Formerly s 52 TPA.

¹⁹ In particular, ss 236, 237 and 243 ACL, formerly ss 82 and 87 TPA.

this context. Thus in *Henville v Walker*, Gleeson CJ noted that although common law analogies ‘are not controlling ... they represent an accumulation of valuable insight and experience which may be useful in applying the Act’.²⁰ Yet at the same time it has been emphasised that the clear words of the act must prevail. In the words of Gummow J in *Marks v GIO Australia Holdings Ltd* ‘[a]nalogy ... is a servant not a master’.²¹ In recent times, the High Court has emphasised anew the importance of applying the words of the statute and cautioned strongly against unthinking application of tests or principles developed in different general law contexts.²² As yet a sustained analysis of how to reconcile these approaches has not been forthcoming.²³

The approach adopted in this paper accepts that it is very important not to allow a statutory scheme to be unthinkingly undermined by common law conceptions. However, it also reflects the view that it is highly desirable that undefined statutory words that echo common law concepts and principles should be interpreted by reference to that established body of learning, provided that in doing so the statutory purpose is promoted, rather than stultified. The High Court has repeatedly emphasised the principle of coherence as an overriding criterion in the application and development of the law.²⁴ While the precise requirements of this principle are yet to be fully charted, it is increasingly accepted that they demand an integrated approach to the analysis and application of statutory and judge-made law²⁵ that moves well beyond the traditional ‘oil and water’²⁶ attitude. In the context of the statutory law relating to misleading conduct, the various schemes relevantly impact upon a vast number of commercial and consumer disputes and overlap considerably with the private law of contract, tort and equity. It follows that the principle of coherence arguably will require an enquiry into the extent to which common law and equitable principles drawn from analogous fields might properly influence the interpretation and operation of concepts of causation under the statutory schemes

²⁰ (2001) 206 CLR 459, 470 [18].

²¹ (1998) 196 CLR 494, 529 [103].

²² *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304, discussed below at text to fn 116-122 (*Campbell v Backoffice*’).

²³ See also *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 621–2 [98] (McHugh J), citing with approval *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79, 86 (Fox J).

²⁴ *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ), *Equiscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498, 518 [34], 520 [38] 523 [35] (French CJ, Crennan and Kiefel JJ).

²⁵ Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7; Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24(2) *Statute Law Review* 95; Joachim Dietrich, ‘What is “Lawyering”?’ *The Challenge of Taxonomy*’ (2006) 65(3) *Cambridge Law Journal* 549; Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *PLR* 26; Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1; Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36(3) *UNSW Law Journal* 1002; Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of Principles of Coherence’ (2015) 38(1) *UNSW Law Journal* 367; Joseph Campbell and Richard Campbell, ‘Why Statutory Interpretation is Done as it is Done’ (2014) 39 *Australian Bar Review* 1.

²⁶ Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56 *Cambridge Law Journal* 300.

and, conversely, whether insights from those schemes in turn should inform the continuing evolution of those general law principles.²⁷

As the following discussion demonstrates, the mode of analysis adopted in this paper promotes the coherent treatment of like causal concepts across common law and statute, while according proper significance to the distinct aims and policies underpinning the statutory framework of remedies for misleading conduct. In this respect, the approach reveals that common law concepts of causation shed considerable light on statutory causation for misleading conduct. However, the statutory debates also highlight deficiencies in the common law conceptions of, and consequently treatment of, causation. To that extent, future judicial clarification of statutory causation may exert a welcome gravitational force²⁸ on its common law counterparts.

2. What is meant by causation under the statute?

The starting point for the enquiry lies in the words of the statute. As noted earlier, the High Court has repeatedly (if not consistently)²⁹ admonished against blind application of common law conceptions of causation in the context of the ACL. The most recent of these warnings came in *Campbell v Backoffice Investments Pty Ltd* where Gummow, Hayne, Heydon and Keifel JJ warned against inappropriate application of guides to causation developed ‘in relation to the law of deceit, *not* the operation of statutory provisions for the award of damages suffered by contravention of consumer protection provisions proscribing misleading or deceptive conduct’ and which carry within them ‘a number of subsidiary questions, such as what is a “material” representation, and when is a material representation “calculated” to induce entry into a contract’.³⁰

On the other hand, what is meant by the language of ‘by’, ‘because of’ and (for that matter ‘as a result of’ under the Commonwealth apportionment provisions) is undefined by the Act. This stands in contrast with the various civil liability and wrongs acts, which do explicitly stipulate the meaning of and tests for causation in the context of claims alleging negligence,³¹ although even here the definitions are not exhaustive and explicitly incorporate (unidentified) common law causation ‘principles’ in aid of the statutory concepts.³² Sections 236, 237 and 238 of the ACL do not define the meaning of statutory causation at play in claims for compensation for loss caused by misleading conduct. Given that causal concepts are pervasive in the private law, it seems highly unlikely that Parliament chose the particular causal language intending that it

²⁷ Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38(1) *UNSW Law Journal* 362.

²⁸ Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7; Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38(1) *UNSW Law Journal* 362.

²⁹ Cf *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459.

³⁰ [2009] HCA 25; (2009) 238 CLR 304, 351 [143] (emphasis in original).

³¹ Civil Law (Wrongs) Act 2002 (ACT), s 45(1); Civil Liability Act 2002 (NSW), s 5D(1); Civil Liability Act 2003 (Qld), s 11(1); Civil Liability Act 1936 (SA), s 34(1); Civil Liability Act 2002 (Tas), s 13(1); Wrongs Act 1958 (Vic), s 51(1); Civil Liability Act 2002 (WA), s 5C(1).

³² See eg Wrongs Act 1958 (Vic) s51(2).

should reflect entirely novel meanings, in the absence of any legislative definition.³³ The challenge remains to identify causal principles and concepts in the general law that align with and promote the statutory language and purposes of the legislation.

A first step is to clarify what kinds of enquiries are embraced by the concept of causation as employed in the broader legal context in which the ACL is situated. It is then necessary to consider the appositeness of those enquiries in light of the language, structure and purpose of the Act. As to the first, in the law of torts (in which wrongs such as deceit and negligent misstatement offer parallel common law redress for misleading conduct), the label of causation frequently is used to encompass two quite different enquiries. The first addresses the question of ‘factual causation,’ that is whether the conduct bears an explanatory relation to the existence of some outcome (in this context, usually a loss suffered by the plaintiff) that in fact occurred. This is what has been termed by Stapleton as a question of ‘historical involvement’.³⁴ The second is a normative question of whether the defendant should be held liable for the caused loss (a question of the defendant’s ‘scope of liability’).³⁵ The second enquiry is often termed ‘legal causation’ to signal its distinctive focus. At common law, factual causation is a primary hurdle to recovery of any amount by way of compensation for tort, the precise amount of which may then be informed by subsequent, second-order considerations that include concepts of remoteness, mitigation and apportionment on the basis of fault.³⁶ Although often collapsed under the same umbrella label of ‘common sense causation’,³⁷ it is increasingly recognised that each stage of the enquiry raises distinct issues.³⁸ It is a notable development in the statutory law relating to wrongs in Australia that this division is reflected in the legislative provisions dealing with causation in the various state and territory civil liability and wrongs acts.³⁹ Although these acts do not apply to govern the inquiry into causation under the Commonwealth schemes, the analytical division dictated by these acts has proven influential.⁴⁰

³³ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ): ‘[Section] 82(1) should be understood as taking up the common law practical or common-sense concept of... except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had parliament intended to say something else, it would have been natural and easy to have said so.’

³⁴ Eg J Stapleton, ‘Occam’s razor reveals an orthodox basis for *Chester v Afshar*’ (2006) *LQR* 426; J Stapleton, ‘Cause in fact and scope of liability for consequences’ (2003) 119 *LQR* 388.

³⁵ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [162]-[163] (Edelman J), citing J Stapleton, ‘Cause-in-fact and the Scope of Liability for Consequences’ (2003) 119 *LQR* 388.

³⁶ Eg for negligent misstatement see *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 248–9 [186] (Gummow J). The same structured enquiry marks the contractual approach to causation: see *Siegwerk Australia Pty Ltd (in liquidation) v Nuplex Industries (Aust) Pty Ltd* [2016] FCA 158 [70] (Beach J).

³⁷ *March v E & MH Stramare* (1991) 171 CLR 506, 515-516 (Mason CJ).

³⁸ *Wallace v Kam* [2013] HCA 19, (2013) 250 CLR 375 [11]-[12] (the Court).

³⁹ It has to be added that the provisions do not keep a clean divide between the two steps: see for example Wrongs Act s 51(2), requiring ‘the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party’. See further Civil Law (Wrongs) Act 2002 (ACT), s 45(1); Civil Liability Act 2002 (NSW), s 5D(1); Civil Liability Act 2003 (Qld), s 11(1); Civil Liability Act 1936 (SA), s 34(1); Civil Liability Act 2002 (Tas), s 13(1); Wrongs Act 1958 (Vic), s 51(1); Civil Liability Act 2002 (WA), s 5C(1).

⁴⁰ *ABN AMRO NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1, [774]-[800]. See also *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 [163] (Edelman J).

As to the second issue of the appositeness of this division in the context of the statute, it is notable that, by contrast to the position at common law, s 236 does not mention any second-order restrictions. It simply adopts an apparently unitary causal link: whether the loss or damage is suffered ‘because of’ the prohibited conduct. It is therefore a real question whether the provision is concerned only with factual causation. On one view, reflected in some cases,⁴¹ the statutory protective purpose of the prohibition of misleading conduct under the ACL would be promoted by applying a factual enquiry only. A simple factual causation requirement would provide maximum protection against loss for consumers, while encouraging repeat traders to monitor their conduct very closely, to ensure that it is not misleading in any respect. This expansive approach to defendants’ scope of liability would be harsh but consistent with a strong consumer protection regime.⁴²

Against this expansive approach, it can be noted that the statute not only protects vulnerable individuals in consumer transactions but also applies to business-to-business transactions in which the plaintiff may be a large corporation and the defendant a small business.⁴³ Moreover, the statutory norm captures misleading conduct that is innocent as well as deliberate.⁴⁴ In this context, it is relevant to consider that even the tort of deceit admits of rules designed to limit defendants’ scope of liability. A defendant who has engaged in deceit is liable for all intended losses and losses arising *directly* from the conduct.⁴⁵ While generous, this test does operate to exclude loss arising from ‘extrinsic causes’ such as losses arising from third party acts or independent events outside the scope of risk of the deceitful conduct, or grossly negligent failure on the part of the plaintiff to act to mitigate her losses.⁴⁶ It is legitimate in that context to ask whether a statute such as the ACL that fails to distinguish between different degrees of defendant culpability for the purposes of ascertaining contravention of a statutory norm necessarily requires courts to ignore those distinctions at the remedial stage. In that regard, it is notable that the statutory structure separates the statutory norm from the remedial responses to its contravention, suggesting that the two enquiries may be both functionally and normatively distinct. Further, and significantly, not all of the expressive burden of deterring wrongful conduct performed, for example, by the measure of compensation in deceit must be borne by defendants under the statute. The ACL provides a comprehensive regime of enforcement powers to the regulator, which enables the regulator to seek remedies such as adverse publicity orders⁴⁷ and civil pecuniary penalties,⁴⁸ regardless of whether any individual

⁴¹ *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109, 127-130 [54]-[61] (Gaudren, Gummow and Hayne JJ).

⁴² *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 506 [144] (McHugh J).

⁴³ *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191, 197-8 (Gibbs CJ).

⁴⁴ *Ibid*, 197 (Gibbs CJ)

⁴⁵ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 (Lord Denning MR).

⁴⁶ See eg *HTW Valuers v Astonland* [2004] HCA 54; (2004) 217 CLR 640, 659 (extrinsic losses); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109, 119-20 (grossly unreasonable conduct by the plaintiff may reduce defendant liability as a supervening cause);

⁴⁷ ACL, s 247.

⁴⁸ ACL, s 224, where there is a contravention of the s 29 prohibitions.

has suffered harm. It follows that recognising limitations on the scope of defendant liability for misleading conduct in private actions, for example reflecting the defendant's degree of culpability or the foreseeability of loss or damage, need not compromise the instrumental purposes of the Act in promoting fair business practices and efficient market outcomes.

The introduction of an apportionment provision in the federal legislation further suggests that issues of culpability and responsibility are not alien to the legislative regime and purpose. It is notable that the new apportionment provision, s 137B CCA, appears to distinguish between factual causation (loss brought about 'as a result of' a defendant's contravention) and parties' respective 'responsibility' for that loss, a broader term that clearly encompasses normative standards of fault. Finally, even when determining the initial question whether there has been contravention of the statutory prohibition of misleading conduct, courts frequently consider normative questions when determining whether conduct is 'likely' to mislead or deceive.⁴⁹ The statute is thus imbued with subtle fault-based enquiries at both contravention and remedial stages.

On balance, it seems likely that the statutory framework of remedies both accommodates and incorporates normative standards of conduct that may influence defendants' scope of liability under the Act. Consistently with this view, in applying s 236 damages, courts have repeatedly (if not invariably) refused simply to make defendants the insurers of plaintiff losses that were factually caused by their misleading conduct. Rather, reflecting the general law approach to common sense causation, courts have held that the causal enquiry under s 236 similarly encompasses both factual causation and scope of liability issues:⁵⁰

The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word 'by', is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.⁵¹

In summary, it is clear that the statute requires at a minimum that factual causation is satisfied. It is likely that some normative limitations on defendants' scope of liability are also consistent with the broad language and purpose of the legislation. This second-order question is quite distinct from the first. We return to that point in the final section of this article. However, before doing so, it must be recalled that courts have identified two further core issues concerning

⁴⁹ Elise Bant and Jeannie Paterson, 'Limitations On Defendant Liability For Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement' in Kit Barker, Ross Grantham and Warren Swan (eds), *Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Bloomsbury, 2015) 159.

⁵⁰ See *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 489–91 [96]–[98], 504 [136] (McHugh J, with whom Gummow J agreed); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.

⁵¹ *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109, 119 [25]–[26] (Gleeson J).

factual causation that must first be addressed.⁵² The first is to clarify the nature of the links in the enquiry into factual causation. The second is to identify the relevant test(s) that must be met to establish factual causation.

3. What are the factual links relevant to the enquiry into factual causation?

(i) The role of ‘reliance’.

Not all links factually relevant to a dispute are the proper focus of the statutory enquiry into factual causation. A plaintiff’s birth is a necessary condition for her later suffering loss but the statutory enquiry must be, and is, more targeted. And, as we will see, the nature of the causal links to be established may affect the appropriate test of causation.

As noted above, s 236(1) of the ACL allows recovery of compensatory damages only where the plaintiff suffered loss or damage ‘because’ of certain, prohibited conduct. The statutory enquiry concerns whether the defendant’s misleading conduct bears some sort of explanatory relation to the existence of the plaintiff’s proven loss.⁵³ The causal ‘relata’⁵⁴ are the misleading conduct and the loss.⁵⁵ The particular factual route by which these relata are connected can be many and varied, as we will see further below. However, one of the most commonly pleaded causal links is that the plaintiff has detrimentally changed her position as a result of the defendant’s misleading conduct by deciding to do or refrain from doing some act. That particular link or connection between the defendant’s conduct and the plaintiff’s loss is, in private law, commonly conceptualised in terms of ‘reliance’. A more neutral label is ‘decision causation’. This label may be more apposite to the enquiry into factual causation, because it omits normative considerations commonly associated with reliance (such as trust or dependency) and thereby avoids the confusion of issues of factual causation and culpability.

As Professor Cooke has noted in the context of estoppel, this requirement of reliance or decision causation can be further broken down into a two-stage enquiry: first, whether the defendant’s representation caused the claimant to adopt an assumption (‘reliance in the mind’) and, secondly, whether the assumption caused him to change his position (the outward-looking, act-based aspect of reliance).⁵⁶ While it is usual to collapse the two stages into one question of decision causation, an approach that will be adopted in this paper for reasons of space, it must be remembered that a plaintiff must establish factual causation at both stages and may fail at either stage, and for different reasons. For example, a plaintiff may be induced by a defendant’s misleading conduct to assume that goods that she is purchasing hold certain qualities. However,

⁵² *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [184]-[185] (Edelman J) and *Brosnan v Katke* [2016] FCAFC 1, [121]-[124] (the Court), see above at text to fn 15.

⁵³ J Stapleton, ‘An ‘Extended But-For Test for the Causal Relation in the Law of Obligations’ (2016) *OJLS* 697.

⁵⁴ *Ibid* at 699.

⁵⁵ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [152] (Edelman J). This need not be so: cf the UK *Consumer Protection from Unfair Trading Regulations* 2008 reg 27A6, which require a causal link between the misleading conduct and the plaintiff’s decision to enter into the transaction.

⁵⁶ Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) 88–99; discussed in Elise Bant, *The Change of Position Defence* (Hart Publishing 2009), pp 30–40.

those qualities might be entirely irrelevant to her decision to purchase the goods, which was made prior to becoming aware of the misleading conduct. In this case, while her assumption was caused by the misrepresentation, she did not act on that assumption. Conversely, a plaintiff may act on the basis of a misunderstanding induced not by the defendant's misrepresentation but by her own prior and independent error. Again, the conclusion must be that the misrepresentation was not relevantly causally operative. At each stage in this causal enquiry, it is necessary to determine what test of causation applies. We return to this question below.

(ii) Reliance and 'market-based causation'

The emphasis placed on reliance in the statutory causal enquiry has led to a widespread assumption that this is an element of the action for relief. This assumption has been challenged in a spate of recent cases alleging 'market-based causation'.⁵⁷ In a nutshell, the cases involve claims that misleading statements contained within a prospectus or other 'disclosure document' issued by the defendant have caused the market price of shares to be artificially inflated. The plaintiff's loss is suffered when, having purchased shares at that inflated price, the true position is revealed, the market adjusts and the share prices correspondingly fall.⁵⁸ As the cases increasingly recognise,⁵⁹ it is theoretically possible for a causal connection to be established between the misleading statement and the plaintiff's loss in those cases, in which the immediate reliance on the misleading conduct is not by an individual plaintiff but a third party pluralist 'market' comprising hundreds or thousands of individuals.

Another rash of examples involving 'market-based causation' may arise from recent revelations that car manufacturers such as Volkswagen, General Motors and Mitsubishi have published misleading information regarding certain vehicles' fuel efficiency or their level of carbon emissions. In some cases, consumers will no doubt allege that they purchased vehicles in reliance on those misleading statements. Other consumer complaints may arise from the fact that, once the misleading information became public, the market value of the cars dropped, affecting the resale value of already purchased vehicles. In this latter category of case, it is arguably irrelevant to the factual causal enquiry that, for the individual purchaser, fuel efficiency or emissions formed no part of their initial decision to purchase the vehicle. Nonetheless, the loss or damage suffered (the drop in re-sale value of the car) is factually attributable to the misleading conduct.

In deciding whether these kinds of cases can satisfy the causal connection between contravention and loss required for an award to damages, the instrumental aims of the prohibitions on misleading conduct must be kept firmly in mind. The statutory regime

⁵⁷ *In the matter of HIH Insurance Limited (In Liquidation) (ACN 008 636 575) v McGrath (in his capacity as Liquidator of HIH Insurance Limited (in liquidation))* [2016] NSWSC 482; *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322; *Melbourne City Investments Pty Ltd v UGL Limited* [2015] VSC 540; *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* (No 1) [2014] FCA 437.

⁵⁸ See eg Edelman J's analysis in *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [154].

⁵⁹ *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357; *Bolitho v Banksia Securities Ltd* [2014] VSC 8; *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328; (2015) 230 FCR 469; *ABN AMRO NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1, 272 [1375] -[1376] (the Court).

concerning disclosure statements under the Corporations Act, for example, is designed to ensure that the market is not misled and that, accordingly, consumers can safely rely on the market price reflecting the true value of the purchased asset. On this basis, a plaintiff who purchases shares at an inflated market price and suffers loss in the impending market correction may well have relied on the misleading conduct, albeit without being conscious of that influence.⁶⁰ This is reliance in a more generalised or indirect sense, because the plaintiff is relying on the efficient operation of a properly informed market, which in turn has been undermined by the particular misleading conduct. There is nothing in the language of the Corporations Act to indicate that this kind of causal chain cannot suffice and everything in the protective and commercial purposes of the Act to suggest that it can. The same may be said for the Australian Consumer Law.

(iii) Is plaintiff reliance always required?

This conclusion reminds us that while the pattern of facts in many claims dictates that direct plaintiff reliance commonly forms one of the causal links in undertaking the statutory enquiry, the language of the statute is always the starting point. Reliance is not stipulated in the ACL: the requirement is one of causation⁶¹ and what causation entails is determined by the language and purpose of the statute, as informed where appropriate by common law conceptions and, critically, the factual circumstances of the claim. Depending on the facts of a case, it is possible that plaintiff reliance (whether direct or indirect) may even be irrelevant or absent, yet causation will be established.

As Edelman J noted in *Caason*,⁶² causation without plaintiff reliance may be common in misleading conduct cases. His Honour instanced as a ‘common example of causation without plaintiff reliance ... cases that involve misleading conduct by one trader which leads to customers being diverted from another trader’.⁶³ Another good example of a case where statutory causation was established in the absence of plaintiff reliance is *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd*.⁶⁴ In that case, the misleading conduct of the defendant caused third parties not to pay certain royalties to the plaintiff, to which the plaintiff was otherwise entitled. The causal ‘chain’ in that case probably still involved reliance, but it was reliance *by the third party on the misleading conduct of the defendant*, which then led to the third party failing to pay the plaintiff, rather than any direct reliance by the plaintiff on the misleading conduct of the defendant. The trial judge, Jacobsen J, had no qualms in finding that this causal chain between the two relata of misleading conduct and the plaintiff’s loss still

⁶⁰ A similar case may be where investors have suffered loss by investing in schemes that would not have gone ahead without a misleading valuation: *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488.

⁶¹ *Campbell v Backoffice* [2009] HCA 25; (2009) 238 CLR 304, 351 [143] (Gummow, Hayne, Heydon & Kiefel JJ). See also *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [68] (Gilmour and Foster JJ) [153] (Edelman J) in the context of s 729 of the Corporations Act;

⁶² [2015] FCAFC 94; (2015) 236 FCR 322, [155].

⁶³ *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* [1992] FCA 437; (1992) 37 FCR 526

⁶⁴ [2010] FCA 29; (2010) 263 ALR 155.

sufficed to establish causation for the purposes of s82 of the TPA,⁶⁵ a finding which was not challenged on appeal.

A separate, fascinating question is whether lack of reliance on the part of a plaintiff should constitute a restricting factor on a defendant's scope of liability for the loss factually caused by its misleading conduct. For example, a plaintiff may purchase shares fully aware of the defendant's misleading conduct. Can he subsequently seek compensation for the loss he suffers following the market correction of the price? Although this issue appears to overlap with the requirement of factual causation, as we will see, it is more properly understood constituting a potential reason for limiting (or indeed denying) defendant liability. We return to this question in this context below.

This section has been concerned to identify what factual links are, in theory, germane to the statutory causal enquiry into whether the plaintiff's loss or damage was suffered 'by' or 'because of' the defendant's conduct. It has shown that plaintiff reliance is often involved but is not a requirement of the Act. The next step is to determine the applicable test of causation in establishing those factual links.

4. What is the test of 'factual causation' under the ACL: 'but for' and 'a factor'.

(a) 'But for'

We have noted that, unlike the various wrongs and civil liability acts, the ACL does not provide a test of causation. It is necessary to consider that issue under the general law, before turning to consider the appositeness of those tests in the statutory context. As a broad generalisation, there are two main approaches to factual causation evidenced in private law, although the both are found in various forms and formulations. The first is that factual causation signifies what has been described as a 'metaphysical relationship between an event and an outcome'.⁶⁶ This approach, associated with the 'but for' test, involves a theoretical investigation into a counterfactual world where the putative event (here, the misleading conduct) did not exist. The aim of this enquiry is to determine whether it is more likely than not that the event was necessary for the particular outcome the subject of the claim. If, in the hypothetical world, the absence of the event would have led to a different outcome, then the way is open to infer that the event was necessary for the outcome that actually occurred in this, real world and causation is established. In the context of claims for compensation arising from misleading conduct, this counterfactual enquiry is expressed as whether, but for the conduct, the defendant would not have suffered loss or damage. As Justice Edelman has observed extra-judicially, at its heart, this is not a factual question, but a counterfactual question and therefore inherently philosophical or metaphysical in nature.⁶⁷ It might be added that that the enquiry only connects

⁶⁵ Ibid [286]-[291].

⁶⁶ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322 [153] (Edelman J); See also J Edelman 'Unnecessary Causation' (2015) 89 *ALJ* 20.

⁶⁷ Ibid.

to the factual world of the dispute to the extent that it is possible and legitimate to draw inferences from the metaphysical world to reality.

In cases involving claims in tort or criminal acts, this enquiry often wears a distinctly scientific aspect.⁶⁸ Experts are called in to testify as to the tests they have undertaken that simulate or model the real world event and what elements have been changed to create a valid hypothetical framework. The cogency of their causal hypotheses is assessed by the extent to which the adopted approach sheds light on what likely happened in the real, contested situation. The less reliable the test, or the less the simulated position models reality, for example, the less likely a court will be prepared to draw inferences from the hypothetical world for the purposes of solving the particular, factual dispute at hand. Some cases present few difficulties. So, for example, the question whether the bullet fired from the gun of the defendant injured the plaintiff can be tested by asking whether, but for the firing of the gun by the defendant, the plaintiff would not have been injured in the way that in fact occurred. This is often something that can be tested relatively easily, by a simulation under laboratory conditions if necessary. Factors such as wind, the actions of the plaintiff at the time, gravity, the position of the defendant, the make and model of the gun and so on can all be calibrated into the simulation. If, in that simulated world, the other-plaintiff would have walked away unharmed, then the way is open for courts to draw the inference that, in the real world, the firing of the gun was necessary to, and thus caused, the injury of the plaintiff. In other cases, the process by which a result is brought about is so well known as a matter of general experience that no expert evidence is required. When a dog runs in front of a moving bicycle, knocking against the front wheel, and the bicycle (and its rider) falls over, it does not take a scientist to conclude that ‘but for’ the dog’s intervention, the accident would not have occurred.

Difficulties arise, however, where the conditions or factors that make up the process by which a result was brought about are unknown, as occurs in some medical cases and (as will be discussed further below) in many instances of decision causation. If the aetiology of an event is unknown or unknowable, or when the impact of some reason in a chain of decision-making cannot be replicated or measured, how is the simulated world on which the ‘but for’ approach to causation rests to be constructed and how are courts to know when reliable inferences may be drawn from one world to another?⁶⁹

⁶⁸ See for example the many chapters dedicated to examining the proper use and limits of scientific evidence in a leading collection on the subject: J Goldsworthy (ed) *Perspectives on Causation* (Hart Publishing, Oxford 2012). As Wright has noted in the same collection, establishing causation commonly involves carefully designed experiments employing Mill’s Difference Method, carried out to see whether excluding the defendant’s action leads to a different result to that which occurred: R Wright ‘The NESS Account of Natural Causation: A Response to Criticisms’ in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) 285, 289.

⁶⁹ The same problem arguably wholly undermines the practical utility of the related NESS test in such circumstances. On the nature and operation of this test, detailed consideration of which falls outside the scope of this article, see R Wright, ‘The NESS Account of Natural Causation: A Response to Criticisms’ in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) Ch 14; ‘Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility’ (2001) 53 Van LR 1071; ‘Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts’ (1988) 73 Iowa LRev 1001; ‘Causation in Tort Law’ (1985) 73 Cal L Rev 1735.

The ‘but for’ test also struggles to deal adequately with cases of causal ‘overdetermination’, that is, where there is more than one independently sufficient factor to produce the result that in fact occurred. A common example used in causation scholarship is where there were two fires (one lit by the defendant) either of which would have been sufficient to burn down a barn. In such a case, the application of the ‘but for’ test leads to the unsatisfactory conclusion that neither fire was a cause of the result. But for one fire, the barn would still have been destroyed by the other fire. Similar limitations of the ‘but for’ test are exposed in cases of ‘underdetermination’, that is, where there are multiple reasons that, taken singly, are insufficient to produce the plaintiff’s decision to act, but suffice when combined in one or more ways. A ‘small fires’ example is often used to illustrate the problem: ie where there were 10 small fires (one of them lit by the defendant), none of which were independently sufficient to burn the barn down, but combined to bring about that result. Again, in this case, none of the fires taken singly counts as a relevant ‘cause’ on the ‘but for’ test, seemingly denying the obvious positive contribution made by each to the outcome that in fact occurred.

(b) ‘A factor’

This brings us to an alternative causal test which seems to avoid some of the difficulties noted above. This approach asks whether, as a matter of fact, a certain event played some role (was ‘a factor’ in) in the historical process that led to the result that in fact occurred.⁷⁰ On this approach, the putative cause does not need to be a but-for or necessary cause of the result that in fact occurred: it is enough if it formed one of the historical components that, together with *all other* factors *actually* present on the day, played some role towards, and in that sense contributed to, the result that in fact occurred. This is not a counterfactual, theoretical or abstract(ed) enquiry but an examination into the historical process by which the relevant result the subject of proceedings came about.

On some formulations,⁷¹ the role or contribution of any factor in the process by which a result was brought about must be ‘significant’ or ‘material’ to count. Other formulations simply require that the event be ‘a factor’ in the process that ended with the result that in fact occurred, but exclude trivial contributions. The difference in formulation need not be one of substance. It is possible for the formulations to align on the basis that an event that made a positive, non-trivial contribution as a factor in the factual process linking event and outcome is ‘material’,

⁷⁰ It may be that Wright’s NESS account is evolving to meet these considerations. Recently, he has stated that a putative cause will count if it simply forms part of (rather than was necessary to) a set of conditions that together were sufficient lead to the result that in fact occurred. If so, then it comes very close to what we consider to be an alternative ‘a factor’ test,: see eg R Wright, ‘The NESS Account of Natural Causation: A Response to Criticisms’ in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) 285, 291 and 308, but note fn 40, suggesting that the ‘a factor’ test remains discrete.

⁷¹ The language of ‘material contribution’ is notoriously elastic: see eg *Allianz Australia Ltd v Sim* [2012] NSWCA 68 [40]-[47] (Allsop P), ultimately adopting an analysis that closely resembles the a factor test outlined in this paper and *Strong v Woolworths Ltd* [2012] HCA 5 [22]-[29] accepting that the formulation may extend beyond scenarios that would satisfy a ‘but for’ (including NESS) test.

even if it was unnecessary for the result that occurred.⁷² This is consistent with Lord Reid's observation in *Bonnington Castings Ltd v Wardlaw*⁷³:

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.

However, it is submitted that the language of materiality and triviality may be used to conceal normative judgments about responsibility and scope of liability, in a way which obscures the relevant considerations and collapses these independent questions in an unhelpful way.⁷⁴ For this reason, we suggest that the 'a factor' formulation as set out above is preferable and a useful way of guiding the causal enquiry as a matter of practical legal reasoning.

In concluding this discussion, this section has argued that the 'a factor' test provides courts with another option in some cases that routinely confound or fail the 'but for' test and yet seem to involve causatively pertinent events.⁷⁵ These include cases of causal over-and under-determination, in which the test's focus on the historical process that in fact occurred readily enables courts to find that a contributing factor to that process was causally relevant, notwithstanding that it may not satisfy the 'but for' test.

Some may doubt whether this test of contribution is truly causal in nature.⁷⁶ How, they might ask, can a fact or matter be a cause of the particular outcome if it made no difference (in a 'but for' sense) to the existence of that outcome? On the other hand, it seems counter-intuitive to others to deny the clear role in bringing about the end result played by contributory factors such as each fire in the hypothetical given earlier.⁷⁷

This paper takes the latter position and treats the concept of 'a factor' contribution as a test of causation which reflects a factual enquiry into the historical processes by which a particular result was brought about. This approach is also consistent with causal terminology found in statutes⁷⁸ and commonly employed by the High Court.⁷⁹ The repeated formula of 'causation or

⁷² J Stapleton, 'Unnecessary Causes' (2013) 129 *LQR* 39.

⁷³ [1956] UKHL 1; [1956] AC 613, 621.

⁷⁴ eg R Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) 285, 305.

⁷⁵ See further Jane Stapleton, 'Unnecessary Causes' (2013) 129 *LQR* 39 at 43.

⁷⁶ J Edelman 'Unnecessary Causation' (2015) 89 *ALJ* 20; R Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) 291 fn 40.

⁷⁷ Jane Stapleton, 'Unnecessary Causes' (2013) 129 *LQR* 39 at 43; Elise Bant, 'Causation and Scope of Liability in Unjust Enrichment' (2009) 17 *Restitution Law Review* 60.

⁷⁸ For a small sample over a wide range of topics and jurisdictions, see Accident Compensation Act 1985 (Vic) ss 129A, 129B, 138 (2); Contaminated Sites Act (WA) s 25; Damage by Aircraft Act 1963 (Tas) s 4; Dust Diseases Act 2005 (SA) s 8(1) discussed in *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [117]-[118] (Doyle CJ and White J); Insurance Act 1902 (NSW) s 18B; Insurance Contracts Act 1984(Cth) s 5; Livestock Act 2008 (NT) s 72; Police Powers and Responsibilities Act 2000 (Qld) s598; Public Governance, Performance and Accountability Act (Cth) 2013 s 69.

⁷⁹ *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 at 514 per Mason CJ, Toohey and Gaudron JJ agreeing at 524-525; *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111, [12] (the Court).

contribution’ when addressing causal enquiries in those contexts is clearly consistent with treating the concepts as acceptable alternatives, if not identical enquiries.

(c) Which test applies under the Act?

(i) The ‘a factor’ test is preferred in cases of decision causation

It is a notable feature of the private law that the ‘a factor’ test as formulated above is more dominant in some areas than others. In particular, it seems that cases of ‘decision causation’ pose a particular sort of causal question to which it is far better attuned than the ‘but for’ test. As discussed earlier, decision causation in this context refers to the impact of some fact or matter on the plaintiff’s decision to act or refrain from acting in a way relevant to the plaintiff’s claim. Decision causation is notably present in deceit, which has been the chief source of analogical reasoning at play in the ACL causation cases to date.⁸⁰ The defendant’s misleading conduct must have relevantly influenced the plaintiff’s decision to act or refrain from acting to the plaintiff’s detriment. But precisely the same enquiry as to decision causation is also in play under the general law in cases such as mistake, misrepresentation, negligent misstatement, duress, undue influence and estoppel. As we have seen, it is also present in most (albeit not all) claims involving misleading conduct.

It is well established in Australia that the appropriate test in these general law contexts is ‘a factor’: whether the putative cause (the defendant’s misrepresentation,⁸¹ the plaintiff’s unilateral mistake,⁸² the defendant’s pressure,⁸³ a relationship of influence⁸⁴ or some other relevant fact or matter⁸⁵) was ‘a factor’ in the plaintiff’s decision to change her position in the way that is the subject of her cause of action. The same approach has been adopted in respect of misleading or deceptive conduct under the ACL where the plaintiff’s claim was that he relied to his detriment on the defendant’s misleading conduct.⁸⁶ In England, the UK Supreme Court in *Hayward v Zurich Insurance Company plc*⁸⁷ recently adopted the same test in a case involving fraudulent misrepresentation, drawing on the analogous treatment of causation in duress.

⁸⁰ For example the widespread citation of *Gould v Vaggelas* (1985) 157 CLR 215, the subject of criticism in *Campbell v Backoffice* [2009] HCA 25; (2009) 238 CLR 304, noted above at text to fn 22 and discussed below at text to fns 116-122.

⁸¹ *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J), 250–1 (Brennan J); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning & Assessment Act 1979 (NSW)* (1986) 162 CLR 340, 366–7 (Brennan J).

⁸² *Salib v Gakas* [2010] NSWSC 505, [328]; *Lahoud v Lahoud* [2010] NSWSC 1297, [176].

⁸³ *Barton v Armstrong* [1976] AC 104 (Privy Council)

⁸⁴ Discussed J Edelman and E Bant, *Unjust Enrichment* (Hart Publishing, Oxford 2016) pp 235-242.

⁸⁵ Eg estoppel : eg *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 104– 05 (Robert Goff J), affirmed on appeal; *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505, [71] – [74] (French CJ, Kiefel, Bell and Keane JJ).

⁸⁶ *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 506 [144] (McHugh J).

⁸⁷ [2016] UKSC 48, [26]-[40].

There are a number of reasons why an ‘a factor’ test may be preferred in cases involving questions of decision causation over the more familiar ‘but for’ test.⁸⁸

(ii) Reason 1: The uncertain aetiology of decision making

The first is simple forensic uncertainty combined with the uncertain aetiology of decision-making.⁸⁹ As we have seen, the ‘but for’ test of causation is well suited to testing chains of involuntary events (for example, the impact of a bullet fired from a gun), the sequencing of which can be identified, simulated and tested. In many cases, we can answer with some certainty whether ‘but for’ the firing of the gun, the putative result (injury of the plaintiff) would have occurred.

Where, by contrast, the dispute turns on the effect of a particular wrongful act on a plaintiff’s decision making process, the application of the ‘but for’ test becomes deeply problematic.⁹⁰ 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 to the question whether some particular fact or matter caused a person’s decision to act or not to act.⁹¹ As Professor Birks noted in the context of the law of unjust enrichment:

mental processes cannot be weighed and measured. Will-power has no voltage. So, if we ask, in relation to the mental process which goes into a decision to transfer wealth, how much disturbance shall count as an operative, restitution-yielding vitiation ... the truth is that there can be no exact answer.⁹²

The relative weight and influence of one reason amongst many — both conscious and subconscious — in a party’s decision-making is not something that can be measured or tested in any scientific way. Indeed, parties themselves may not know all their reasons for decision, or may fail to appreciate the relative importance of one reason over the other. Application of the ‘but for’ test in such a context necessarily invites intense speculation about what the defendant might have done in circumstances that in fact never occurred, and which cannot be replicated. Arguably, this is not a basis upon which party rights and liabilities should be determined. Strict application of a ‘but for’ test moreover would dictate that in some cases,

⁸⁸ Elise Bant, ‘Causation and Scope of Liability in Unjust Enrichment’ (2009) 17 *Restitution Law Review* 60. See also Tang Hang Wu, ‘Restitution for Mistaken Gifts’ (2004) 20 *Journal of Contract Law* 1 at 25, discussing Tony Honoré, ‘Necessary and Sufficient Conditions in Tort Law’ in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) p 363.

⁸⁹ See eg *Brosnan v Katke* [2016] FCAFC 1, [123] (the Court) citing *Reynell v Sprye* [1852] EngR 371; (1852) 1 De GM & G 660, 708-709; [1852] EngR 371; (1852) 42 ER 710, 728-729 (Lord Cranworth); *Smith v Kay* [1859] EngR 38; (1859) 7 HLC 750, 759; [1859] EngR 38; (1859) 11 ER 299, 303 (Lord Chelmsford LC); *Arnison v Smith* (1875) 41 Ch D 348, 369 (Lord Halsbury LC). But cf *Mills v Mills* [1938] HCA 4; (1938) 60 CLR 150, 185-186 (Dixon J); *Eclairs Group Ltd and Glengary Overseas Ltd v JKC Oil & Gas plc* [2015] UKSC 71, [20]-[21] (Lord Sumption), [54] (Lord Mance)).

⁹⁰ Elise Bant, ‘Causation and Scope of Liability in Unjust Enrichment’ (2009) 17 *Restitution Law Review* 60. The same problems affect formulation of the ‘set’ of conditions required for application of the NESS test, as well as the application of the but-for test to that set of conditions: see above fn 69. On the evolving nature of that test, see above fn 70.

⁹¹ Nor are there any ‘causal laws’ that can tell us when some reason, when combined with others, will be sufficient to produce the plaintiff’s decision, as required under the NESS test: see above fn 69.

⁹² Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) p 157.

plaintiffs would be constitutionally incapable of proving causation. This outcome would be particularly odious in the consumer law context and could operate profoundly to undermine the statutory protective purpose. Time and again, in cases of decision causation, courts have refused to engage in ‘pure speculation’ as to what a party might have done but for some fact or matter.⁹³ In those circumstances, the best that courts can do is to determine, as a matter of fact, whether it was more likely than not that the putative cause was one of the factors that contributed to the plaintiff’s decision to act on this particular occasion that did, in fact, occur. That is the ‘a factor’ test.

Although the ‘a factor’ test enables courts to focus on what occurred, rather than what might have occurred, it is not enough to show that one factor was potentially a reason (was ‘in the mix’) for the plaintiff’s decision, or increased the risk of the plaintiff making a certain decision.⁹⁴ The ‘a factor’ test still requires some basal certainty in, or assumptions about, the aetiology of decision-making. While the specific elements of a person’s decision-making may not realistically be open for forensic examination, calibration and re-animation, courts have significant experience in assessing mental states⁹⁵ and, it must be recalled, the level of proof that is required is only to the civil standard. In this context, courts generally assess claims of ‘a factor’ causation on the assumption that humans are to some extent rational agents who take into account relevant considerations in a process of decision-making.⁹⁶ They further assume that (in the absence of evidence to the contrary) this plaintiff is a rational agent. Where the plaintiff claims to have taken a relevant (or, perhaps, not irrelevant) consideration into account, courts are accordingly more likely to accept that evidence. These assumptions are most clearly exposed through the objective approaches sometimes adopted by courts when addressing decision causation, to which we return below.⁹⁷

By contrast, novel reliance-based theories such as ‘market-based causation’ represent a further challenge to causation methodologies. It is yet to be seen, for example, whether Australian courts will be prepared to accept, as US courts have done, assumptions of rationality and reliance in market behaviour or whether there are other bases for accepting market-based causation as an instance of, or independent approach to, the ‘a factor’ and ‘but for’ tests.⁹⁸ While this issue cannot be resolved here, the complexity of the modelling required to sustain market-based causation reflects the uncertain aetiology of decision causation magnified a thousand-fold. Some statutes address the difficulty of establishing decision causation by

⁹³ Eg *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14; (2014) 253 CLR 560, [30] (French CJ).

⁹⁴ Cf *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; (2011) 196 FCR 145, 171 [104]

⁹⁵ ‘The state of a man’s mind is as much a fact as the state of his digestion’: *Edgington v Fitzmaurice* [1885] 29 Ch D 459, 483 (Bowen LJ). For a perceptive discussion of the delicate and complex nature of this factual enquiry, see Justice Robert French, ‘Mental states in civil litigation’ (FCA) [2003] FedJSchol 15.

⁹⁶ Whether this is justified is addressed below at text to [fn 108](#).

⁹⁷ See below at text [to fn 111-122](#).

⁹⁸ A Watson and J Varghese, ‘The Case For ‘Market-Based Causation’ (2009) 32(3) *UNSWLawJ* 948.

‘deeming’ reliance in certain contexts.⁹⁹ It may be that statutory intervention along these lines is a surer route for future development of this area of the law. Alternatively, as suggested above, the policy behind the prohibition of making markets efficient and therefore reliable could provide a generalised presumption of reliance favouring plaintiffs who have purchased goods assuming the market price to be an accurate reflection of its value.

(iii) Reason 2: Over- and under-determination

Although cases of over- and under-determination are rare in the context of involuntary causation, they are commonplace in the context of decision causation.¹⁰⁰ Thus in *Barton v Armstrong*,¹⁰¹ a case of duress, the defendant’s threat to kill the claimant was one of the reasons that the claimant agreed to enter into a transaction. There were also strong commercial reasons influencing that decision. The majority accepted that ‘it may be that Barton would have executed the documents even if Armstrong had made no threats’ but that nonetheless the threats had ‘contributed’ to the decision.¹⁰² The decision made by the plaintiff in *Barton* was ‘overdetermined’ in the sense that there may have been more than one reason that was independently sufficient to justify the decision. Nonetheless, the majority held that causation was established if Armstrong’s threats were ‘a’ reason for him entering into the transaction.¹⁰³ As Lords Wilberforce and Simon put it, on this test, it was sufficient ‘that the illegitimate means used was a reason (not *the* reason, nor the *predominant* reason nor the *clinching* reason) why the complainant acted as he did’.¹⁰⁴

Again, cases of underdetermination are rife in decision causation, not least because it is impossible objectively to measure the ‘weight’ (or size) of each reason for decision. For example, a consumer may purchase a product because of its size, colour, price and the fact that it is labelled as having been ‘made in Australia’. When she discovers that the product was, in fact, made in another country, she may well be unable to testify with any certainty that, but for the misrepresentation, she would not have purchased the product. But for the misrepresentation, she might have placed more weight on other factors such as price and decided to purchase anyway. Or she may have decided not to purchase anything at all, or to purchase another product entirely. Any attempt to apply the but-for test in that context inevitably requires her to exercise a high degree of speculation. By contrast, she may well be able to affirm with precision that the misrepresentation was one of the reasons for – it contributed to – her decision to

⁹⁹ Eg s 729(2) Corporations Act: ‘A person who acquires securities as a result of an offer that was accompanied by a profile statement is taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer.’

¹⁰⁰ See also *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (Court of Appeal) 483 (Bowen LJ) in a case of fraudulent misrepresentation: the relevant question of causation is ‘if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did’, see also 481 (Cotton LJ), 485 (Fry LJ). See also *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583 (Stephenson LJ); *Nicholas v Thompson* [1924] VLR 554; *Wilcher v Steain* [1962] NSWLR 1136.

¹⁰¹ *Barton v Armstrong* [1976] AC 104,

¹⁰² *Ibid* 120 (Lord Cross, delivering the majority judgment).

¹⁰³ *Ibid* 118-119

¹⁰⁴ *Ibid* 121 (Lords Wilberforce and Simon) (emphasis in original); see also at 118 (Lord Cross).

purchase the product. On the basis of causation as contribution, the fact that the misrepresentation was ‘a factor’ in her reason for decision will suffice.

In summary, in the context of decision causation, the ‘a factor’ test meets the recurrent difficulties of over- and under-determination while still requiring that the particular fact or matter plays an active role in inducing the plaintiff’s decision:¹⁰⁵

Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to a single one of those considerations, provided it had some substantial rather than negligible effect.¹⁰⁶

(iv) Reason 3: Cognitive limitations in human decision-making

The final reason for rejecting the ‘but for’ test for cases of decision causation arises from recent psychological studies into the process of individual decision-making. These studies suggest that individuals often experience a cognitive overload in making complex decisions and instead base decisions on a few salient features of the transaction in question. Individual decision-makers are, moreover, commonly influenced in the way in which they use relevant information by personal biases and rules of thumb, which can then be manipulated by marketing strategies and are affected by the circumstances in which the transaction occurs.¹⁰⁷ If 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, then the ‘but for’ test cannot logically apply. What cannot be replicated cannot be tested under simulated conditions. This understanding undermines the assumption that we can *ex post* replicate and thus dissect a particular, individual decision to identify the relative weight assigned to the various potentially relevant considerations.¹⁰⁸ In such a case, the best one can ask is whether it is more likely than not that a particular fact or matter was a reason for a plaintiff’s decision to act on this particular occasion in dispute. Given the complex range of factors affecting individual decision-making, this contributing factor approach is more likely to replicate the way in which decisions are made and therefore represents a fairly good method for identifying the range of probable causes for a particular decision.

3. Ramifications for statutory causation under the ACL

This broader common law analysis of causation has demonstrated the need to distinguish between factual causation and scope of liability, the different operation of the ‘a factor’ and ‘but for’ tests of causation and the particular roles and limitations of the concept of reliance.

¹⁰⁵ In cases of omissions, the ‘a factor’ test is more demanding than ‘but for’: see below at text to fn 128.

¹⁰⁶ *Como Investments Pty Ltd (in liq) v Yenald Nominees Pty Ltd* (1997) 19 ATPR ¶41-550, 43 619, quoted with approval in *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 494 [109] (McHugh J).

¹⁰⁷ See Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203; Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211.

¹⁰⁸ Nor can we identify a set of reasons together sufficient to produce the decision that in fact occurred, let alone determine whether the particular reason (for example, the defendant’s misrepresentation) was necessary to the sufficiency of that set of reasons, as required by the NESS test: see above fn 69.

This clarification can be expected to provide yield insights on a range of issues posed by statutory causation. For reasons of space, this paper briefly mentions only three.

(i) Overcoming forensic uncertainty: a good working rule for decision causation

We have seen that a significant issue with decision causation is forensic uncertainty. In practice, this has meant that courts are far more likely to be required to infer causation from the surrounding circumstances of the impugned transaction, rather than have the benefit of contemporaneous and unbiased evidence of the plaintiff's state of mind.¹⁰⁹ Indeed, many civil liability statutes expressly exclude evidence of causation arising from the plaintiff's own evidence, presumably for reasons of reliability.¹¹⁰

This challenge of determining decision causation has been long managed by the private law through the development of commonsensical and objective rules of thumb. In particular, where some conduct was of a nature to have induced a reasonable person to act in a certain way, and the defendant did so act, then courts generally will be prepared to infer that the one caused the other - in the absence of any evidence to the contrary.¹¹¹ This same process of inference has been adopted in deceit,¹¹² estoppel,¹¹³ duress¹¹⁴ and, in due course, misleading or deceptive conduct.¹¹⁵

As noted earlier, in *Campbell v Backoffice* the High Court cast doubt on the utility and propriety of this approach to causation, warning that it was framed in the context of deceit, not the ACL, and limited to representations rather than broader conduct.¹¹⁶ The latter issue can be quickly put to rest. Although it is true that in cases of deceit, courts generally employ language of representation, there is no rule that overt representations should not be seen in light of the defendant's broader conduct. More pertinently, in estoppel, precisely the same approach is adopted notwithstanding that it is well understood that 'representations' extend to all relevant

¹⁰⁹ See, eg, *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, 555–6 [45] (Kiefel J, Wilcox J agreeing); *Caffey v Leatt-hayter [No 3]* [2013] WASC 348, [332] (Beech J); *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796 [119] (Black J).

¹¹⁰ See Civil Liability Act 2002 (NSW), s 5D(3)(b); Civil Liability Act 2003 (Qld), s 11(3)(b); Civil Liability Act 2002 (Tas), s 13(3)(b); Civil Liability Act 2002 (WA), s 5C(3)(b).

¹¹¹ This rule of thumb is consistent both with application of a 'but for' test (in which the reasonable person's assumed patterns of decision-making form the basis for the application of the test) and the 'a factor' test (a reasonable person would take this factor, amongst others, into account in reaching the decision to act). In that sense, the working rule is agnostic as to the proper test of causation.

¹¹² *Gould v Vaggelas* (1985) 157 CLR 214, 238 (Wilson J).

¹¹³ See, eg, *Pickard v Sears* (1837) 6 Ad & E 469; 112 ER 179; *Smith v Chadwick* (1884) 9 App Cas 187 (House of Lords).

¹¹⁴ *Barton v Armstrong* [1976] AC 104, 118–20 (Lord Cross) (Privy Council); see also *Antonio v Antonio* [2010] EWHC 1199 (QB).

¹¹⁵ *Ricochet Pty Ltd v Equity Trustees Executor and Agency Co Ltd* (1993) 41 FCR 229; *MWH Australia v Wynton Stone Australia Pty Ltd* (2010) 31 VR 575.

¹¹⁶ [2009] HCA 25; (2009) 238 CLR 304, 341–2 [102].

aspects of the defendant's conduct:¹¹⁷ acts and omissions, silence and explicit communications all potentially count.¹¹⁸ So the working rule on causation derived from the contexts of deceit and estoppel is in no way restricted to explicit communication or 'representations'. Moreover, as we have seen, the courts' approach to inferring causation is not unique to deceit: it is employed in every instance of decision causation in the private law and for powerful reasons.

In *Campbell v Backoffice* itself the High Court considered that there was contrary express evidence of the plaintiff¹¹⁹ that overrode any inference of causation otherwise open on the facts. The High Court seemed to assume in that context that a 'but for' test of causation was both appropriate and necessary for the plaintiff to prove causation. However, the point was not argued and the High Court's attention was not drawn to the many authorities to the contrary, both in the ACL and elsewhere, in cases of decision causation. It may be that the fact that the plaintiff appeared to be an experienced investor may have provided some assumed pattern of behaviour and reasoning that was capable of sustaining the 'but for' test. Conversely, the Court itself noted that 'assessment of evidence of what would have been done if more information had been known may not be easy.'¹²⁰ In any event, its warning to be alive to the broader, evidential context in determining causation under the Act is a cogent one. However, the fact that a causal inference was not sustained on the facts of that case, in the light of the evidence (such as it was) should not be a reason for abandoning more generally what otherwise constitutes a very helpful guide to decision causation.¹²¹

For these reasons, the High Court's more recent affirmation of the utility of the working rule in *TPG* is to be welcomed.¹²²

(ii) Decision causation and omissions

In *Caason*, Edelman J observed that reliance is not stipulated under s729 of the Corporations Act as a condition of recovery in respect of misleading statements: the requirement is one of causation.¹²³ Nor is it required under the equivalent remedial provisions of the ACL. However, his Honour suggested that another significant reason why it is arguable that reliance is not a necessary element of the requirements of statutory causation is because s 729(1) permits liability in cases of omissions;¹²⁴

¹¹⁷ Hence the employment of language of 'estoppel by conduct'; see discussion by Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000) ch 3.

¹¹⁸ The distinctions between representations of fact, silence, etc, all go to the separate question of whether reliance was *reasonable*: see E Bant and M Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *OJLS* 427.

¹¹⁹ [2009] HCA 25; (2009) 238 CLR 304, 353 [147]. See also *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796, [87], [120] (Black J).

¹²⁰ *Ibid*, [146].

¹²¹ *MWH Australia v Wynton Stone Australia Pty Ltd* (2010) 31 VR 575, 602–3 [103]–[106] (Buchanan and Nettle JJA).

¹²² *TPG* (2013) 88 ALJR 176, 185 [55] (French CJ, Crennan, Bell and Keane JJ).

¹²³ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [153] (Edelman J) see also [68] (Gilmour and Foster JJ).

¹²⁴ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [156].

[I]t is at best a strain of language to speak of “reliance” upon an omission. As Mr Beach QC (as his Honour was then) observed, how does the investor “rely” on “an omission from the disclosure document” to “suffer loss or damage” when the investor is not aware of the omission? (See Beach J, “Class actions: Some causation questions” (2011) 85 ALJ 579, 584).

To address this conundrum, it is potentially valuable, again, to step outside of the statute to consider insights that may be gleaned from its surrounding common law context. In this field, it is the law of unjust enrichment that offers valuable lessons on the particular issues arising in cases of omissions and decision causation and the critical role of the ‘a factor’ test. Unjust enrichment is peculiarly concerned with decision causation. For example, a key question in any claim for restitution of a benefit on the ground of mistake is whether the mistake caused the plaintiff’s decision to enrich the defendant. In that context, courts at the highest level in England and Australia have had to grapple with the significance of cases equivalent to omissions, namely where the plaintiff was ignorant of some fact or matter relevant to the decision at hand. In the context of the prohibitions on misleading conduct, plaintiffs are ignorant of the matters omitted by the defendant. The cases are directly analogous, offering valuable insights into the principled treatment of omissions at general, and providing an opportunity for coherent development of the law at common law and under statute.

In the law of unjust enrichment, it is well established that mistakes are not restricted to decisions based on consciously identified, incorrect data. As the High Court of Australia noted in *David Securities Pty Ltd v Commonwealth Bank of Australia*, mistakes can also include ‘sheer ignorance’ of a fact or matter relevant to the transaction.¹²⁵ Thus, in *David Securities*, the plaintiff alleged that the impugned payments were made in ignorance of a legislative provision that rendered void the contractual covenant pursuant to which the payments were made. The High Court held that, in principle, this qualified as an actionable mistake. The High Court remitted the case back to the trial judge to decide whether the mistake had caused the payments.¹²⁶ The same approach was taken by the UK Supreme Court in *Pitt v Holt*, which considered that ignorance of some fact or matter could constitute a relevant mistake where it informed a tacit but incorrect assumption upon which a decision was based.¹²⁷

However, there is also a well-recognised danger that the ‘but for’ test will generally be overly inclusive of putative causes in ignorance cases. It is all too often the case that, had plaintiffs been aware of some fact or matter of which they were ignorant, they might have acted differently.¹²⁸ This is so even where the particular plaintiff never turned her mind to the matters

¹²⁵ *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, 369 [27] (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), citing PH Winfield, ‘Mistake of Law’ (1943) 59 *Law Quarterly Review* 327 at 327; see also *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] HCA 61; (1994) 182 CLR 51; *Mercantile Mutual Health Ltd v Commissioner of Stamp Duties* [2002] QCA 356; [2003] 2 Qd R 515; *Hilliard v Westpac Banking Corporation* [2009] VSCA 211; (2009) 25 VR 139. Cf *Commonwealth v Davis Samuel Pty Ltd (No 7)* [2013] ACTSC 146; (2013) 282 FLR 1, [1690]–[1707] (Refshauge J), perhaps better understood as involving the unjust factor of ‘no intention to benefit’; see chapter twelve.

¹²⁶ *David Securities Pty Limited v Commonwealth Bank of Australia* [1992] HCA 48 [62]; (1992) 175 CLR 353, 386 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹²⁷ *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 [105]–[108] (Lord Walker, delivering the judgment of the Court).

¹²⁸ *Pitt v Holt* [2010] EWHC 45 (Ch); [2010] 1 WLR 1199 [50] (Justice Robert Englehart QC).

informed by the ‘missing’ fact or matter. This over-inclusiveness led the Supreme Court to narrow the definition of mistake to exclude cases of ‘mere causative ignorance’.¹²⁹ By contrast, however, on the ‘a factor’ approach, this further step is unnecessary, because such cases of ‘mere causative ignorance’ will not, in general, satisfy the ‘a factor’ approach. For instance, Professor Tettenborn gives an example of a donor who gives £1000 to his niece in ignorance of the fact that she has married his despised enemy.¹³⁰ On a ‘but for’ test, this example of ‘mere causative ignorance’ is over-inclusive, giving rise to liability in circumstances where the matter seemed entirely irrelevant to the donor’s decision-making process. By contrast, the example does not satisfy the ‘a factor’ approach, because the donor had no belief, and made no assumption, about his niece’s marital status in making his gift. It did not influence his decision-making process.¹³¹ On this approach, the matter of which the plaintiff was ignorant was not causally relevant.

In Australia, courts directly considering the question of causation for the unjust factor of mistake and drawing an analogy with the approach taken in cases of misrepresentation have adopted the ‘a factor’ test.¹³² Although there are some suggestions in those cases that a contributory reason must be a ‘significant’ factor to count, this would run contrary to the tenor of the High Court’s decision in *David Securities*. In that case, the High Court did not expressly consider the appropriate test for causation or the required contributing link.¹³³ Instead, the case was remitted to the trial judge to determine whether the payments were made ‘because of their mistaken belief’.¹³⁴ However, given the unanimous rejection by the High Court of a test for ‘fundamental’ mistake on the grounds of its non-justifiability, a test for ‘fundamental’ cause or ‘significant’ cause is unlikely to have been favoured by the High Court. Consistently with that view, and as discussed earlier, the reference to ‘significant’ cause or ‘material’ contribution in recent decisions is best understood as excluding factors that clearly had a negligible effect on the decision in question, rather than introducing a new substantive standard for the link required between the mistake and the enrichment.¹³⁵

On this approach, courts faced with cases of misleading conduct involving omissions arguably should abandon attempts to gauge what a plaintiff would have done had she known of the omitted material. That question is over-inclusive and distracts attention from the key question, which is the role (if any) played by the omission in bringing about the loss or damage that occurred. Consistently with the approach taken for mistake in unjust enrichment, an omission will only form part of the causal process of plaintiff reliance where it informed a positive assumption or belief (‘a factor’) on which a plaintiff acted.

(iii) Factual causation and scope of liability

The final point of clarification for statutory causation to come out of the preceding analysis relates to the distinction between factual causation and scope of liability enquiries. The

¹²⁹ *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 [108].

¹³⁰ A Tettenborn, *Law of Restitution in England and Ireland*, 3rd edn (London, Cavendish 2002) p 76.

¹³¹ Cf R Wright, ‘The NESS Account of Natural Causation: A Response to Criticisms’ in R Goldberg (ed) *Perspectives on Causation* (Hart, Oxford 2011) 285, 311-321.

¹³² *Salib v Gakas* [2010] NSWSC 505 [328]; *Lahoud v Lahoud* [2010] NSWSC 1297, [176].

¹³³ *David Securities Pty Limited v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, 378 [43] (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹³⁴ *David Securities Pty Limited v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, 386 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 407 (Dawson J).

¹³⁵ Above at text to fn 72.

rationales discussed earlier for adopting an ‘a factor’ test in cases of decision causation at common law provide ample support for its application in the statutory context, including in controversial ACL cases such as *Henville v Walker*.¹³⁶ In that case, there were multiple causes of the plaintiff’s decision to undertake an ill-fated development project, one of which was the defendant’s misleading statements as to the present appetite for luxury villas, and another of which was the plaintiff’s own miscalculations as to the cost of the development. The amount of the loss was subsequently exacerbated by the downturn in the property market.

This was, then, a case of ‘causal overdetermination’, a prime example of a case where application of the ‘but for’ test would lead to the unsatisfactory conclusion that neither the misleading statements nor the plaintiff’s miscalculations caused the loss that in fact occurred. The High Court correctly reasoned that the fact that there were additional causes of the loss that in fact occurred did not mean that the defendant’s contravention of the Act was not also ‘a factor’ in that loss. This causal connection between the defendant’s conduct and the loss that in fact occurred properly brought the defendant within the remedial provisions of the Act.

It can be accepted that the factual causal connection was firmly established in *Henville*. The controversy over the case lies in the conclusion that the defendant was made (in theory)¹³⁷ responsible for all the loss that was as a matter of factual causation attributable to his conduct. However, and to return to a point made very early in this article, under general law, factual causation is generally only one condition of defendant liability. A conclusion of causation does not normally end the enquiry. There remains the very difficult and contentious normative question of the defendant’s proper scope of liability for the loss caused by the proscribed conduct. It is beyond the scope of this article to engage in any detail with those issues here.¹³⁸ However, there are two points that have been to date sufficiently under-explored in the authorities and commentary to merit explicit mention, even if their ultimate resolution must await another day. The short point of the following discussion is to emphasise the independent and normative character of the enquiries and, therefore, their distinctiveness from the factual causation enquiry.

The first point relates to the need to separate out the question of factual causation from the process of determining claimable loss. Stapleton has recently emphasised the role of the ‘no better off’ principle in tort law, which demands that the injury must represent ‘damage’ relative to the benchmark of where the victim would have been absent tortious conduct.¹³⁹ On her analysis, even if a defendant’s breach contributed to (was ‘a factor’ in the process resulting in an injury), he is not liable to pay compensatory damages if the same or an equivalent injury would have occurred in the absence of that tortious conduct. This principle appears to be

¹³⁶ [2001] HCA 52; (2001) 206 CLR 459.

¹³⁷ In reality, the plaintiff sought compensation for a lesser amount than the full reliance loss and so was awarded that lesser amount.

¹³⁸ For one analysis, see E Bant and J Paterson, Elise Bant and Jeannie Paterson, ‘Limitations On Defendant Liability For Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement’ in Kit Barker, Ross Grantham and Warren Swan (eds), *Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Bloomsbury, 2015) p 159.

¹³⁹ Jane Stapleton, ‘Unnecessary Causes’ (2013) 129 *LQR* 39, pp 54-62.

founded in conceptions of corrective justice. It is, however, subject to exceptions, themselves dependent on normative choices made by the law. So, for example, the law might determine for reasons of policy that where there has been more than one wrongful contribution to a loss, each of which were independently sufficient to cause the loss, each wrongdoer should be held jointly liable for the whole of that loss and left to sort out contributions and indemnity issues between themselves.

Whether an equivalent principle operates in relation to compensatory damages available for misleading conduct is an unanswered question. For example, assuming that ‘market based causation’ is made out in a case, does it matter that the loss experienced by the plaintiff as a consequence of the market would have been suffered anyway due to other, independent market forces, or through circumstances peculiar to the plaintiff? This question, which might be variously addressed (depending on the facts of the case) through concepts of ‘*novus actus interveniens*’, the application of some ‘no better off’ principle, concepts of remoteness, plaintiff mitigation and so on is a normative one that is quite distinct from the logically anterior question of factual causation. For present purposes, the important point is that its resolution depends upon close analysis of the language and purpose of the particular statute and should not be dictated by common law conceptions and principles without proper justification. For example, it is suggested above that the ‘no better off’ principle may reflect norms of corrective justice. While these are by no means alien to consumer law statutes, the latter are also strongly informed by instrumental concerns to promote fair commercial standards of behaviour and to effect consumer protection. There is no basis for assuming, blithely, that the common law principle should apply to the statute in the absence of good evidence grounded within the statute itself. There are examples of such evidence, such as where statutes contain express provisions against double-recovery, for example. But the issue is one that requires explicit and rigorous examination.

Secondly, there is the intriguing possibility that lack of reliance may in some circumstances operate as a restriction on compensation for loss factually caused by a defendant’s contravention.¹⁴⁰ For example, suppose a plaintiff actively knows a defendant’s statement as to the value of certain shares is misleading but purchases the shares notwithstanding. The plaintiff then suffers a loss when the statement is corrected and the market falls. Assuming for present purposes that the market has responded in an informed and efficient way to the two statements, it could be said that the market has ‘relied’ on the misleading conduct. Then, it may well be that there is a sufficient causal link between the misleading conduct and the plaintiff’s loss, on either a ‘but for’ or ‘a factor’ approach. But for the misleading statement, the market price of the shares may not have been initially inflated and then would not, in turn, have fallen on correction of that statement. Again, assuming an efficient market, the misleading conduct likely was ‘a factor’ in the initial inflation of the share price and thus ultimately contributed to the plaintiff’s loss.

But should the plaintiff recover, given that not only was he not personally misled, but he positively understood the true state of affairs? There are a variety of considerations relevant to

¹⁴⁰ Cf *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94; (2015) 236 FCR 322, [159]-[182] (Edelman J).

this enquiry. As Edelman J has noted, chief amongst them is whether the statute says anything about the matter, whether as a matter of interpretation, implication or by reference to the policy of the statute.¹⁴¹ In relation to the latter, the provisions concerned with misleading conduct suggest that the statutory policy may be ambivalent on this issue. On the one hand, the statutory purposes of promoting fair business dealings and protecting consumers may require that misleading conduct be deterred even in the absence of reliance. On the other hand, the fact that the statute seems to recognise the relevance of plaintiff fault and relative defendant culpability suggests that a plaintiff who seeks to ‘game the statute’ by bringing opportunistic claims to compensation in circumstances where he knew of the misleading conduct should be given short shrift. In a recent case, this led a court to find the plaintiff guilty of abuse of process and liable for the defendant’s costs.¹⁴² The significant and powerful enforcement powers given to regulators provide a sanction against misleading conduct that is not reliant on action by individual plaintiffs. This means that a policy of reducing opportunistic litigation need not undermine the prohibition’s incentives to fair and honest dealing. Again, what is clear for current purposes is the marked difference in the nature of the enquiries from those concerned with factual causation.

Conclusion

This article has sought to clarify the concepts of factual causation, reliance and the role and operation of the ‘but for’ and ‘a factor’ causal tests relevant to the statutory causation enquiries for misleading conduct. In conclusion, it is worthwhile considering how application of this analysis would affect parties’ pleadings, the relevant evidence and the reasoning of courts in a hypothetical scenario, loosely based on *Campbell v Backoffice*.¹⁴³

Suppose a purchaser buys shares in a company following receipt of misleading materials that omit certain information about the company’s poor financial performance. When the purchaser discovers the truth, he seeks compensation for the loss caused by that misleading conduct. In this case, the most likely (but not only) form of the claim is that the purchaser has suffered loss in reliance on the misleading conduct. This pattern of facts requires the purchaser to prove that the conduct caused him to adopt an assumption on which he then acted (most likely, that the company was financially sound). We have seen that the ‘but for’ test introduces undesirable problems into this enquiry. There may be multiple sufficient reasons for the plaintiff’s assumptions as to the company’s sound financial state: the company’s corporate advertising on television and multimedia, the purchaser’s own research and the misleading conduct for example. But for any of those matters, the plaintiff might still have entered into the transaction. That is, the purchaser’s decision-making might well be ‘over-determined’. In any event, unpicking the purchaser’s reasoning runs a fair risk of engaging in unfounded speculation. Instead, the enquiry should focus on whether the misleading conduct contributed to, was ‘a factor’ in, the plaintiff’s decision to enter into the transaction. The purchaser may well be able to state with some confidence that he did notice and take into account the misleading materials.

¹⁴¹ Ibid.

¹⁴² *Treasure Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351; (2014) 45 VR 585. See further *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSCA 235.

¹⁴³ [2009] HCA 25; (2009) 238 CLR 304.

That is, they were ‘a factor’ (not the deciding, determinative or sole factor) in his decision to purchase the shares. Beyond that he (and therefore the Court) cannot and should not go. In terms of the relevance of omissions, as opposed to expressly misleading statements, if the omissions informed his assumption that the company’s financial position was sound, and if he acted on that assumption, then again the omissions constitute a relevant cause of his decision to purchase. Notably, it is not relevant, on this approach, to ask what the purchaser would have done had he been aware of the omitted information.

If the court is not prepared to, or is not permitted to, accept the purchasers’ evidence as to his reasoning in entering into the transaction, it may rely on the good working rule identified earlier. In the usual run of things, the financial performance of a company would be ‘material’ (that is to say, the sort of matter on which a reasonable and rational purchaser may rely) to purchasing shares in that company. The misleading conduct of the vendor both in terms of any active misrepresentations and omissions inform that matter. Given that the misleading conduct was of a nature to induce entry into the transaction, and this particular purchaser did enter into the transaction following the misleading conduct, the court may safely infer that one caused the other, in the absence of evidence to the contrary. The purchaser’s claim may, however, fail if it is shown that he entered into the transaction for entirely unrelated reasons, such as for a dare, because of advice he received from a trusted third party that was unaffected by the defendant’s conduct,¹⁴⁴ or due to his own judgment that, irrespective of its current financial position, the company’s future is bright.¹⁴⁵

Finally, it must be recalled that factual causation is only a very small element of the liability enquiry. Of considerable significance is whether there are other issues or matters that operate to restrict or extinguish the defendant’s scope of liability. One such possibility, as we have seen, is where a plaintiff purchases shares positively aware of the misleading conduct and fully appraised of the company’s position. The plaintiff may have purchased the shares aware that others will be fooled by the misleading conduct and intending to take advantage of the unmerited rise in share price. In those circumstances, although the subsequent share price may fall dramatically on revelation of the information (and before the plaintiff has offloaded his shares), courts will need to consider whether the plaintiff’s lack of reliance (or perhaps deliberate abuse of the statutory process) operates to bar the plaintiff from recovery. But this normative and policy-based enquiry is entirely separate from the question of factual causation. So too is the question whether the plaintiff should be allowed to recover loss that the defendant is able to show would have been suffered by the plaintiff in any event. In this space, the common law ‘no worse off’ principle should not be transplanted to the statutory context unless it is consistent with and promotes the statutory language and purpose.

Finally, the conundrums faced by courts addressing statutory concepts of causation sounds a warning for courts applying causal principles in common law contexts. It is too readily assumed that ‘but for’ causation is the applicable test of causation without considering the basis of that approach and its cogency in particular contexts. Further, insights from the statutory context have a substantial capacity to ‘feed back’ into common law enquiries to the mutual benefit of

¹⁴⁴ *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796 [121]–[128] (Black J).

¹⁴⁵ On the relevance of the representee’s experience, see *ibid*, [119], [121], [122], [125] (Black J).

both bodies of law. So, for example, we have seen that the relevance of omissions in the statutory context may be clarified by reference to unjust enrichment jurisprudence. This may in turn clarify how to address very difficult issues of common law causation that frequently arises in cases of medical advice, where the complaint is that the medical practitioner omitted to advise of some risk. In these cases, the courts' starting assumption that the 'but for' test applies¹⁴⁶ may merit reconsideration, given the issues of over-inclusiveness and the relative merit of the 'a factor' test in that context. Further, the statutory experience affirms the importance of separating out factual and normative enquiries, rather than collapsing them into a reductive 'common sense causation' enquiry. Again, the 'failure to advise' cases may benefit from consideration of whether, even if the omission contributed to the plaintiff's decision to proceed with the particular procedure or treatment (thus satisfying the causation requirement) there are other good normative reasons for excluding liability. Once such reason may be, for example, that the plaintiff was aware of and assumed the risk of undisclosed adverse outcomes.¹⁴⁷ A parallel concern with risk-taking is evidenced elsewhere in the law.¹⁴⁸ Importantly, this is not a question of factual causation but a normative issue of the defendant's scope of liability.

The short point is that once these simple but important clarifications and distinctions are made, the way is open to a more coherent approach to causation and scope of liability issues more generally. Given the prevalence of statutory norms prohibiting misleading conduct throughout Australian commercial and consumer law, the fundamental role played by causal concepts in supporting those prohibitions and the feedback between general law and statutory regimes in this field, this enquiry constitutes a critical first step in promoting a more coherent law relating to misleading conduct in Australia. However, its methodology and the substantive issues it raises potentially are of far wider import to the principled and consistent operation of private law principles of liability more generally.

¹⁴⁶ *Wallace v Kam* [2013] HCA 19, (2013) 250 CLR 375; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434, [24]-[25] (McHugh J); *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; (2011) 196 FCR 145, [98], citing *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537, [111]-[113] (Kiefel J, with whom Hayne, Crennan and Bell JJ agreed), see also [104].

¹⁴⁷ See eg discussion in *Wallace v Kam* [2013] HCA 19, (2013) 250 CLR 375 [35]-[40] (the Court); *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 [17] (Gleeson CJ);

¹⁴⁸ Edelman and Bant, *Unjust Enrichment* (Hart Publishing, Oxford 2016); E Bant and M Bryan, 'Fact, Future and Fiction: Risk and Reliance in Estoppel' (2015) *OJLS* 1.