Ambition Versus Judicial Reality: Causation and Remoteness Under Civil Liability Legislation

SUSAN BARTIE†

The expression of judicial reasons on any element of the negligence action has considerable pragmatic, as well as conceptual, significance. First, those reasons explain to an unsuccessful party why they were unsuccessful; secondly, they serve to develop legal principle on matters of law; and thirdly, they may allow future parties to predict likely judicial outcomes on matters of fact. Given that such functions are very much linked with the judicial role, it is of no surprise that the way in which a court articulates its reasons has generally been the province of judges, free of legislative direction. Contrary to this trend, recommendations forming the basis of legislative provisions dealing with issues of causation and remoteness have ambitiously sought to reform both the courts' approach as well as the way that judges articulate their reasons on these issues.

IN 2002 and 2003 the legislatures of the States and the Australian Capital Territory enacted statutory provisions ('the causal provisions') which govern the approach that courts must take to elements of the negligence action formerly known as causation and remoteness.[1] While much has been written of these provisions,[2] and some State courts have applied them,[3] little has been said of what

† Lecturer, The University of Adelaide. I would like to thank Sally Giles, John Gava, Wendy Lacey and Bernadette Richards for their helpful comments on an earlier draft of this paper.

1. Civil Law (Wrongs) Act 2002 (ACT) s 45; Civil Liability Act 2002 (NSW) s 5D; Civil Liability Act 2003 (Qld) s 11; Civil Liability Act 1936 (SA) s 34; Civil Liability Act 2002 (Tas) Div 3 s 13; Wrongs Act 1958 (Vic) s 51(1); Civil Liability Act 2002 (WA) s 5C.
2. See eg B McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 Syd L Rev 443; D Mendelson, 'Australian Tort Law Reform: Statutory Principles of Causation and the Common Law' (2004) 11 J Law & Med 482; T Carver, 'Causation and Queensland's Civil Liability Act' (2004) 24 Qld Lawyer 189; P Underwood, 'Is Mrs Donoghue's Snail in Mortal Peril?' (2004) 12 Torts LJ 39.
3. See eg *Graham v Hall* [2006] NSWCA 208; *KT v PLG* [2006] NSWSC 919; *Elbourne v Gibbs* [2006] NSWCA 127; *McDonald v Sydney South West Area Health Service* [2005] NSWSC 924; *Riley v Bankstown City Council* [2005] NSWSC 748; *Telstra Corp Ltd v Bisley* [2005] NSWCA 128.

it was that law reformers hoped to achieve by recommending their enactment and only cursory remarks have been made of the prospect of the provisions fulfilling such aims. It is contended in this paper that the provisions were recommended by the Panel headed by Ipp JA[4] in the hope that they would achieve two central aims. First, it was hoped that they would prompt courts to refrain from applying the 'common sense' and 'remoteness' approach to causation previously embodied in the common law and instead embark on a new two-stage approach ('factual causation' and 'scope of liability') as prescribed in the causal provisions. Secondly, it was hoped that the provisions would prompt the courts to better explain the considerations underlying their determinations on these issues and that in the future they would refrain from deploying what the Panel described as opaque language. The first part of this paper describes the new legislative approach and the ambitions of those who put forward the reform.

In the second part of this paper it is contended that the two-stage approach was recommended by the Panel on the strength of the work of a particular legal theorist, Professor Jane Stapleton. The only authority referenced by the Panel was Stapleton's work. No judicial authority was cited in support of the two-stage approach. The Panel recognised that the courts had not previously adopted a two-stage approach.[5] Ipp JA, writing judicially, also acknowledged that the causal provisions embody Stapleton's approach.[6] There are clear parallels between the Panel's critique of the common law approach and the reform they advocated and Stapleton's own critique and reform. Stapleton has contended in several substantial bodies of work published in Australia, England and the United States that there are two central elements that the courts must address in every case through the clear articulation of reasons: 'cause in fact' and 'scope of liability'. Both Stapleton and the Panel believe that by adopting a two-stage approach and by refraining from using opaque language courts can better identify the relevant normative issues said to be at the heart of the causative inquiry and address them in their written reasons in all cases. From this it can be inferred that in putting forth the recommendations the Panel hoped that the courts' reasoning on causation and remoteness might achieve the clarity that Stapleton considers can result from her own two-stage approach. The similarity between Stapleton's theories and the Panel's aspirations and model is explored in the second part of this paper. It is considered that the Panel was inspired by and relied upon her theories in putting forward their recommendations on these issues.

In the final part of this paper the desirability of this reform and the prospects of the causal provisions fulfilling the aspirations of the Panel are considered. The peculiarity of this reform lies in the fact that while the Panel drew primary inspiration from a

---

4. Review of the Law of Negligence Panel, *Final Report* (Sep 2002) ('Ipp Report'). The other members of the Panel were Prof P Cane, Assoc Prof D Sheldon and Mr I Macintosh.
5. Ibid 109.
6. *Ruddock v Taylor* (2003) 58 NSWLR 269, 286.

critique of the common law and a theory which seeks to re-fashion the common law approach, the provisions themselves do not convey this fact or the Panel's ambitions. The legislative debates are also confused on what the provisions sought to achieve.[7]

It is arguably open to the courts in their interpretation and application of the provisions to ignore the Panel's critique of the former approach. Further, even if the courts were to identify and recognise the critique and seek to satisfy such ambitions, how likely is it that they would be successful? The premise underlying the reform is that the courts' prior opaque reasoning or evasion or reasons on this issue was indicative of a lack of focus rather than an inability to do better. A contrary view is that, consistent with prior common sense theories, there is no satisfactory way of clearly exposing a normative issue at the heart of judicial reasoning in all cases and that an endeavour to do so in the manner envisaged by the Panel is more likely to highlight the unsatisfactory nature of the courts' reasoning processes on this issue. It is contended that if the provisions have any prospect of fulfilling their aims, courts will need to acknowledge that they are based on a critique of the prior common law approach, draw on the strength of Stapleton's work and attempt to carry out her theories. It is contended that this is an unrealistic ambition.

If the ambition and inspiration for the causal provisions is not recognised or thought relevant to their construction, one wonders how the common law will develop on these issues. Recent case-law suggests that the courts are capable of identifying normative issues in a way which largely accords with the Panel and Stapleton's vision in some cases, although this does not necessarily mean that they will be able to do so in all cases. A likely interpretation of the causal provisions is that the second element, 'scope of liability', embodies the purposive approach to common sense causation, inspired by Lord Hoffmann and accepted in a number of recent High Court cases. In conclusion, it is considered that an interpretation which does little to upset the present common law approach is preferable to one which seeks to half-heartedly carry out the Panel's ambitions. Either Stapleton's approach should be trialled by the courts or they should be left to develop their own approach and articulate reasons as they have always done. Any other approach will no doubt

---

7. The Hon Robert Carr (then Premier and Minister for the Arts and Minister for Citizenship of NSW) stated that the intention behind the causal provisions was to 'guide the courts as they apply a commonsense approach': New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 Oct 2002, 5764. The Hon Paul Holloway (then Minister for Agriculture Food and Fisheries) stated: 'Ipp proposes this test because he says that findings of causation involve a normative as well as a factual element. Ipp says that a finding that negligence was a necessary factual condition of the harm does not of itself support a finding of liability, and that courts in fact make judgments about when liability should be imposed. The reasoning behind these judgments, he says, is not elucidated by such terms as "commonsense causation" or "effective cause". He intends that courts should expressly consider in each case whether and why responsibility for harm should be imposed on the negligent party': South Australia, *Parliamentary Debates,* Legislative Council, 15 Oct 2003.

only serve to confuse this area of the law. The soundness and utility of the Panel's attempt to rely on the strength of an academic's approach rather than work with the approach already embodied in the common law is to be questioned.

ASPIRATIONS BEHIND THE CAUSAL PROVISIONS

Since 1991, the Australian common law approach to causation has been that set down by a majority of the High Court in *March v E & MH Stramare Pty Ltd*[8] and further endorsed by the High Court in *Bennett v Minister for Community Welfare.*[9] There the High Court adopted a 'common sense' approach to causation whereby both factual and other considerations (at that time regarded as value judgments and policy considerations[10]) were meshed within the one comprehensive approach to determine the cause. It was considered to be a question of fact involving the exercise of the courts' common sense and experience. The majority expressly rejected the notion of reducing the issue to a formula (such as the 'but for' test[11]) or two-staged test. Mason CJ held in *March* that remoteness, namely, whether the harm is reasonably foreseeable in accordance with the test laid down in the *Wagon Mound* cases[12] and developed and qualified in the common law,[13] was an element of the negligence action separate from causation.[14] Since that time this approach has not been explicitly overturned or altered by the High Court.[15]

The aspirations behind the new causal provisions suggest that the court should embark on an entirely different journey. The provisions do not refer at all to the concept of remoteness. Yet the commentary to the recommendations forming the impetus for the provisions indicates that they should replace both the former remoteness and causation elements. This commentary is located in a report compiled

8. (1991) 171 CLR 506.
9. (1992) 176 CLR 408.
10. Ibid 412–13 (Mason CJ, Deane & Toohey JJ).
11. Explained further below, see pp 420–21.
12. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] 1 All ER 404; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1966] 2 All ER 709. It is acknowledged that this concept has been used to connote a variety of different principles.
13. See *Hughes v Lord Advocate* [1963] AC 837 and *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518 on the issue of what harm may be considered foreseeable. See *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152 where the reasonable foreseeability test was qualified such that only the initial injury need be foreseeable. If, due to the plaintiff's special susceptibility they suffer harm which is greater than that which is foreseeable, so long as the initial harm is foreseeable they are entitled to recover for both the initial and greater harm.
14. See *March v Stramare,* above n 8, 510 (Mason CJ) and McHugh J's explanation of this approach in *Chappel v Hart* (1998) 195 CLR 232, 243.
15. While the approach has not been overturned, Assoc Prof Mendelson has noted judicial sentiment which she has described as constituting a critique of the approach: see D Mendelson, *The New Law of Torts* (Oxford: OUP, 2006) 331–4.

by the Panel headed by Ipp JA, commissioned to review and make recommendations to reform the law of negligence.[16] The general approach embodied in the causal provisions is drawn entirely from the recommendations made by the Panel. Chapter 7 of the Ipp Report (where the recommendations are found) is entitled 'Causation and Remoteness of Damage' and the recommendations make explicit reference to the concept of remoteness.[17] The report indicates that the aspiration behind the causal provisions was therefore to divide all of the determinations formerly made under the guise of 'common sense causation' and 'remoteness' into two separate elements.[18]

The first element of the causal provisions is termed 'factual causation' and requires the courts to determine 'that the negligence was a necessary condition of the occurrence of the harm'. The Ipp Report explains that in most cases this element can be resolved through the application of the 'but for' test: whether the harm would have occurred 'but for' the defendant's negligence.[19] It is a preliminary question designed to eliminate acts and omissions which have no relationship to the harm suffered. This element merely asks whether the harm formed part of the history of the occurrence and thus would capture an infinite number of acts and omissions. The second element is termed 'scope of liability' and requires the courts to determine 'that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused'. For the purpose of the second element (viz, 'scope of liability'), the courts are directed to consider 'whether and why responsibility for the harm should be imposed on the negligent party'. This second inquiry is designed to limit the number of causes and requires the courts to embark on a normative evaluation of whether the negligent act or omission *should* be a cause. In most cases it will be the determinative element. For the sake of clarity it is worth quoting the provisions in full.

Section 5C(1) of the Civil Liability Act 2002 (WA) provides:

> A determination that the fault of a person (the tortfeasor) caused particular harm comprises the following elements:
>
> (a) that the fault was a necessary condition of the occurrence of the harm ('factual causation'); and
>
> (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused ('scope of liability').

16. Ipp Report, above n 4.
17. Recommendation 29(b)(ii) expressly states that '[s]cope of liability' covers issues, other than factual causation, referred to in terms such as "legal cause", "real and effective cause", "commonsense causation", "foreseeability" and "*remoteness of damage*"' (emphasis added): ibid 117.
18. See Civil Law (Wrongs) Act 2002 (ACT) s 45; Civil Liability Act 2002 (NSW) s 5D; Civil Liability Act 2003 (Qld) s 11; Civil Liability Act 1936 (SA) s 34; Civil Liability Act 2002 (Tas) Div 3 s 13; Wrongs Act 1958 (Vic) s 51(1); Civil Liability Act 2002 (WA) s 5C.
19. Ipp Report, above n 4, 109.

Section 5C(4) gives further direction on the 'scope of liability' determination:

> For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor.

There are further provisions which apply to certain exceptional cases where the negligence would not ordinarily satisfy the factual causation element. The cases contemplated are those where it is evidentially impossible (eg, where science cannot isolate and identify a single cause of the harm or risk of harm to the plaintiff) to establish that the negligence was a necessary condition of the loss. These provisions are complex and differ in form in each jurisdiction.[20] As these provisions and the problems associated with them have been fully and more than adequately dealt with elsewhere,[21] they will not be addressed here. By putting such matters to one side, this paper gives full concentration to those aspects of the causal provisions that apply to the general run of cases.

Recommending that through such reform the courts should abandon prior common sense tests and remoteness enquiries and instead address two elements, termed 'factual causation' and 'scope of liability', is significant. The Panel acknowledged that their recommendations constituted a departure from the former enquiries, but down-played their significance, saying that, '[d]espite this appeal to common sense, it is accepted that causation has two aspects'[22] which they then explain to be 'factual'[23] ('factual causation') on the one hand and 'normative'[24] ('scope of liability') on the other. Their presentation of the reform suggests that this approach merely requires the courts to acknowledge and explicitly address what they already know to underpin the former common sense test. However, the idea that these two aspects can be easily separated out and identified from within both the causation and remoteness enquiries denies the significance of the majority judgment in *March.* Mason CJ gave clear reasons for not wanting to separate these enquiries, but instead to adopt one comprehensive approach to causation, which his Honour considered to be a question of fact, and to address the issue of remoteness, a question of law, separately.[25] He explicitly rejected a two-stage approach and regarded the 'but for' test to be a useful guide only, saying:

---

20. Cf Civil Liability Act 2002 (NSW) s 5D(2); Civil Liability Act 2002 (WA) s 5C(2) with Civil Liability Act 1936 (SA) s 34(2); Civil Liability Act 2003 (Qld) s 11(2); Civil Liability Act 2002 (Tas) Div 3 s 13(2) with the Wrongs Act 1958 (Vic) s 51(2). Civil Law (Wrongs) Act 2002 (ACT) s 45(2) resembles the South Australian provision.
21. See Mendelson, above n 2, 502–505.
22. Ipp Report, above n 4, 109.
23. Ibid.
24. Ibid 114.
25. *March v Stramare* above n 8, 515 (Mason CJ).

> As Dixon CJ, Fullagar and Kitto JJ remarked in *Fitzgerald v Penn,* 'it is all ultimately a matter of common sense' and '[i]n truth the conception in question [ie, causation] is not susceptible of reduction to a satisfactory formula'.[26]

The Panel's presentation wrongly suggests that there is no real or material distinction between the majority's approach in *March* and McHugh J's dissenting views. Like the statutory provisions, McHugh J considered that the approach to both causation and remoteness could be boiled down to two central elements or stages. His Honour envisaged that the first stage would involve a purely factual inquiry, in most cases resolved through the 'but for' test, devoid of value judgments and policy considerations. The second stage, termed 'remoteness of damage', would encompass all other policy-based rules.[27] His Honour regarded the common sense approach as amounting to a 'vague rule' which invited courts 'to use subjective, unexpressed and undefined extra-legal values to determine legal liability',[28] whereas his preferred approach provided the opportunity for full disclosure. McHugh J stated that the second stage was 'concerned only with the question of whether a person should be held responsible for an act or omission which ex hypothesi was necessarily one of the sum of conditions or relations which produced the damage'.[29] Relying on Stapleton's work,[30] McHugh J considered that all policy based rules formerly described as causation or remoteness should fall within the second stage:

> Once it is recognised that foreseeability is not the exclusive test of remoteness and that policy-based rules, disguised as causation principles, are also being used to limit responsibility for occasioning damage, the rationalisation of the rules concerning remoteness of damage requires an approach which incorporates the issue of foreseeability but also enables other policy factors to be articulated and examined.[31]

But presenting the reform as simply drawing on the accepted view that causation has two aspects is to deny the significance of the common law approach. It also denies the fact that the High Court expressly rejected an approach to causation and remoteness which breaks the inquiry into two central aspects, one factual the other normative. For many years judges and scholars have engaged in a complex and unresolved debate about which theory of causation is more attractive in principle,[32] and which is most effective in explaining the underlying considerations. By advocating a departure from the common sense test and remoteness, the Panel

---

26. Ibid (references omitted).
27. Ibid 534 (McHugh J).
28. Ibid 535.
29. Ibid 531 (McHugh J).
30. J Stapleton, 'Law, Causation and Common Sense' (1988) 8 Oxford J Legal Studies 111.
31. *March v Stramare* above n 8, 535 (McHugh J).
32. 'Causation has plagued courts and scholars more than any other topic in the law of torts': JG Fleming, *The Law of Torts,* 9th edn (Sydney: LBC Information Services, 1998) 218.

sought to weigh into this debate and have attempted to resolve it in a manner contrary to the prevailing common law.

Despite down-playing the significance of the reform, the commentary to the recommendations makes it abundantly clear that the purpose of their proposal was: (i) to reform the prior approach to causation and remoteness which, in the Panel's view, had become confused and uncertain at least in part because the factual aspect was not distinguished from the normative;[33] and (ii) to reform the way that the courts articulate their reasons on these issues.[34] In the Panel's view, the common sense approach and the foreseeability requirement to remoteness expressed 'a conclusion without explaining how that conclusion was reached'[35] and discouraged 'explicit consideration and articulation of reasons, for imposing or not imposing liability for the consequences of negligence, that are securely grounded in the circumstances of individual cases and address issues of personal responsibility'.[36] If the courts were to satisfy the Panel's concerns in applying the provisions, they would need to abandon the comprehensive common sense approach and separate the remoteness inquiry. All considerations previously falling under these rubrics would need to be sorted into one of the two elements – factual causation or scope of liability. Further, the courts would need to articulate their reasons differently, in a way that better explains the normative considerations underlying their determinations in *all* cases.

The recommendations were based on the premise that the way that the courts previously articulated their reasons on causation and remoteness resulted in both confusion and uncertainty and that the reform would eliminate some of this confusion and uncertainty. From this it seems that if the provisions were to have any prospect of achieving such aims, the courts would need to be willing to depart from what was considered to be an unsatisfactory approach. The fact that the Panel's proposal requires the courts to embark on something new is highlighted in the following quote from Hayne J in *Chappel v Hart*[37] where he openly acknowledged that the prior approach permitted courts to refrain from giving reasons in many cases:

> The resolution of [common sense causation] will *often* find expression in an assertion of its result without any lengthy articulation of reasons. Especially would that be so in a case where policy considerations do not assume prominence in the process. In this case, however, it is as well to try to identify the process of reasoning that is adopted. [38]

33. Ipp Report, above n 4, 115.
34. Ibid 117.
35. Ibid.
36. Ibid.
37. Above n 14.
38. Ibid 282 (emphasis added).

INSPIRATION FOR THE CAUSAL PROVISIONS

While no case-law was cited by the Panel as assisting the recommendations, the following footnote appeared:

> The Panel's consideration of and recommendations about causation have been greatly assisted by the work of Jane Stapleton, especially 'Causation and Scope of Liability for Consequences'. [39]

The fact that the reform was intended to embrace Stapleton's thesis was made explicit by Ipp JA writing judicially in *Ruddock v Taylor*.[40] From this we can conclude that the recommendations were neither a unique innovation of the Panel nor drawn from the common law but were instead heavily influenced by Stapleton's work.

Like the Panel's recommendations, Stapleton's work is based on the premise that the existing common law approach to causation and remoteness does not adequately capture the arguments (or considerations) underlying the causation and remoteness enquiries. She considers that the current approach promotes the evasion of reasons[41] and that much of the language used, such as 'common sense causation', is opaque and allows the courts to state a conclusion without expressing the reasons for that conclusion.[42] The Panel's critique of the common law and the recommendations made, as explained further below, appears to be inspired by her work.

Stapleton described her task as being to 'map the analytical issues with which courts are faced in this field and to suggest ways that navigation within that map could be made more transparent by the clarification of legal terminology'.[43] Elsewhere she has described this as a process of unpacking.[44] Her 'map' or 'unpacking' of the analytical issues has led her to conclude that there are two central elements in this field: cause in fact and scope of liability. 'Cause in fact' 'provides the link between the breach and C [the claimant] suffering actionable damage'.[45] The causal provisions in the Act replicate this element under the guise of 'factual cause'. Special analytical issues can arise at this stage in cases where there are evidentiary gaps. Stapleton deals with these issues under this first element and maps out particular ways of addressing them.[46] Again, this approach is reflected in the causal provisions. For Stapleton, scope of liability 'considers which of the stream of consequences of the

39. Ipp Report, above n 4, 109, n 6.
40. Above n 6, 286.
41. See J Stapleton, 'Unpacking Causation' in P Cane & J Gardner 'Relating to Responsibility: Essays for Tony Honoré on his Eightieth birthday' (London: Hart Publishing, 2001) 158.
42. Ibid 150; J Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, 411–12, 420.
43. Stapleton, above n 42, 388.
44. Stapleton, above n 41.
45. Stapleton, above n 42, 391.
46. Ibid 395–410.

tort that happened on this particular occasion should be judged to be within the scope of D's [the defendant's] liability'.[47] The expressions used are almost identical to those of the causal provisions. At the 'scope of liability' stage she believes that the task for the court is to clearly expose the normative consideration at play. In her work she has attempted to outline the various normative issues that can arise in negligence action at this second stage and has highlighted some of the opaque language (such as 'novus actus interveniens') that has masked the considerations at this stage.[48]

While breaking consideration on these issues into two stages is not particularly novel, Stapleton's work is unique insofar as she has attempted: (i) to identify and classify the numerous different analytical issues that arise in negligence actions and describe where they are best considered and addressed; (ii) to highlight and provide alternatives to the previously opaque language; (iii) to rationalise the two stages (cause in fact and scope of liability) within the context of the other elements of the negligence action; and (iv) to explain how the so-called normative issues believed to be present in each case can best be exposed and addressed. She has written several substantial works which build upon and clarify her theories. The Panel's recommendations seek to capture aspects of this unique approach. They seek: (i) to classify the analytical issues into two stages in the way that Stapleton envisages; (ii) to prompt courts to refrain from employing opaque language; and (iii) to allow courts to expose and address what, like Stapleton, they describe as the 'normative issue' in every case in the place of prior opaque language or entire evasion of reasons.

Given these similarities and the Panel's express reference to her work, it would appear that the Panel agrees with Stapleton that the causal inquiry comprises of two elements, that opaque language should be removed and that a normative issue must be exposed at the 'scope of liability stage'. From this it can be inferred that the Panel supports Stapleton's stance on what the 'scope of liability' element entails in terms of judicial reasoning. This element is clearly the most controversial aspect of the causal provisions. The ongoing debates about cause and remoteness[49] have on the whole centred on what actually drives a court to make its finding on these issues. Is it intuition, public policy, legal policy, matters of principle or arbitrary notions of fairness and justice? Stapleton's response is that courts address and evaluate a normative issue which is not a matter of mere policy. It is tempting to conclude that Stapleton expects courts to embark on a quest for legal or public policy. After all, in the 1980's she began by critiquing the work of Hart and Honoré, whose quest was

47. Ibid 391.
48. Ibid 417, 421–22.
49. For a recent example of this debate in the context of the remoteness inquiry, contrast the views expressed in M Stauch, 'Risk and Remoteness of Damage in Negligence' (2001) 64 Mod LR 191 with I Chiu, 'A Just and Fair Principle of Compensability? Rethinking the Remoteness of Damage Rule in *Wagon Mound*' (2004) 12 Tort LR 147, 154.

to refute the claim of causal minimalists[50] that causation was determined entirely through policy considerations (legal or public). However, Stapleton also refutes these same claims. While legal policy may in some cases influence the way courts address the normative issues, Stapleton says that describing the normative inquiry as a matter of policy 'does not seem to capture convincingly the core impulses (or at least all of the impulses) underlying the legal judgment in these cases'.[51] She has agreed with Hart and Honoré that the reasoning process embraces much more:

> Hart and Honoré's work convincingly suggests to us that where the law refuses to impose liability on a person for a consequence of their conduct, the law will have taken into account a range of legal concerns not all of which can be dismissed as pragmatic 'policy': some are far more accurately described as concerns of justice, fairness, blame and moral responsibility.[52]

Stapleton says that courts must reveal the existence of such legal concerns in their judgments. This does not, however, appear to entail a broad general search for 'justice, fairness, blame and moral responsibility'. To reveal the normative issue she considers that courts should embark on an 'evaluative determination that is dependent on the context and purpose of the inquiry'[53] and should be guided 'by the perceived purpose of the tort and a range of associated legal rules and concerns'.[54] In the work which is referenced by the Panel, Stapleton outlines how and when such legal rules and concerns arise and how they are best expressed and addressed.[55] While Stapleton's theories might seem to align with those of legal realists and causal minimalists, by agreeing with Hart and Honoré that: (i) cause is not resolved through legal policy; and (ii) '[t]o think that the deployment of causal terms in such cases is 'a mere disguise for arbitrary decision or judicial policy … is a blinding error'',[56] it seems clear that she does not wish to be categorised as a minimalist or realist. In the following quote she acknowledges the existence of binding rules of law within her approach:

---

50. Causal minimalists consider that once a factual link between breach and harm is established all other considerations reduce to matters of policy. Some consider that such matters of legal policy really concern public policy (eg, preserving the environment or creating economic efficiency). Others take a broader standpoint, aligning legal policy at the second stage to idiosyncratic notions of 'justice, fairness, blame and moral responsibility' to be applied intuitively: see discussion in Stauch, ibid 191–92 and HLA Hart & AM Honoré, *Causation in the Law,* 2nd edn (Oxford: Clarendon Press, 1985) 291–99.
51. J Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of liability for Consequences' (2001) 54 Vanderbilt L Rev 941, 986–87.
52. Stapleton, above n 41, 147. She has illustrated this point by giving the example of explaining the cause of President Kennedy's death as a matter of 'legal policy'. She believes that this highlights the inadequacy of describing the considerations as matters of mere policy: see Stapleton J 'Perspectives on Causation' in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: OUP, 2000) 61, 67).
53. Stapleton, above n 42, 411.
54. Ibid 412.
55. Ibid 412–23.
56. Stapleton, above n 41, 156 quoting Hart & Honoré, above n 50, 3.

> Typically, the normative concerns that influence courts' decisions on scope are, unlike the fact of historical involvement, ones on which reasonable minds might differ for a variety of moral as well as policy reasons. These deserve careful open evaluation by courts and care must be taken not to freeze them inappropriately as rules of law. Sometimes, however, these judicial concerns are held sufficiently in common that a rule of law can crystallise. The most well known of these are perimeter rules: a perimeter rule is necessary to set the outer possible rim of liability for consequences for a particular cause of action, for no legal wrong can be allowed to lead to unending liability for the infinite stream of consequences flowing from that breach. The perimeter rule is fixed by law and … at present in the tort of negligence it is the *Wagon Mound I/Hughes* rule.[57]

Thus, under Stapleton's theories there remains some room for rules/legal principles such as those which have underpinned the remoteness inquiry.

While it would be futile to traverse here all of Stapleton's unpacked normative issues, it is worth outlining an example in order to illustrate the type of normative issues which she has unpacked and mapped. The example involves a series of scenarios whereby a parent places a baby on some grass to play.[58] In the first scenario, a tiny meteorite falls from the sky and lands on the baby resulting in harm. In the next two alternate scenarios, instead of a meteorite a chemical in a beaker is placed next to the baby which when in contact with water will explode. It rains and the beaker explodes. In one of the scenarios the parent is aware of the possibility of such a chemical reaction and in the other they are not. To determine whether the parent was a cause in each scenario (in circumstances where the meteorite and/or chemical cocktail amount to sufficient causes of the harm), Stapleton explains that courts have traditionally categorised the meteorite and chemical cocktail as coincidental/not coincidental or foreseeable/unforeseeable.[59] In her view, these classifications do not adequately explain the reason why the parent should be the cause, as they state a conclusion without stating the reasons, based on normative considerations, which led the court to such a conclusion. Stapleton considers the normative issues can only be revealed from an assessment of all of the facts along with the purpose of the inquiry (which in negligence is to attribute responsibility).[60] In the first two scenarios, where the parent was not aware of the risk of the meteorite or cocktail, she considers that while in the past courts would say that there was no duty or breach, or that the consequences are too remote, it is possible and preferable to:

> '[U]npack' the reasons on which it is based: namely, that, given the features of the case, a reasonable person would not have taken any more steps to avoid the meteorite/sodium than D1 and D2 took, which here was none. The consequence

57. J Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 LQR 426, 437–8.
58. Stapleton, above n 41, 166.
59. Ibid 166.
60. Ibid.

> would have happened even if the defendant had acted reasonably, so the tortious conduct of the defendant was not relevant to the purpose of the cause of action (sanctioning of certain unreasonable conduct). The choice of whether this is expressed in terms of 'no-breach' or as a finding that the outcome was outside the 'appropriate scope of liability for consequences' depends on other factors such as whether the defendant, in placing the child on the grass, was carelessly running another risk.[61]

In relation to the final scenario she considers that the relevant normative issue is whether the parent should be liable because the 'foreseeability [of harm by the parent] increased the probability of death by' explosion.[62]

The example illustrates and provides force to her thesis that the normative stage is grounded in the context and purpose of the inquiry and is guided by the purpose of the tort and other legal rules and concerns. The causal question is addressed through legal concerns, namely, reasonable expectations of the parent and foreseeability.

Stapleton's work is replete with examples of the types of normative issues that emerge from within the existing common law and she provides commentary on how they can best be exposed. When considering her work it becomes evident that Stapleton exposes and addresses normative issues in a manner not previously encountered in the common law and gives substantial force to her thesis that subscription to her particular theory will make for better judgments (both in terms of outcome and clarity of explanation). The Panel's recommendations were no doubt put forward on the strength of Stapleton's reasoning and analysis; in the hope that the courts could emulate such an approach when answering the question posed in the causal provisions, 'whether or not and why responsibility should be imposed on the negligent party'. They were not put forward to accommodate reasoning previously employed by judges or in the hope that the courts would develop their own theories.

PROSPECTS?

As outlined in the introduction to this paper, it seems unlikely that the causal provisions will fulfill the Panel's ambitions. There is nothing on the face of the provisions which will force the courts to adopt the theory Stapleton advocates or critique the prior approach embodied in the common law and seek to do better. The two-stage approach can be construed in a number of different ways. It is considered that unless judges themselves believe that their prior approach to these issues could improve and commit to trying a new theory, it is unlikely that the way they approach and articulate reasons on such issues can or will change in a way that improves this area of the law. If the new approach to causation and critique of the

61. Ibid 171–2.
62. Ibid 172.

common law was based on the strength of Stapleton's work, it would seem that in order to be successful such strength would need to be brought into the common law. It is considered that the strength of Stapleton's work lies in the way that she carefully dissects and rationalises various considerations she believes lie at the heart of the causal inquiry. Working with prior examples arising within the common law, Stapleton has devised ways in which normative issues can be exposed and addressed which have no common law counterpart. Her 'unpacking' does not convey a sense of arbitrariness or broad quest for justice since, as explained above, she has gone to great lengths to explain and rationalise her approach. She explains and provides examples of how the purpose of the wrong and other legal rules and concerns can direct the decision-maker to effectively uncover and address the normative issue. In order to bring such strength to the common law, the courts would need to carefully study her work and subscribe to her theories. The sophisticated and very distinct nature of her approach and various nuances within it concerning what does or does not constitute an adequate exposition of a normative issue, raises serious question marks over whether the courts are capable of similarly exposing normative issues.

The use of the foreseeability rule in the context of remoteness serves as a good example of the difficulties the courts would encounter if they were to subscribe to Stapleton's work. In the Ipp Report 'foreseeabilty of harm', the rule formerly used to limit the scope of damages as part of the remoteness inquiry, was identified as an opaque concept which expressed a conclusion without expressing the reasons for that conclusion.[63] In her work, Stapleton states that the concept of foreseeabiltiy (what she describes as the 'perimeter rule') can sometimes mask the underlying normative considerations but at other times can be a useful rule to apply.[64] In light of these comments, how can the courts discern whether evoking the foreseeability rule in a particular case is appropriate or not? Will the concept of foreseeability mask or help to resolve the normative issue? Similarly, in the final baby scenario described above, Stapleton used the concepts of foreseeability and probability in a masterly way which exposed the normative issue. No doubt those concepts could also be deployed in a way that would mask the normative issue.

While such sophisticated analysis and dissection is both desirable and impressive, one is left wondering whether it is realistic to expect the court to follow suit. The development of such sophistication has occurred over a number of years outside of the development of the common law. Like the common law, the substance of her approach is best appreciated from reading, comparing, contrasting and analysing the many examples that Stapleton provides in support of her thesis. To do anything

63. See Ipp Repport, above n 4, 115.
64. 'The flexibility of the notion of "foreseeability" can accommodate, but should not be allowed to mask, other concerns, such as how to deal with special sensitivities of minorities in a pluralist society or the "the difficulty of eliminating" the risk': Stapleton, above n 42, 417 (references omitted).

less than study her work in this way would risk a return to reasoning that the Panel has identified as unsatisfactory. This presents as an onerous task incompatible with the judicial role and aspirations of an efficient justice system. Indeed, in the work Stapleton undertook to assist the American Law Institute's *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* she envisaged that there would be a continuing role for the academy in investigating 'the diverse range of legal concerns that provide the fine-structure of the law in operation'.[65] Presumably, unlike the courts, academics have the time to carefully study such concerns and 'unpack' and 'unearth' them. They are also free from the restrictions of the doctrine of precedent which may inhibit a court's ability to develop doctrinal clarity. Absent such freedom, can the courts ever clarify the law in the way the Panel envisaged, inspired by Stapleton's work? This illustrates the ambitious nature of the Panel's aims.

It is also possible that Stapleton and the Panel's views of what lies at the heart of the causal inquiry are different to the views held by some judges. It is clear that an approach that will sometimes require the frank disclosure of policy (both legal and public) is at odds with the present attitude and approach of some members of the High Court bench.[66] Further, without reference to Stapleton's work, and in particular her explanation of what it is that lies at the heart of the causal inquiry, it is tempting to conclude that through the 'scope of liability' inquiry judges are expected to frankly outline policy considerations or their own arbitrary notions of justice. Indeed, it appears that this conclusion was drawn by Gummow and Hayne JJ in *Travel Compensation Fund v Robert Tambree*[67] where they condemned any approach to causation which involved judges having primary recourse to what is 'fair, just and reasonable' in the making of a value judgment.[68] This is an approach they perceived Ipp JA had adopted in *Ruddock v Taylor*.[69] As Ipp JA in *Ruddock* acknowledged that he had taken an approach which was consistent with the causal provisions,[70] Gummow and Hayne JJ's criticism of his approach could be construed as condemnation of the approach embodied in the causal provisions. As mentioned above, in *Ruddock,* Ipp JA explicitly referenced Stapleton's work as providing supreme authority for the causal approach. Ipp JA also claimed that Stapleton's approach was consistent with the common law – perpetuating the myth presented in the Ipp Report that the approach underlying the causal provisions can easily

65. Stapleton, above n 51, 987.
66. The High Court continues to struggle with its role as policy maker and policy utiliser. Some judges, notably Kirby J, have long advocated more frank acknowledgement of policy concerns in negligence cases. However, at least officially, the majority of the High Court have shied away from considering 'public policy' as an explicit factor in determining liability in all negligence cases': K Burns, 'The Way the World Is: Social Facts in High Court Negligence Cases' (2004) 12 Torts LJ 215, 215.
67. (2005) 224 CLR 627.
68. Ibid 275.
69. Above n 6.
70. Ibid 286 (Ipp JA).

emerge from the common law. In *Ruddock,* the question of cause arose in the context of a claim of false imprisonment. Ipp JA addressed the normative issue as follows:

> As Spigelman CJ has emphasised, it is a fundamental purpose of the common law to protect the personal liberty of individuals. The notion in our society that it is fundamentally wrong to deprive an individual, unlawfully, of his or her liberty is of ancient lineage; it is a basic value with very deep roots. In this case, the appellants unlawfully deprived the respondent of his liberty. Accordingly, for normative reasons, I consider that the appellants ought to be held liable to pay damages for harm the respondent suffered. It would be unjust to hold otherwise.[71]

As Ipp JA's reasoning here presents as a matter of restating the policy of the tort, with no real analytical rigor, it is not surprising that Gummow and Hayne JJ were critical. While Ipp JA referenced Stapleton's approach, his final analysis does not share the strength of her careful unpacking and mapping. His final decision does appear to rest on arbitrary notions of justice and provides little guidance for future decision making. In this way, the causal provisions would appear to have an undesirable influence on judicial decision making rather than promote the goals outlined in the Ipp Report.

However, it should not be too readily assumed: (i) that the High Court will entirely reject a process of unearthing norms; or (ii) that members of the High Court are not capable of doing so in a manner which would satisfy, at least in part, the Panel and Stapleton's aims. In relation to the first assumption, one notable development in the High Court's reasoning on causation is found in references in judgments from 1999 onwards to Lord Hoffmann's approach to causation in *Environment Agency (formerly National Rivers Authority) v Empress Car Company (Abertillery) Ltd*.[72] The references made to this authority suggest that the High Court agrees that part of the causal inquiry requires courts to unearth norms (although not always expressly). While the High Court has in the main made reference to this approach in cases involving the construction of causal terms in the context of statute,[73] it has also done so in cases of pure common law negligence.[74]

The issue in *Empress Car Company* was whether the appellants (whose diesel tank was tampered with by a stranger such that its contents flowed into a river) had

---

71. Ibid 287 (Ipp JA).
72. [1999] 2 AC 22, 29 (Lord Hoffmann).
73. See eg *Henville v Walker* (2001) 206 CLR 459, 491 (McHugh J); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 (Gaudron Gummow & Hayne JJ); *Allianz Australia Insurance Ltd GSF Australia Pty Ltd* (2005) 221 CLR 568, 582 (McHugh J); *Travel Compensation Fund v Tambree,* above n 67, 642–3 (Gummow & Hayne JJ). Gleeson CJ also referred to the significance of the purpose of the statute but with reference to Australian cases rather than Lord Hoffmann's speeches: 639.
74. Most notably *Chappel v Hart* above n 14, 256 (Gummow J), 276 (Kirby J), 285 (Hayne J). See also *Rosenburg v Percival* (2001) 205 CLR 434, 460 (Gummow J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 269.

'caused polluting matter to enter controlled waters' and thereby contravened section 85(1) of the Water Resources Act 1991 (UK). The most important point to note about this case is that Lord Hoffmann did not abandon the common sense approach to causation. Instead, he recognised that the notion of 'common sense' did not amount to a universal norm but instead was dictated by 'the purpose for which the question is asked'.[75] Lord Hoffmann described this task of deciphering the purpose as a question of law.[76] In that case it was a matter of statutory construction. Once the object of the statute or scope of legal wrong was deciphered, it is then to be used to delimit, by shaping the causal inquiry, the scope of the harm for which the defendant is liable.[77] It is an approach to causation which seems to have evolved from, or been heavily influenced by, the purposive interpretation of statutes.

In the Australian cases which have subsequently referenced *Empress Car Company,* judges have emphasised the need to identify the purpose of the wrong or statutory provisions in order to identify the legal norm underlying the commonsense test. The appropriateness of the application of such an approach to cases of common law negligence has been accepted without question. In light of this authority, the causal provision could be interpreted by the courts in a manner which accommodates the present common law. This could be done if courts were to interpret the 'scope of liability' element of the causal provisions, the determination based on the courts' assessment of 'whether or not and why responsibility for the harm should be imposed on the negligent party', as embracing Lord Hoffmann's approach in *Empress Car Company* as adopted in the High Court judgments. If this limb of the causal provisions is construed as an encouragement to courts to unearth and address norms in their articulation of reasons then an argument could follow that the common law purposive approach to commonsense causation already provides such encouragement. In this way it could be said that the provisions do little to alter the common law approach.

Given that Lord Hoffmann described his task of deciphering purpose as a question of law rather than fact then this inquiry could follow as a second step to a causal inquiry, breaking the inquiry into two stages as per the causal provisions. As indicated above, Stapleton has also acknowledged the role of considering the purpose of the wrong in order to reveal and address the relevant norm (although, her thesis, and its strength rests on much more than this). The High Court could therefore find that insofar as the 'scope of liability' element of the provisions prompt the court to unearth and address normative considerations as expressed by the Panel, the courts are already embarking on this process and therefore can continue in the same vein.

---

75. *Environment Agency v Empress Car Company,* above n 72, 29 (Lord Hoffmann).
76. Ibid 31 (Lord Hoffmann).
77. Ibid 32 (Lord Hoffmann).

This proposition is consistent with dicta of Hayne J in *Pledge v Roads and Traffic Authority.*[78] His Honour described common law causation as comprising of two stages, referencing Lord Hoffmann's purposive reasoning in *Empress Car Company* and *Fairchild v Glenhaven Funeral Services Ltd*[79] as falling within the second stage. He also referenced Professor Stapleton's work as providing authority for the proposition that at the second stage judges should consider whether there are any policy considerations which suggest that the defendant should not be liable:

> The questions that are relevant to legal responsibility are first, whether, as a matter of history, the particular acts or omissions under consideration …*did* have a role in the happening of the accident. It is necessary then to examine the role that is identified by reference to the purpose of the inquiry – the attribution of legal responsibility.[80] It is at this second level of inquiry that it may be necessary to ask whether, for some policy reason, the person responsible for that circumstance should nevertheless be held not liable.[81] But that kind of policy inquiry apart, it is necessary to identify the nature of the role which the conduct in question played in bringing about the damage suffered.[82]

In relation to the second assumption outlined above, that members of the High Court are incapable of unearthing norms in a manner which would satisfy, at least in part, the Panel and Stapleton's aims, it is worth considering the High Court's approach in *Travel Compensation Fund v Robert Tambree.*[83] While the High Court has not yet had the opportunity to construe the causal provisions, in *Tambree* a judgment handed down following their enactment, the High Court considered the approach to causation arising under the damages provisions of the consumer protection legislation, section 68 of the Fair Trading Act 1987 (NSW). In delivering their judgments their Honours were obviously aware of the new causal provisions. It is contended that a closer look at the majority judgment in *Tambree* reveals that if the approach to causation taken by Gleeson CJ is measured against Stapleton's theories and the Panel's ambitions, it would on the whole rate quite favourably. It is worth considering further here the facts of the case and reasoning employed. Gummow and Hayne JJ wrote a separate judgment in which they concurred with Gleeson J. Kirby J, whilst critical of what he perceived to be Gleeson CJ, Gummow and Hayne JJ's return to formalism, also adopted a normative approach to resolve the

---

78. (2004) 205 ALR 56.
79. [2003] 1 AC 32.
80. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 269 (Gleeson CJ); *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* (2001) 202 CLR 351, 375–76 (Gummow J); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 (Gaudron, Gummow & Hayne JJ); *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29 (Lord Hoffmann); *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, 71–73 (Lord Hoffmann).
81. Stapleton, above n 41, 166–73.
82. *Pledge v Road and Traffic Authority* above n 78, 59 (Hayne J).
83. Above n 67.

issue which aligned with Gleeson CJ. Callinan J was the only judge who delivered a judgment which did not align with Stapleton's theories.[84]

The issue for the High Court in *Tambree* was whether the respondent auditors and accountants had caused in whole, or only in part, losses suffered by the appellants, the Travel Compensation Fund ('the fund'). The respondents prepared and reviewed the 1997 and 1998 accounts of a travel agency operated by a Ms Fry and her father. In doing so they knew that the accounts were intended for presentation to and review by the fund. The fund operated as an insurer, meeting claims of clients of travel agencies in circumstances where the travel agencies became insolvent. The fund required financial accounts to assess the agency's financial position. If the financial position was poor, such that the agency presented as a bad risk, this would enable the fund's trustees to minimise its exposure by terminating the agency's participation in the fund. Under the fund's Deed of Trust its trustees were compelled to meet claims from clients who had suffered loss through transactions with the agent which had occurred while the agent remained a participant in the fund (clause 15.1). The trustee also had a discretion, routinely exercised, to meet claims of clients whose dealing with the travel agent occurred after the agent's participation in the fund had ceased (clause 15.2(b)).

It was accepted by the parties to the High Court appeal that the financial statements were misleading and deceptive, grossly overstating the financial position of the travel agency, in contravention of the consumer protection legislation. The only issue for the High Court was whether the respondents' conduct was a cause of all of the fund's losses ($143 050) or only those incurred while the agency remained a participant of the fund ($13 320). The New South Wales Court of Appeal had found Ms Fry's conduct in trading illegally post-participation, meant that the respondents were not a cause of those additional losses. All members of the High Court held, contrary to the New South Wales Court of Appeal, that the respondents had caused the fund's entire loss, but differed amongst themselves as to the correct approach to the issue of causation.

Gleeson CJ took a comprehensive common sense approach whereby he did not separate the factual and normative considerations in the way envisaged by both the Panel and Stapleton. However, like the Panel and Stapleton, he did consider that his task was to determine the issue of causation in accordance with legal norms, translated into principles:

> It is not in doubt that issues of causation commonly involve normative considerations, sometimes referred to by reference to 'values' or 'policy'. However, as Stephen J pointed out in *Caltex Oil (Aust) Pty Ltd v Dredge 'Willemstad'*, the object is to formulate principles from policy, and to apply those principles to the

84. *Travel Compensation Fund v Tambree,* above n 67, 655 (Callinan J).

> case in hand. In the context of considering an issue of causation under the Fair Trading Act, the statutory purpose is the primary source of the relevant legal norms.[85]

In his Honour's view, the approach to causation at both common law and under the consumer protection provisions was therefore the same, except that in the latter case the norm was to be derived from the purpose of the statute.[86] He rejected the Court of Appeal's approach of considering whether, as a matter of value judgment, the act of a third party, Ms Fry, in trading illegally, severed the chain of causation between the respondent's wrongdoing and the appellant's loss. Instead, his Honour considered that the outcome depended on 'an accurate identification of the nature of the risk against which the appellant sought protection and of the loss it suffered, considered in the light of the kind of wrongful conduct in which the first and second respondents engaged'.[87]

The crux of Gleeson CJ's reasoning is that the risk for which the fund sought protection from the auditors and accountants included the risk of being required to make payments under either limb of clause 15 of the trust deed. The reasoning depended on Austin J's finding at first instance that, as fiduciaries, in order to meet their obligations the trustees were required to make good the claims. As the auditors knew of the fund's reliance[88] on their representations in undertaking the risk, he held that they ought be held responsible for the entirety of the claimant's loss. His Honour expressed the outcome as deriving from the following principle:

> Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct.[89]

On the whole, Gleeson CJ's approach in *Tambree* is largely in accordance with Stapleton and the Panel's theories on unearthing norms. In cases where there are intervening factors (such as Ms Fry's illegal act) Stapleton has identified the normative issue as 'whether, in the circumstances of the particular case and in the

---

85. Ibid 639 (Gleeson CJ).
86. This case, along with *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079, has served to qualify the principle in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Gaudron, Dawson and McHugh JJ) where it was held that the federal equivalent of the consumer protection provisions, 'should be understood as taking up the common law practical or common sense concept of causation recently discussed by this court in *March* … except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act.' It has done so by placing increased emphasis on the importance of the purpose of the statute.
87. *Travel Compensation Fund v Tambree,* above n 67, 641 (Gleeson CJ).
88. Although it is not clear whether they knew of the operation of clause 15 of the deed.
89. *Travel Compensation Fund v Tambree,* above n 67, 640 (Gleeson CJ).

light of the normative concerns the law brings to bear on the scope issue under the relevant cause of action, the court judges that [the intervening factor] marks the appropriate boundary to D's legal responsibility for the consequences of D's tort'.[90] Gleeson CJ's reasoning, as described above, embodies this exact approach. Measured against Stapleton's work, his Honour's approach is far preferable to the Court of Appeal's resort to opaque notions of breaking the causal chain. The principle put forward by Gleeson CJ also accords with Stapleton's reference to the crystallisation of rules of law and the Ipp Report's reference to the articulation of principles of personal responsibility. It is important to note that while Gleeson CJ, Gummow and Hayne JJ were critical of the way that the Court of Appeal exercised a value judgment, in this case they did not reject the proposition that the resolution of causal issues ordinarily involve the making of a value judgment.[91]

The High Court majority approach therefore accorded loosely with Stapleton's theories on 'scope of liability'. *Tambree* at least suggests that the court is open to the process of unearthing norms and that some members of the High Court can do so satisfactorily (or to Stapleton's standards) in some cases. This alignment may not, however, similarly arise in more difficult cases. The quasi-contractual relationship in *Tambree* between the auditors, accountant and the fund no doubt made the unearthing of such norms and principled expression relatively easy and unremarkable.

CONCLUSION

It is clear that a number of different interpretations of the causal provisions are open to the courts. Already different opinions have been expressed on what the causal provisions entail. Views have been put that the provisions do not govern the remoteness inquiry;[92] that they give the courts power to determine the issues on grounds of policy rather than principle;[93] and that they merely divide up existing principle and do not constitute a departure from the courts' present approach.[94] This paper contends that it is evident that the provisions were intended by those who originally suggested the reform to extend to both the causation and remoteness inquiries and were intended to constitute a departure from the courts' present approach on the basis that that approach allowed the courts to mask or avoid the

90. Stapleton, above n 42, 422.
91. *Travel Compensation Fund v Tambree*, above n 67, 641(Gleeson CJ), 644 (Gummow & Hayne JJ).
92. See Mendelson, above n 15, 375.
93. 'It is regrettable … that the legislatures fell short of their aim of 'greater clarity' in the law of causation. Instead, they have statutorily vested in the judiciary unprecedented powers of discretion to determine on policy grounds rather than on legal principle in each individual case whether and why causal responsibility for the harm should be imposed on the defendant or be left to lie where it falls': Mendelson, above n 2, 509 (references omitted).
94. See treatment of this issue in F McGlone & A Stickley, *Australian Torts Law* (Sydney: Butterworths, 2005) 228–38; Underwood, above n 2, 57.

delivery of clear reasons. Despite such ambitions it is contended that the provisions could and should be interpreted in a manner which accommodates the present common law. The second limb should be interpreted as embracing the purposive common sense approach to causation along with remoteness.

However, if this interpretation is adopted and we are effectively left with the courts carrying out their inquiries on this issue in largely the same fashion, what function do the provisions serve? The opaque language will remain and the two-stage inquiry will simply serve to introduce the 'but for' test as a preliminary inquiry (a mandatory test rather than merely a guide) in most cases. Perhaps all that will change is that the 'purposive' approach will be elevated to a matter of carrying out legislative will in cases of common law negligence as well as in cases of statutory wrongs. The bulk of the Panel's ambitions will go unrealised. It is contended that while doing little to advance or improve the law in this area, it is preferable that the courts take this approach rather than seek to devise a new theory divorced from Stapleton's theories concerning what the second element of the causal provision entails. Given the potential breadth of the 'scope of liability' inquiry ('whether or not and why responsibility for the harm should be imposed'), there is a risk that the question will engulf the negligence action, serving to render the other elements superfluous. It has already emerged that courts are deploying the same set of considerations at both the duty and scope of liability stages in actions under the causal provisions[95] and commentators have drawn a link between the considerations at each of these stages.[96] Of greater concern is the possibility that courts will express their reasoning in a similar manner to Ipp JA in *Ruddock* or the New South Wales Court of Appeal in *Tambree* where conclusions on causation appear to be based on policy considerations and arbitrary notions of justice.

These trends suggest that unless the provisions are to be read with reference to Stapleton's work and with a commitment to trialling her approach (which brings so much more to the 'scope of liability' inquiry and explains its role in the context of the negligence action) it would be best that the High Court interprets the causal provisions in a manner that minimises their impact on the common law approach. Trying to strike a midway point between achieving the ambitions of the Panel and the present common law approach will only serve to further confuse this area of the law. For this reason it is better that the Panel's ambitions go unrealised and judges be left to develop this area of the law and articulate their reasons in the manner they see fit. If the courts' approach is to be critiqued and reformed in this area, on matters which chiefly concern the judicial expression of reasoning, this is a matter for the courts not the legislature.

---

95. See *Graham v Hall,* above n 3, [77]–[82] (Ipp JA, Giles JA & McColl JA concurring).
96. See McGlone & Stickley, above n 94, 230–2.