



CAUSATION CONFERENCE

September 9, 2022

HERBERT SMITH FREEHILLS

36/250 St Georges Terrace, Perth, Western Australia

WELCOME

2022 CAUSATION CONFERENCE

We are pleased to welcome you to the 2022 Causation Conference, sponsored by Herbert Smith Freehills, the Australian Academy of Law and The University of Western Australia Law School.

Causation is one of the basic pillars of the law. Yet its nature, operation and relationship to other foundational concepts remains uncertain and contested, across virtually every field of civil and criminal law. This conference brings together a remarkable group of expert contributors to UWA Law Reviews' 2022 special issue on causation, to debate, elucidate and resolve some of the law's most pressing, and persistent, causal challenges. Speakers will bring their authoritative insights to bear upon the spectrum of private, commercial and criminal law doctrines in which causation plays a leading role, arising at common law, in equity and under statute.

VENUE

In Person

Herbert Smith Freehills, QV.1 Building, 250 St Georges Terrace, Perth WA 6000.

Remote

Prior to the event, a Teams link will be circulated for the day. Join at any time throughout the event using this link. Please ensure you have Teams downloaded on your desktop in advance. Instructions on downloading Teams will be emailed out with the joining link.

CPD Points

Full day in-person and remote attendance will attract 6 CPD points (Category 4 substantive law) (WA practitioners only). Points can also be claimed for individual sessions.

TIMEZONES

Events will take place in Australian Western Standard Time (UTC+8)

CONTACT

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THE UNIVERSITY OF
WESTERN
AUSTRALIA

AAL
Australian Academy of Law

ORDER OF EVENTS

2022 CAUSATION CONFERENCE

Breakfast: Keynote Address

Chair: Ms Elizabeth Macknay

8:00AM *Breakfast*

8:30AM 1. Causation (Contribution) and the 'No Worse Off' Limitation on Liability
Professor Richard Wright (Chicago-Kent College of Law)

9:00AM *Break*

Welcome: 2022 Causation Conference Opening

9:20AM Welcome to Country
Welcome
Professor & Dean Natalie Skead (The University of Western Australia)

Session One: Causation, Contract and Loss

Chair: Mr Matthew Howard SC

9:30AM 2. The Causal Effect of Hypothetical Events Upon Contractual Damages
Mr Joshua Thomson SC (Solicitor General for Western Australia)

3. Omissive Overdetermination: Why the Act/Omission Distinction Makes a Difference for Causal Analysis
Dr Yuval Abrams (New York University School of Law)

10:30AM *Break*

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Session Two: Material Contribution and 'But For' Tests of Causation

Chair: The Hon Justice Katrina Banks-Smith

10:45AM 4. Material Contribution in *Bonnington*: Not an Exception to 'But For' Causation
Associate Professor Neil Foster (The University of Newcastle)

5. Commentary
Professor Elise Bant (The University of Western Australia)

11:45AM *Break*

Session Three: Decision Causation

Chair: The Hon Justice Andrew Beech

12:00PM 6. 'Willpower Has No Voltage': Problems with Causation in Equitable Estoppel
The Hon Justice Julie Ward (President of the New South Wales Court of Appeal)
and *Mr Stephen Puttick* (The University of Western Australia)

7. Causation and Contributory Negligence: The Use and Misuse of Causal Concepts in Cases of Misleading Conduct
Mr Henry Cooney (The University of Western Australia)

1:00PM *Lunch*

Session Four: Law, Science and Causation

Chair: Mr Robert French AC

2:00PM 8. Causation: the Interface Between the Scientific and Legal Methods
The Hon Justice Jonathan Beach (Federal Court of Australia)

9. The Challenges of Proving Toxic Tort Causation: Genetic Markers as the Solution
Ms Sara Golru (The University of Sydney)

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3:00PM *Break*

Session Five: Causation in the Criminal Law

Chair: The Hon Lindy Jenkins

3:15PM

10. A NESS Causation Based Concept for Imputation of Harm in Criminal Laws
Professor Ingeborg Puppe (University of Bonn)
and *Dr Thomas Grosse-Wilde* (University of Bonn)

11. Causation in Homicide, 'Fright, Escape or Self-Preservation' Cases: *Yarran v WA*
Associate Professor Meredith Blake (The University of Western Australia)

4:15PM

Break

Session Six: Causation in Torts

Chair: Professor Elise Bant

4:30PM

12. Inferring Necessary Conditions: The Enduring Paradox of the 'But For' Test in Factual Causation
Dr Marco Rizzi (The University of Western Australia)

13. Three Categories of Causation in Tort Law
Dr Johannes Meyer (The University of Oslo)

5:30PM

Concluding remarks

The Hon Justice Anthony Besanko (Deputy President, Australian Academy of Law)

Acknowledgments and thanks

Mr Yannis Vrodos (Herbert Smith Freehills)

ABSTRACTS

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1. CAUSATION (CONTRIBUTION) AND 'NO WORSE OFF' LIMITATION ON LIABILITY

Professor Richard Wright (Chicago-Kent College of Law)

I rebut claims that there is no core sense of causation that underlies all of our uses of causal expressions, identify that core sense as causation in accordance with and as determined by the laws of nature, and elaborate and defend the NESS (necessary for the sufficiency of a sufficient set) weak-necessity analysis of those laws and their instantiation in specific situations. I explain that omissions/absences are aspects of real states of affairs that usually, but not always, contribute negatively to some result by causing, through lack of instantiation, the failure of a causal process that would have prevented the result from occurring, and that analysis of the failure of a causal process requires focusing on the point at which it irretrievably failed, which differs from the focus on complete instantiation of a successful causal process. Finally, I discuss the 'no worse off' (NWO) limitation on liability for damages for wrongfully caused harm, which applies when the damages would have occurred anyway in the absence of any wrongful conduct by anyone.



2. THE CAUSAL EFFECT OF HYPOTHETICAL EVENTS UPON CONTRACTUAL DAMAGES

Mr Joshua Thomson SC (Solicitor General for Western Australia)

The causal effect of supervening events on damages for contractual breach is uncertain. This paper elucidates some of the circumstances in which supervening events, which occur subsequent to the termination of a contract on the basis of a breach, may affect the assessment of damages. Ultimately, the paper concludes that in such circumstances a contractual breach will not entitle an injured party to damages for the whole of the expected contractual performance where expected performance would have been affected by steps which might be taken by a contracting party or by supervening events. There is a two step process. The injured party must demonstrate the extent to which the contractual breach has caused the loss of expected performance. It is then necessary to consider the value of the expected performance. However, the paper acknowledges that application of this principle may prove difficult in practice.



3. OMISSIVE OVERDETERMINATION: WHY THE ACT/OMISSION DISTINCTION MAKES A DIFFERENCE FOR CAUSAL ANALYSIS

Dr Yuval Abrams (New York University School of Law)

Analyses of factual causation face perennial problems, including pre-emption, overdetermination, and omissions. Arguably the thorniest are cases of omissive overdetermination, involving two independent omissions, each sufficient for the harm, and neither, independently, making a difference. A famous example is Saunders, where pedestrian was hit by a driver of a rental car who never pressed on the (unknownst to the driver) defective (and, negligently, never inspected) brakes. Causal intuitions in such cases are messy, reflected in disagreement about which omission mattered. What these analyses mistakenly take for granted, is that at issue is the 'efficacy' of each omission. I argue, on the contrary, the puzzle of omissive overdetermination favours taking the act/omission distinction seriously.



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4. MATERIAL CONTRIBUTION IN *BONNINGTON*: NOT AN EXCEPTION TO 'BUT FOR' CAUSATION

Associate Professor Neil Foster (The University of Newcastle)



The courts have wrestled for some years with what Lord Reid meant in Bonnington Castings Ltd v Wardlaw [1956] AC 613 when he said that '[the plaintiff] must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury'. Some have taken this to mean that 'material contribution' is something different to classic 'but for' causation. The aim of the article is to demonstrate that this is not correct; that 'material contribution' in Bonnington is an example of, not an exception to, 'but for' causation; and to argue that this misreading of the case should no longer be perpetuated.

6. 'WILLPOWER HAS NO VOLTAGE': PROBLEMS WITH CAUSATION IN EQUITABLE ESTOPPEL

The Hon Justice Julie Ward (President of the New South Wales Court of Appeal)
and Mr Stephen Puttick (The University of Western Australia)



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

7. CAUSATION AND CONTRIBUTORY NEGLIGENCE: THE USE AND MISUSE OF CAUSAL CONCEPTS IN CASES OF MISLEADING CONDUCT

Mr Henry Cooney (The University of Western Australia)



The nature of liability for loss caused by misleading conduct has changed in recent years. A field previously dominated by tort, the last few decades have seen the emergence of statutory causes of action created by legislative schemes proscribing 'misleading or deceptive conduct'. Though there are differences between the tortious and statutory actions, in both tort and in cases of statutory misleading or deceptive conduct, a defendant's liability will sometimes be reduced where the plaintiff has been contributorily negligent. Questions of causation are core to the apportionment of liability in these circumstances, however, as this presentation will address, there is confusion over the concept of causation when liability is apportioned for loss caused by misleading conduct.

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8. CAUSATION: THE INTERFACE BETWEEN THE SCIENTIFIC AND LEGAL METHODS

The Hon Justice Jonathan Beach (Federal Court of Australia)



The mechanism of causation is used to attribute legal responsibility. Both factual and normative legal questions are involved. As to factual causation, complex forensic issues may arise. And it is here where science and the law intersect. Now their methods are different, but such differences must be appreciated in order to adequately assess scientific evidence. How does one engage with such evidence? What type of scientific evidence is relevant to causation? Are there new frontiers in science that have produced new causation questions in the law? This article provides a trial judge's perspective on some of these questions.

9. THE CHALLENGES OF PROVING 'TOXIC' TORT CAUSATION: GENETIC MARKERS AS THE SOLUTION

Ms Sara Golru (The University of Sydney)



Proof of causation in toxic tort litigation has been plagued by issues of causal indeterminacy. The traditional deterministic causation model creates a potentially insurmountable obstacle for plaintiffs who must prove not only that they were exposed to a toxic substance but also that the relevant exposure caused their illness. Some academics and legal practitioners are increasingly embracing genetic information as a potential solution to this problem. However, others are exercising great caution and scepticism, arguing that genetic information poses similar or even more obstacles than other forms of scientific and medical evidence.

10. A NESS CAUSATION BASED CONCEPT FOR IMPUTATION OF HARM IN CRIMINAL LAW

Professor Ingeborg Puppe (University of Bonn)
and Dr Thomas Grosse-Wilde (University of Bonn)



This presentation argues that the NESS test develops its full analytical power if it is properly applied not to an act 'as a whole' but to its wrongful aspects (wrongful aspect causation). This is the first step in ensuring that liability for causing a certain harm lies within the 'purpose' or the 'scope' or 'risk of the violated duty'. This requirement is fulfilled if all aspects and preconditions for the unlawfulness of the conduct are elements of the minimally sufficient condition for the occurrence of the harm (completeness requirement). Even if one has found this right causal relatum, its insights get lost by combining it with traditional 'but for' causation, because this naturally leads to the wrong counterfactual question of what would have happened if the defendant had not acted wrongfully. Furthermore, the wrongful act has to be connected with the harm by a chain of unlawful states of affairs (continuity requirement).

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11. CAUSATION IN HOMICIDE, 'FRIGHT', ESCAPE OR SELF-PRESERVATION' CASES:

YARRAN v WA

Associate Professor Meredith Blake (The University of Western Australia)



Situations in which a deceased person has died in the course of 'fright, escape or self-preservation' have long posed complex causation questions for the criminal law. The Western Australian Court of Criminal Appeal has had the opportunity in recent years to consider the situation where a victim's death follows threats or intimidation delivered by the defendant. In Yarran v The State of Western Australia, decided in 2019, the Court focused on the role that section 272 of the Criminal Code Act Compilation Act (1913) plays in resolving the difficult causation issues which can arise in these sorts of cases. While the earlier case of TB v The State of Western Australia had resolved some of the questions associated with the operation of section 272, Yarran directly raised the issue of the victim's reaction to the threats or intimidation: what relevance should the "unreasonableness" or "disproportion" of a victim's response to an accused's threats have to the question whether the accused 'caused' that response under s272? Is the nature of the victim's response part of the legal causation inquiry, or does it only concern the criminal responsibility (scope of liability) inquiry within the excuse of Accident? This article explains the court's approaches to this question and highlights some of the more general, fundamental questions raised by the case around the relationship between the different causation provisions in the WA Criminal Code.

12. INFERRING NECESSARY CONDITIONS: THE ENDURING PARADOX OF THE 'BUT FOR' TEST IN FACTUAL CAUSATION

Dr Marco Rizzi (The University of Western Australia)



The Court of Appeal of Western Australia engaged with the issue of factual causation recently in East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) ('Ellis'). Quinlan CJ, Mitchell and Beech JJA took the opportunity to reaffirm the arguably paradoxical proposition that, in a situation of structural scientific uncertainty, it is possible to infer a causal link on the balance of probabilities in order to demonstrate that the breach is a 'necessary condition' of the harm per s 5C(1)(a). This commentary sketches the facts and main findings of the Court in Ellis to highlight this paradox and call for a revision of what is a largely obsolescent provision.

13. THREE CATEGORIES OF CAUSATION IN TORT LAW

Dr Johannes Meyer (The University of Oslo)



I examine a claim by the Norwegian scholar Nils Nygaard that there are three categories of causation in tort law. Nygaard claimed that, for each of these categories of causation, different tests would apply. Nygaard's claim has not yet been widely accepted in Norwegian courts or scholarship, but represents an intellectual observation worthy of further examination. I will explain and expand on this claim and argue that Nygaard's three categories of causation represent three fundamentally different forms of inquiries, depending on whether and to what extent the inquiry refers to counterfactual scenarios. Building upon insights from research methodology in history, cognitive science and psychology, I propose that Nygaard's three categories correspond to (a) causal explanations of actual courses of events, (b) negative counterfactual hypotheses and (c) positive counterfactual hypotheses.

SPEAKERS

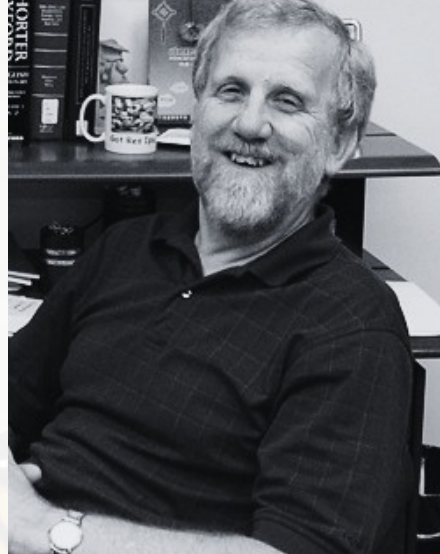
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BREAKFAST

Keynote Address



Chair: Ms Elizabeth Macknay,
Partner - Disputes,
Managing Partner, Perth,
Herbert Smith Freehills



Speaker: Professor Richard Wright,
Distinguished Professor Emeritus,
Chicago-Kent College of Law

WELCOME



Professor Natalie Skead,
Dean of UWA Law School



Welcome to Country

SPEAKERS

2022 CAUSATION CONFERENCE

SESSION ONE

Causation, Contract and Loss



Speaker: Mr Joshua Thomson SC,
Solicitor General for Western
Australia



Chair: Mr Matthew Howard SC,
Francis Burt Chambers



Speaker: Dr Yuval Abrams,
Fellow at New York University
School of Law

SESSION TWO

Material Contribution and 'But For' Tests of Causation



Speaker: Associate Professor Neil
Foster, The University of
Newcastle



Chair: The Hon Katrina Justice
Banks-Smith,
Federal Court of Australia



Commentator: Dr Elise Bant,
Professor of Private Law & Commercial
Regulation,
The University of Western Australia

SPEAKERS

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SESSION THREE

Decision Causation



Speaker: The Hon Justice Julie Ward,
President, New South Wales
Court of Appeal



Speaker: Mr Stephen Puttick,
Adjunct Research Fellow,
The University of Western
Australia



Chair: The Hon Justice
Andrew Beech, Supreme
Court of Western Australia
Court of Appeal



Speaker: Mr Henry Cooney,
Adjunct Research Fellow,
The University of Western
Australia

SESSION FOUR

Law, Science and Causation



Speaker: The Hon Justice Jonathan
Beach, Federal Court of Australia



Chair: Mr Robert French AC, Chancellor
of The University of Western Australia



Speaker: Ms Sara Golru, PhD
Candidate, The University of Sydney

SPEAKERS

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SESSION FIVE

Causation in the Criminal Law



Speaker: Professor
Ingeborg Puppe,
University of Bonn



Speaker: Dr Thomas
Grosse-Wilde,
University of Bonn



Chair: The Hon Lindy Jenkins,
Western Australian Law
Reform Commission



Speaker: Associate Professor
Meredith Blake,
The University of Western
Australia

SESSION SIX

Causation in Torts



Speaker: Dr Marco Rizzi,
Senior Lecturer,
The University of Western Australia



Chair: Dr Elise Bant, Professor of
Private Law & Commercial
Regulation, The University of
Western Australia



Speaker: Dr Johannes Meyer,
The University of Oslo