

CAUSATION IN CONTEXT: INTERPRETING THE NEXUS CLAUSE IN THE REFUGEE CONVENTION

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INTRODUCTION

While recent positive developments in the interpretation of the Refugee Convention 1951¹ (the Convention) continue to ensure its contemporary relevance,² significant divergence persists both within and

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1. United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

2. See *R. v. Immigration Appeal Tribunal, ex parte Shah; Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. (1999) (appeal taken from C.A.) for an example of a recent case extending the application of the

between contracting state parties in relation to some key elements of the definition of “refugee” and many states continue to devise restrictive interpretive techniques to inhibit the potential application of the Convention.³ One of the elements of the definition which does not yet enjoy uniform interpretation among states, and which is increasingly identified by state parties as a source of constricting the potential application of the Convention, is the nexus clause; that is the requirement that a person’s well-founded fear of being persecuted be “for reasons of” one of the five enumerated grounds: race, religion, nationality, membership of a particular social group, or political opinion.⁴

It is well accepted that this clause denotes a causal link between the applicant’s well-founded fear of being persecuted and a Convention ground.⁵ However, the analysis of the common law jurisprudence⁶ undertaken in this Article reveals that there is little consensus as to the appropriate test to be applied in interpreting this aspect of the definition, and that there is pervasive confusion surrounding causation in the refugee context. Today, many different approaches to causation exist in

Convention to situations involving violence against women in Pakistan. These and other recent developments are discussed by Rodger Haines in *Gender-Related Persecution*, a background paper commissioned by the United Nations High Commissioner on Refugees (UNHCR) for an expert roundtable discussion on gender-related persecution as part of the Global Consultations on International Protection in the context of the 50th anniversary of the Convention. Rodger Haines, *Gender-Related Persecution 2*, at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=PROTECTION&page=PROTECT&id=3b93912e4> (noting that in the past decade “the analysis and understanding of sex and gender in the refugee context has advanced substantially in the case law, in state practice and in academic writing”) (last visited Feb. 21, 2002).

3. See European Council on Refugees and Exiles, *Research Paper on Non-State Agents of Persecution* (Nov. 1998), available at <http://www.ecre.org/research/nsagents.doc> (last modified autumn 2000) (addressing the key issue of whether a person falls within the protection of the Convention when he or she fears persecution by non-state agents).

4. See Convention, *supra* note 1, art. 1A, at 152 (“For the purpose of the present Convention, the term ‘refugee’ shall apply to any person who. . .”). See also *id.* art. 1A(2).

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Id. (emphasis added). See also United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, art. 1(2), 19 U.T.S. 6223, 6223, 606 U.N.T.S. 267 (removing the phrase “As a result of events occurring before 1 January 1951”) [hereinafter Protocol].

5. See, e.g., *Gafoor v. INS*, 231 F.3d 645, 653 (9th Cir. 2000); *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (2000) 201 C.L.R. 293, 302 (Austl.) (per Gleeson, C.J., Gaudron, Gummow & Hayne, JJ.); *Applicant A v. Minister for Immigration & Ethnic Affairs*, (1997) 190 C.L.R. 225, 240 (Austl.) (per Dawson, J.); *Canada v. Ward*, [1993] S.C.R. 689, 712; *Ex parte Shah*, 2 A.C. at 646 (per Steyn, L.J.); *id.* at 653 (per Hoffmann, L.J.).

6. Note that the analysis in this Article is based on the interpretation of the Convention by common law courts.

refugee law, both between and within jurisdictions, with standards ranging from an “effective sole cause” test and the “but for” and other common law tests, to a more liberal test of “contributing cause.” Moreover, the analysis undertaken in this Article suggests that there is a tendency in some jurisdictions toward an overly restrictive understanding of the requirements of the clause and an inappropriate reliance on standards of causation developed in inapposite areas of domestic law in informing relevant standards in the refugee context. There is no doubt that courts are increasingly concerned with the meaning and method of analysis of the causation element in the refugee definition⁷ and that the issue is beginning to attract the attention of legislators, who recognize the potential for restricting the scope of the Convention by formulating a stringent causation test.⁸

The aim of this Article is to explore current approaches to identifying and applying the causation test inherent in the “for reasons of” clause and to attempt to devise a *sui generis* test appropriate to the unique aims and objects of the Convention. Part I begins by reviewing both the principles governing the causation analysis and their methods of application in different jurisdictions. Part II then proceeds to review the considerations that might inform the development of a causation standard in refugee law, including guidance that might be obtained from other areas of law, against the background of the need for a context-specific interpretation. Finally, Part III synthesizes the insights developed in Parts I and II in order to formulate a standard that is consistent with the humanitarian and protective aims of the Convention.

I. CAUSATION STANDARDS IN REFUGEE LAW

Whilst the definition of a “refugee” and the consequences of recognition as such are set out in the Convention, implementation of the provisions of the Convention is left to state parties through domestic legislation and domestic adjudication by administrative tribunals and appellate and superior courts. Since there is no international body to which refugee applicants can submit communications regarding the

7. See *infra* notes 13–99 and accompanying text. It is worth noting that the issue of “causation” is frequently defined as a specific element in the determination process and in many cases the courts denote the separateness of the issue by inserting a subheading in a judgment entitled “causation.” See, e.g., *Kozulin v. INS*, 218 F.3d 1112, 1115 (9th Cir. 2000) (containing subheading entitled “Causation of Attack”); *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997) (containing subheading entitled “(c) Causation—‘On account of’”).

8. See *infra* notes 67–70, 84–88 and accompanying text.

interpretation and implementation of the Convention,⁹ differences in interpretation between state parties develop and persist unresolved by any overarching supervisory body. It is thus not surprising that different states take different approaches to a number of aspects of the refugee definition, including the meaning and application of the “for reasons of” clause. However, there is cause for concern when these different approaches result in inconsistent determinations for refugee applicants, and affect the chances of success for applicants in similar circumstances according to the jurisdiction in which they claim protection.

This Article begins by attempting to categorize existing jurisprudence in five common law countries¹⁰ according to the different tests currently adopted in assessing whether the nexus clause is satisfied. As the analysis will reveal, there is a wide array of approaches in operation. However, much of the nexus analysis in the case law suffers from a lack of clarity which makes categorization difficult and prone to overlapping.

In particular, there is frequent confusion or conflation of the elements of causation and intent as elements of the nexus analysis, which can make it difficult and somewhat artificial in many cases to isolate the causation standard as an issue of discussion. As mentioned above, it is well recognized that the nexus clause denotes a causal link. Curiously however, while it is recognized that causation does not necessarily involve any element of intent in other areas of the law,¹¹ in the refugee context courts frequently introduce it unselfconsciously into the equation as though it were an inevitable aspect of a causal determination.¹² That is, the causal link is often held not to be established unless the applicant is able to establish that the (past or future) persecutor intends to inflict se-

9. See Convention, *supra* note 1, art. 38, at 178 (“Any dispute between parties to this Convention . . . shall be referred to the International Court of Justice.”). However, Article 38 has never been invoked and in any case does not permit individual petitions. This is in contrast to the position in relation to other international human rights treaties such as the International Covenant on Civil and Political Rights. See *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* (Philip Alston & James Crawford eds., 2000) for a discussion of the different models of complaint procedures provided for in other human rights treaties.

10. The jurisdictions considered for this Article are the United States, Canada, United Kingdom, Australia, and New Zealand.

11. As Lord Salmon cogently explained, “giving the word ‘cause’ its ordinary and natural meaning, anyone may cause something to happen intentionally or negligently or inadvertently without negligence and without intention.” See *Alphacell Ltd. v. Woodward*, 1972 A.C. 824, 847 (appeal taken from Q.B.). See also *McCann v. Switz. Ins. Austl. Ltd.*, (2000) 176 A.L.R. 711, 716 (Austl.) (per Gleeson, C.J.) (where turning to equity, in the field of breach of fiduciary duty, even in cases involving fraud on the part of the fiduciary, “the liability of a solicitor to a client brought about by a dishonest or fraudulent act will frequently arise in circumstances where the solicitor did not intend that there should be loss to the client, and where there were additional causes of the loss”).

12. For a detailed explanation of this phenomenon in United States law, see Shayna Cook, *Repairing the Legacy of Elias-Zacharias*, 23 MICH. J. OF INT’L L. 223 (2002).

rious harm because of the applicant's race, political opinion, or other protected status. This leap from causation to intention is seldom identified or justified.

The confusion can be explained in part by an underlying and rarely articulated difference in the function which different courts perceive the "for reasons of" clause as possessing. That is, although it is seldom acknowledged explicitly, the application of a causal analysis frequently produces different outcomes in similar cases according to whether the "for reasons of" clause is perceived as pertaining to the persecutor's intent, the intent of the state that withholds protection, or the reason for the applicant's well-founded fear of being persecuted.

Thus, while this Article is primarily concerned with analyzing existing approaches to the causation standard in refugee adjudication and moving toward the formulation of an appropriate standard consistent with the purpose of international refugee law, the discussion is undertaken with sensitivity to the underlying complexity produced by differing visions (whether explicit or not) of the function of the causal analysis in the refugee definition.

A. Sole Cause

The most restrictive method of interpreting the nexus clause would be to require that the protected ground constitute the sole cause or reason for the well-founded fear of being persecuted. Although such a test was initially adopted by lower courts in various jurisdictions, appellate courts have frequently rejected this approach on the basis that the "plain meaning" of the phrase "for reasons of" "does not mean persecution solely on account of" the protected grounds,¹³ and that to read a sole cause test into the definition "would render the Convention protection largely ineffectual."¹⁴ For example, a sole cause test could not accommodate situations involving causes that are inextricably related to one another, nor would it accommodate a combination of partial causes. As a justice of the Australian Federal Court has explained:

To require that a feared persecution arises solely for a Convention reason would be to narrow the scope of the protection artificially. It would be an inadequate response to the possible varieties of and excuses for the oppression of target groups within a repressive society.¹⁵

13. *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).

14. *Minister for Immigration & Multicultural Affairs v. Abdi*, (1999) 162 A.L.R. 105, 112 (Austl.) (per O'Connor, Tamberlin & Mansfield, JJ.).

15. *Jahazi v. Minister for Immigration & Ethnic Affairs*, (1995) 61 F.C.R. 293, 299 (Austl.) (per French, J.).

Lower courts and tribunals¹⁶ and appellate and superior courts in other jurisdictions¹⁷ have drawn similar conclusions.

Notwithstanding the very important rejection of a sole cause test in principle, an analysis of the application of abstract principle to individual determinations reveals that in practice courts frequently apply an *effective* sole cause test by rejecting Convention-related explanations for persecution (despite evidence to the contrary) and hypothesizing about alternative non-Convention grounds that can exclusively account for the fear of persecution. In other words, courts frequently proceed on the apparent assumption that there is one sole explanation or reason for a well-founded fear of being persecuted, and therefore the existence of a non-Convention ground as a potential explanation for the fear of being persecuted negates a Convention-related explanation. Such an approach involves an artificial analysis whereby a false dichotomy is drawn between non-Convention grounds and Convention-related explanations or factors.

For example, in a recent application for asylum by a woman from El Salvador who had fled to the United States following “beatings, threats and harassment” suffered at the hands of FMLN guerillas, including her common law husband, following her refusal to join the guerillas, the United States Court of Appeals for the Ninth Circuit upheld the Board of Immigration Appeal’s (BIA) dismissal of her claim. The court held that, “the BIA could have reasonably concluded that the abuse she suffered was not on account of a political opinion, but would have occurred if she defied [her husband] on any matter” and that unless “there is substantial evidence that [her husband] abused [her] on account of her political opinion . . . she is not eligible for asylum.”¹⁸ Given the evidence (which the BIA accepted as credible) of a clear and direct political element in

16. See *In re T-M-B-*, 21 I. & N. Dec. 775, 778 (BIA 1997).

In determining the motivation for threats or harm in an actual or imputed political opinion asylum claim, the record must be examined for direct or circumstantial evidence from which it would be reasonable to conclude that those who threatened or harmed the respondent were in part motivated by an assumption that her political views were antithetical to their cause.

Id. See also *In re S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

17. See *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) (“Persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.”). See also *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Gutierrez v. INS*, No. 98-70214, 1999 U.S. App. LEXIS 29235 (9th Cir. Nov. 3, 1999); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999); *Minister for Immigration & Multicultural Affairs v. Sarrazola*, (1999) 166 A.L.R. 641 (Austl.); *Chokov v. Minister for Immigration & Multicultural Affairs*, (F.C.A. 1999), available at <http://www.austlii.edu.au.htm>; *Jahazi*, 61 F.C.R. at 299–300.

18. *Alfaro-Rodriguez v. INS*, No. 98-70289, 1999 U.S. App. LEXIS 31945, at *6 (9th Cir. Dec. 2, 1999).

the applicant's risk of being persecuted, the court's (extraordinary) affirmation of the BIA decision can only be explained on the basis of an underlying rejection of the notion that the Convention definition is capable of being satisfied when multiple factors are at play, and an apparent assumption that the presence of a nonpolitical motive proves the absence of a political motive.¹⁹

In another decision, the United States Court of Appeals for the Ninth Circuit upheld the BIA's rejection of the claim of a Guatemalan man who feared persecution by guerillas. The guerillas had tried on numerous occasions to recruit him into their ranks and had accused him of "having the same mind set" as his brother who was serving in the Guatemalan army. The BIA rejected his political opinion claim on its own assessment of a "reasonable" guerilla's mindset: "[the BIA] did not believe [the applicant's] testimony that the guerillas would attempt to induct him into their ranks at the same time that they attributed a pro-military opinion to him because of his brother's military service."²⁰ The Board accepted the Immigration Judge's assessment that therefore "[t]he recruitment was motivated by the fact that the respondent is a young, healthy male, not for any of the five grounds enumerated in [the Convention]."²¹ As the dissent rightly points out, the Immigration Judge's rejection of the claim (affirmed by the BIA and the majority of the Ninth Circuit) notwithstanding evidence of imputed political opinion (which was not rejected on credibility grounds) directly contradicts the previously-accepted principle²² that the Convention definition is satisfied where the persecution is feared merely "in part" for a Convention reason.²³ Although not overt, in effect this constitutes a sole factor test.

This is not an isolated problem, rather there are countless examples of this phenomenon²⁴ including a case in which the United States Court of Appeals for the Fifth Circuit accepted that the applicant "feared persecution because of his membership in a 'particular social group'—the royal family of the Esubete of Nigeria," but rejected his claim nonetheless because it was really "on account of a personal dispute"²⁵; a

19. *Cf. Tarubac v. INS*, 182 F.3d 1114, 1119 (9th Cir. 1999) (holding that "the presence of a nonpolitical motive for persecution does not, without more, prove the absence of a political motive."). *See also Alfaro-Rodriguez*, 1999 U.S. App. LEXIS 31945, at *9–*10 (Ferguson, J., concurring and dissenting).

20. *Sebastian-Sebastian v. INS*, 195 F.3d 504, 506 (9th Cir. 1999).

21. *Id.* at 510–11.

22. *See infra* notes 70–75.

23. *Sebastian-Sebastian*, 195 F.3d at 516–19 (Pregerson, J. dissenting).

24. *See, e.g., Ruiz v. INS*, No. 97-7115, 1999 U.S. App. LEXIS 27937 (9th Cir. Oct. 25, 1999); *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998); *Cuadras v. INS*, 910 F.2d 567 (9th Cir. 1990).

25. *Adebisi v. INS*, 952 F.2d 910, 913 (5th Cir. 1992).

case where the same court affirmed the BIA's rejection of the claim of a fifteen year old Haitian girl who provided evidence of past political persecution²⁶ where the Immigration Judge and BIA had held "that the attack was as likely an act of crime as an instance of political persecution"²⁷; a case in which the United States Court of Appeals for the Eighth Circuit upheld the rejection of an application by a young girl from El Salvador who "testified that the FLMN members threatened to kill her after she told them that she supported the government" on the basis that "the evidence suggests that her support for the government was not the reason for their efforts to recruit her" but rather that they tried to recruit her "because of her relatively young age"²⁸; a case where the Fifth Circuit again affirmed the BIA's rejection of an asylum applicant on the basis that although the applicant was detained and beaten by police after he participated in a Kurdish anti-government demonstration, "the BIA found that the police interrogated [the applicant] because they were seeking information on terrorist organizations such as the PKK"²⁹; a decision of the Ninth Circuit which rejected a fifteen year old Indian boy's claim that he feared persecution by the BTF (an organization supporting an independent Sikh state) as a result of his father's leadership in a political organization opposed to the BTF, on the basis that the BTF "wanted to make [the applicant] unavailable to support his father" and that this suggests that it "wanted to punish [the applicant's] father, rather than to persecute [the applicant] for his political beliefs"³⁰; and a very recent case in which the Ninth Circuit rejected the claim of an El Salvadoran man who feared persecution from a wealthy, local politician following the applicant's complaint to police regarding the alleged rape of his aunt by the politician on the basis that "the evidence suggests that he fears harm because of a personal matter between [the applicant] and [the politician]" notwithstanding evidence that in the "lengthy, devastating and highly polarizing civil war" then taking place in El Salvador, the rape accusation would "also be construed as an overtly political act, posing a direct threat to the

26. See *Civil v. INS*, 140 F.3d 52, 59–62 (1st Cir. 1998) (Bownes, J. dissenting) (setting out the extensive evidence put forward by the applicant as to her well-founded fear of being persecuted on account of political opinion).

27. *Id.* at 56 (stating that the court was "less willing" than the Immigration Judge to accept its proposition but nonetheless affirming the Immigration Judge's and BIA's findings). See also *id.* at 65 (Bownes, J. dissenting) (criticizing the Immigration Judge for having had "speculated that the attack on Civil's home was 'more likely' the [random] act of common criminals than act of paramilitary forces intended as political persecution").

28. *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998). This was cited as the primary reason. In addition, the Court questioned the credibility of the applicant. See *id.* at 627–28.

29. *Ozdemir v. INS*, 46 F.3d 6, 8 (5th Cir. 1994).

30. *Sangha v. INS*, 10 F.3d 1482, 1482 (9th Cir. 1997).

established political order.”³¹ This problem is most acute in the United States context due to the overwhelming focus on ascertaining the intention of the persecutor.³² However it is not confined to cases adjudicated in the United States; examples can be found in other jurisdictions. For example, the British Court of Appeal recently affirmed the decision of the Immigration Appeal Tribunal to reject a claim for asylum by a Colombian man who gave evidence (accepted as credible) that he feared that he would be killed by ELN guerillas or government soldiers following his decision to leave the ELN with which he had previously been involved.³³ It was held that he had failed to prove nexus on the basis that “the ELN did have substantial criminal as well as political aspects to its activities” and that he had failed to prove that he would be subject to detrimental treatment “for a Convention reason and not merely a reprisal on the part of his former associates against a man who had been of practical use to them.”³⁴

In these cases, the applicants’ claims were not rejected merely because of evidentiary issues or deficiencies; rather, there is a deeper underlying assumption at work. The courts in these cases appear determined to isolate the single (or predominant) explanatory factor for the person’s predicament (or for the motivation of the persecutor to inflict the serious harm) rather than acknowledge the complexity of the factual situations and the interlinked matrix of factors that often lead to a person’s need for international surrogate protection on Convention grounds.³⁵ Moreover, in cases involving non-state agents operating in highly politicized environments, there is a tendency to attempt to “surgically differentiate” the political motivations of the persecutors from supposed non-political objectives such as extortion.³⁶ The artificiality of the reasoning which thus ensues provides powerful support for the clear

31. *Molina-Morales v. INS*, 237 F.3d 1048, 1053 (9th Cir. 2001) (Fletcher, J. dissenting).

32. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992). *See also supra* note 12.

33. Transcript: *Smith Bernal, Guitierrez v. Sec’y of State for the Home Dep’t*, 2000 LEXIS (C.A. May 4, 2000) (Eng.) (per Buxton, L.J.).

34. *Id.* at *8.

35. Indeed, this has been explicitly acknowledged by one refugee adjudicator in the United States. In *In re V-T-S*, B.I.A. Interim Dec. 3308 (Mar. 6, 1997), Board Member Rosenberg of the United States BIA acknowledged that “[b]y characterizing the dispute as nonpolitical or invoking another nonprotected motive as the reason for the persecution threatened or imposed on the victim, we have too often dismissed valid claims.” This has not gone unnoticed by the courts. *See, e.g., Osorio v. INS*, 18 F.3d 1017, 1028–29 (2nd Cir. 1994) (where the United States Court of Appeals for the Second Circuit affirmed, most dramatically, the petitioner’s contention that under the Board’s approach, Alexander Solzhenitsyn’s dispute with the former Soviet Union would have been aptly characterized, and wrongly dismissed, as literary and not political).

36. *See In re T-M-B-*, 21 I. & N. Dec. 781–91 (BIA 1997) (Rosenberg, dissenting). The Ninth Circuit Court of Appeals ultimately overturned this majority stance of the BIA in *Borja v. INS*, 175 F.3d 732, 732 (9th Cir. 1999).

rejection of a sole factor test in the Refugee Convention both in principle and in practice.

B. “*But for*”/Common Law Test of Causation

The “but for” test, borrowed largely from tort law, has mixed support in the refugee context and is the source of considerable confusion, disagreement and conflicting interpretations and understandings among judges. James Hathaway advocates the use of the “but for” test, which he defines by formulating the following question for decisionmakers: “Would the claimant be similarly at risk of serious harm but for her civil and political status?”³⁷ However, he emphasizes that “it is not required that the totality of the risk faced by the claimant be specific to persons of her civil or political status,” but only that the particular level of jeopardy faced by the applicant be linked to civil or political status.³⁸ This formulation of the “but for” test effectively sidesteps the limitations of the “sole cause” test to accommodate multiple causes by asking “*but for* the protected ground, would the persecution have occurred?” Notwithstanding this, by definition the test requires that the Convention ground constitute the determinative factor, without which the well-founded fear would not exist.

However, the precise relationship between this test and its counterpart in tort law is far from clear. Under traditional tort formulations the “but for” test cannot adequately accommodate multiple causes.³⁹ In a refugee context, then, where a person is being persecuted for both enumerated and unenumerated reasons, the “but for” test could yield conflicting results depending on whether Hathaway’s version or a more traditional tort law version is used.⁴⁰

Confusion surrounding the meaning and method of application of the “but for” test in the refugee context is further magnified in the case law due to the frequent assumption that reference to “but for” denotes incorporation of the common law tortious standard of causation, which begins with a “but for” analysis and then proceeds to limit legal liability

37. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 140 (1991).

38. *Id.*

39. See Chiles Kester, *The Language of Law, the Sociology of Science and the Troubles of Translation, Defining the Proper Role for Scientific Evidence of Causation*, 74 NEB. L. REV. 529, 535 (1995) (providing a well-known example involving two fires, A and B, which meet and subsequently cause a house to burn. It later becomes clear that either fire on its own would have destroyed the house. In tort law, since it cannot be said that “but for” Fire A, the harm would not have occurred, the person who set Fire A is not responsible. The same is also true for the person who set Fire B, with the result that *neither* fire is found to have caused the harm, since it cannot be said that but for one fire, the harm would not have occurred.). See also *infra* notes 169–72.

40. See discussion of tort law *infra* notes 152–81 and accompanying text.

by introducing policy considerations into the equation. The confusion is particularly pronounced in the jurisprudence of the Australian courts. For some years, various judges of the Federal Court of Australia have propounded the view that the principles of causation developed in the area of liability for the tort of negligence are applicable in the context of the refugee definition in the Convention. The first apparent reference to this issue was by French, J. in *Chen Shi Hai*⁴¹ where his Honour explained:

The courts in developing the common law and in the construction of statutes which give rise to questions about causation have often selected some one or more out of an infinite number of conditions to be treated as the legally relevant cause. In making those selections the law is moved by considerations of policy, not simply of logic Questions of causal connection in the law have been described as ultimately a matter of commonsense not susceptible of reduction to a satisfactory formula These discussions have generally arisen when the question of causation is linked to a legal liability such as, for example, damages in tort or under statute. There is however no reason why the same approach should not be applied to determining whether an apprehended persecution is ‘for reasons of . . .’ one of the specified attributes to which Article 1 of the Convention refers. Mere application of a ‘but for’ test to satisfy the connection could take the scope of Convention protection well beyond that which it was intended to secure.⁴²

Such statements have been interpreted as authority for the proposition that the “but for” test, although relevant, should not exclusively determine causation in the refugee context.⁴³ That is, just as the common law test of causation does not consist solely of the “but for” analysis, but rather introduces notions of policy and common sense to guide the limitation of legal liability, so too, similar principles have been imported into the refugee context in Australia. In a number of cases the Federal Court has reiterated that “the ‘but for’ test of causation [is] not to be used exclusively,”⁴⁴ but rather, “[t]he question whether a particular causal

41. Ultimately this decision was upheld by the High Court of Australia (after being overturned by the Full Federal Court). See *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (2000) 201 C.L.R. 293 (Austl.).

42. *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (1998) F.C.A. 622 para. 9 (Austl.).

43. *Gersten v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 1768 para. 105 (Austl.) (per Katz, J.); *Minister for Immigration & Multicultural Affairs v. Chen Shi Hai*, (1999) 92 F.C.R. 333, 342 (Austl.) (per O’Loughlin & Carr, JJ.).

44. *Gersten*, (1999) F.C.A. 1768 para. 107 (per Katz, J.). See also *Chen Shi Hai* (1999) 92 F.C.R. at 342 (per O’Loughlin & Carr, JJ.).

connection between persecution and membership of a group attracts Convention protection will be resolved not merely by the logic of causality but as a matter of evaluation which has regard to the policy of the Convention.”⁴⁵

It is apparent from an analysis of the Australian cases that, where it is engaged, the policy or “common sense” test is often intended to operate as an additional hurdle to refugee applicants in order to assuage concerns that an application of the “but for” test alone would be overly inclusive. The concern is that reliance on the “but for” test alone could lead to an artificial chain of reasoning that would connect factors to an applicant’s well-founded fear of being persecuted that are only remotely (and even accidentally) related to the true reasons for fearing serious harm. As explained by Sedley, L.J. of the British Court of Appeal in his recent decision in *Velasco v. Secretary of State for the Home Department*, in the course of rejecting the submission of the applicant that a “but for” test was appropriate in the refugee context:

[a] ‘but for’ test in this context opens up the possibility of an infinity of causes. I put to Mr Jones in argument the example of an individual who, on the way to church, witnesses a crime and is then threatened with serious retribution by the criminals if he or she exposes them. But for that person’s religion . . . they would not have been put in fear of persecution. Even Mr Jones, I think, quailed at the prospect of having to argue that such a case came within the Convention; and yet, without reducing the argument to an absurdity, it would come within the Convention if the applicant’s argument in this case were right.⁴⁶

In tort law the distinction made between the two tests is that the “but for” test assists in measuring “causation in fact,” whilst policy considerations operate so as to determine “causation in law.” In other words, a plaintiff must always prove that the defendant’s negligence was the “but for” cause of his or her predicament, but may nonetheless fail to establish a claim because legal/policy considerations require a denial of liability.⁴⁷ This approach to the issue of causation was clearly adopted by Hill, J. of the Australian Federal Court, in the context of the Refugee Convention, in *Peiris v. Minister of Immigration & Multicultural Affairs*, wherein following the application of the “but for” test to the facts of that case, his Honour asked “[b]ut does it follow from that inevitably as a

45. *Jahazi v. Minister for Immigration & Ethnic Affairs*, (1995) 61 F.C.R. 293, 299 (Austl.) (per French, J.).

46. Transcript: Smith Bernal, *Velasco v. Sec’y of State for the Home Dep’t*, para.7, 2000 LEXIS (C.A. April 2000) (Eng.).

47. See *infra* notes 136–53 and accompanying text for further discussion of tort law.

matter of law, not as a matter of fact, that persecution must be found to be motivated by political views?”⁴⁸

There does however appear to be some imprecision and consequent confusion as to what exactly is meant by the use of the tort-based “common sense” approach. In *Okere v. Minister for Immigration & Multicultural Affairs*, a decision often relied upon as authority for the proposition that tort principles are relevant in the refugee context,⁴⁹ Branson, J. (of the Australian Federal Court) explained that the common law test of causation, which requires the application of “common sense to the facts of each case” was an appropriate approach to the construction of the refugee definition, having regard to the relevant principles of treaty interpretation.⁵⁰ However her Honour did not refer specifically to the “but for” test⁵¹ and her reliance on the “object and purpose” of the Convention suggests that she intended to formulate a somewhat broad and generous approach and not necessarily to introduce a method of narrowing the application of the Convention. Her Honour explained that another way of expressing the “common sense” approach is by asking

48. *Peiris v. Minister of Immigration & Multicultural Affairs*, (1999) F.C.A. 880 para. 21. Note that an appeal was allowed by consent from this judgment on November 12, 1999.

49. This is largely because Branson, J. cited the decision of the High Court in *March v. E & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. 506, a decision concerned with the law of tort, in formulating her test to be applied in the Convention context. For example, in *Gersten*, Katz, J. said:

It is apparent from French, J.’s remarks in *Chen* that his view was, and had been in *Jahazi* as well, that, just as in the area of causation in the negligence context, causation in the context of the definition of a refugee for the purposes of the Convention was not to be determined by the exclusive application of the ‘but for test of causation. It appears to me further that Branson, J., by later adopting in *Okere* what she referred to as ‘the *March v. Stramare* test,’ was taking the same approach as French, J. had taken in *Jahazi* and *Chen*.’

Gersten, (1999) F.C.A. 1768 para. 105.

50. *Okere v. Minister for Immigration & Multicultural Affairs*, (1998) 87 F.C.R. 112, 117–18 (Austl.) (per Branson J.).

I appreciate that the *March v. Stramare* test is a common law test of causation, but having regard to the principles of interpretation of treaties referred to above, it reflects, in my view, an appropriate approach to the construction of this aspect of Article 1A(2) of the Convention. It is, in my view, only to put the same test in different words to invite the identification of the true reason for the persecution which is feared The RRT was required in this case, in my view, to ask itself whether, applying common sense to the facts which it accepted, the applicant has a well-founded fear of persecution the true reason for which is his religion.

Id. This has been assumed to encompass the “but for” test. See *Peiris*, (1999) F.C.A. 880 para. 19 (“It would seem clear enough that the Tribunal in the present case did not directly apply a common law test of causation as that suggested [in *Okere*] by her Honour.”). See also Mark Leeming, *When is Persecution for a Convention Reason?*, 7 AUSTL. J. ADMIN. L. 100, 102 (2000).

51. Cf. Leeming, *supra* note 50, at 102 (citing *Okere* as authority for the proposition that “the ‘but for’ common law test of causation is applicable” in the refugee context).

what is the “true reason” or indirect cause for the persecution that is feared, an approach that was reiterated and applied in a number of her subsequent judgments.⁵² In *Okere*, Branson, J. held that a Nigerian man who feared persecution (death) from a satanic sect following his refusal to join the sect on the basis that his Christian beliefs prevented him from so doing, was capable of satisfying the Convention definition even though his fear was only indirectly a result of his religious beliefs.⁵³ The analysis in that case reveals that this “common sense,” “true reason,” or “indirect” test considers the reason (direct or indirect) for the person’s predicament rather than the motivation of the persecutor, since in *Okere* there was no suggestion that members of the cult had chosen the applicant because of his religious beliefs; on the contrary he had been selected through local custom by a fortune teller.⁵⁴ Indeed, her Honour’s citation of a seminal decision of the High Court regarding indirect discrimination or disparate impact in support of this principle⁵⁵ makes clear that her emphasis was on the objective nature of the inquiry (as opposed to requiring a search for the subjective intention of the persecutor) and not necessarily on introducing tort-based principles into refugee determination.

In her subsequent judgment in *Hellman v. Minister for Immigration & Multicultural Affairs*, Branson, J. confirmed that when engaging the language of “common sense” in previous decisions she had not intended to equate the “true reason” test to the common law “but for” test.⁵⁶ How-

52. See, e.g., *Kanagasbai v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 205.

53. *Okere* (1998) 87 F.C.R. at 118 (per Branson, J.) (explaining that

[h]istory supports the view that religious persecution often takes ‘indirect’ forms. To take only one well known example, few would question that Sir Thomas More was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.

Id.

54. *Id.* at 114.

55. *Id.* (citing *Australian Iron & Steel Proprietary Ltd. v. Banovic*, (1989) 168 C.L.R. 165, 176–77, 184 (per Deane, Gaudron & Dawson, JJ.)).

56. *Hellman v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 645 para. 37.

Incidentally, I am unclear as to why the approach to the identification of the reason for persecution taken by me in *Okere*, and in *Kanagasabai* in which I adopted a similar approach, has been characterised as an application of the ‘but for’ common law test of causation. I do not accept that the determination of whether a person has ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ within the meaning of Article 1A(2) of the Convention calls for an application of a ‘but for’ test of causation.

Id.

ever, the reasons she provided are interesting since they do not reveal a concern that the “but for” test would provide too onerous a test but rather that it would present too low a barrier. Her Honour acknowledged that in the tort context, the “but for” test alone is not a sufficient indication of legal liability as it is considered to be useful only as a “negative criterion of causation,” thus echoing concerns expressed in other decisions of the Federal Court that application of this test would be over-inclusive and must therefore be narrowed in some way. She stressed that the Convention test is to be differentiated from the common law test of causation applicable in tort law and concluded that “the preferable course for the Tribunal to adopt is to focus on the actual wording of Article 1A(2) of the Convention.”⁵⁷ However this does not provide a great deal of guidance other than to confirm that the Australian position is highly subjective.

The concern that an application of the “but for” test, without more, would encompass scenarios and predicaments outside the intended purview of the Convention has also been voiced by the House of Lords and the British Court of Appeal. In *R v. Immigration Appeal Tribunal, ex parte Shah*, Lord Hoffmann took the view that the “but for” test “goes from overcomplication to oversimplification” in its examination of causation,⁵⁸ and preferred instead the “application of common sense notions rather than mechanical rules.”⁵⁹ According to Lord Hoffmann, the “but for” test in certain cases would yield a more generous nexus finding than would be warranted under a “common sense” analysis. Using the example of a time of civil unrest, during which women are particularly vulnerable to attack by marauding men, “because the attacks are sexually motivated or because they [the women] are thought weaker and less able to defend themselves” he explained that while the “but for” test would produce the result that the women would satisfy the refugee definition (for reasons of membership of a particular social group), this would be erroneous because the “necessary element of discrimination is lacking.” What this example reveals, however, is that his Lordship’s real concern about this scenario is that whilst there would be discrimination in effect or impact, there would be no *intent* to discriminate against women *qua* women in such a situation (at least according to his Lordship’s analysis). This approach then turns on his implicit view that some kind of intent requirement is inherent in the “for reasons of” clause, rather than on the shortcomings of the “but for” test *per se*. Once intent is required then

57. *Id.*

58. *R. v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, 654, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999) (per Hoffmann, L.J.).

59. *Id.*

any causation standard formulated will be inadequate since causation does not inherently imply any element of intent.

The underlying concern of Lord Hoffmann in *Ex parte Shah* has been expressly relied upon by the British Court of Appeal in rejecting the claim of a Nigerian man in a remarkably similar predicament to that of the applicant in the Australian decision of *Okere*, discussed above. In *Omoruyi v. Secretary of State for the Home Department*, the applicant was at risk of persecution from a Nigerian cult following his refusal to join it. He had been prevented from joining the cult by his Christian beliefs and thus submitted that his fear of being persecuted was for reasons of religion. The Court dismissed the submission that a “but for” test was applicable in this scenario on the basis that, just as in the “marauding men” example provided by Lord Hoffmann in *Ex parte Shah*, this case involved no element of discrimination or singling out of the applicant by the cult on the basis of his religious beliefs. Thus, “the mere fact that as a Christian *he was more at risk than most* of being harmed by the Ogboni does not qualify him for asylum any more than [in Lord Hoffmann’s above illustration in *Shah*] women who during civil unrest were assumed to be.”⁶⁰ Rather, his well-founded fear “stemmed from his refusal to comply with their demands.”⁶¹ Interestingly, this is precisely the kind of “false dichotomy”—opposing personal reasons against Convention reasons—criticized by Branson, J. in *Okere*.⁶² The difference in result, then, between this case and *Okere* is not so much in the test of causation that was applied (since Branson, J. also eschews a “but for” analysis) but in the extent to which the respective courts were willing to consider the objective predicament in which the applicant was placed as opposed to the intent of the persecutors as the determinative issue. Somewhat paradoxically, the British Court of Appeal has subsequently specifically rejected the argument that the reasoning in *Omoruyi* requires an applicant to prove the persecutor’s motive in every case, acknowledging that such a requirement would “confine the scope of Convention protection in a straitjacket so tight as to mock the words in the recital . . . the widest possible exercise of these fundamental rights and freedoms.”⁶³ However it is very difficult to reconcile this conclusion with the outcome in *Omoruyi*. These cases serve to highlight the urgent need for greater conceptual clarity to be achieved in respect of this element of refugee determination.

60. *Omoruyi v. Sec’y of State for the Home Dep’t*, (2001) Imm. A.R. 175, 184 (Eng.) (per Simon Brown, L.J., with whom Waller, L.J. and Forbes, L.J. agreed) (emphasis added).

61. *Id.*

62. *Okere*, (1998) 87 F.C.R. at 118.

63. *Sepe v. Sec’y of State for the Home Dep’t* (UNHCR Intervening), 2001 E.C.W.A. Civ. 681, ¶ 92 (Eng.) (per Laws, L.J.); *id.* at ¶ 154 (per Jonathan Parker, L.J.).

The cases discussed so far have evinced a concern as to the inappropriate leniency of a “but for” standard. Conversely, the use of the “but for” test in the refugee context has been rejected by the United States Court of Appeals for the Ninth Circuit as being an unfairly high standard on the basis that it imposes too onerous a burden on applicants and may thus exclude some worthy applicants from satisfying the refugee definition. In *Gafoor v. INS*⁶⁴ the court reiterated that in a case involving more than one possible explanation for a well-founded fear of persecution (i.e., both protected and non-protected grounds), it is necessary for the applicant to establish only that the well founded fear is in part for reasons of a Convention ground. In setting out this principle, the court explicitly rejected an argument that it is necessary for the applicant to establish that the protected ground was “sufficient to bring about the action” or that “the persecution would not have occurred in the absence of a protected ground” (i.e., a “but for” test).⁶⁵ In other words, the court acknowledged that it is not always possible to identify the one determinative cause of the fear of persecution without which the applicant would have no well-founded fear, thus making the “but for” test an unworkable approach in the refugee context.

The problems with the “but for” test in the context of mixed motives often result in its abandonment in this context. For example, in more recent cases involving “mixed motives” or “mixed causes/factors,” the Full Federal Court of Australia has apparently moved towards a more generous test. Rather than adopting the language of “but for,” common sense or any other method of formulating the common law test of causation, the court has applied a quite straightforward and liberal approach whereby “it is sufficient if one of the reasons for which persecution is feared is a [Convention] ground.”⁶⁶ In response, the Australian Parliament has very recently amended the Migration Act of 1958 “so as to narrow the interpretation given to the definition of ‘refugee,’ ”⁶⁷ such that

64. *Gafoor v. INS*, 231 F.3d 645, 652–53 (9th Cir. 2000).

65. *Id.*

66. *Minister for Immigration & Multicultural Affairs v. Sarrazola*, 107 F.C.R. 184, 186 (2001) (Austl.) (per Heerey, J.).

67. See Information and Research Services, *Migration Legislation Amendment Bill (No. 6) 2001*, BILLS DIGEST No. 55 2001–02, at 1. “Over recent years the interpretation of the definition of a refugee by various courts and tribunals has expanded the interpretation of the definition so as to require protection to be provided in circumstances that are clearly outside those originally intended.” *Migration Legislation Amendment Bill (No. 6) 2001*, REVISED EXPLANATORY MEMORANDUM, “Outline” para. 3.

In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention. These generous interpretations of our obligations

Article 1A(2) of the Convention does not apply in relation to persecution for one or more reasons “unless that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution.”⁶⁸ The explanatory material accompanying the Bill states that “although it still *may* be possible to allege more than one motivation, the Convention ground must be essential, that is, if the Convention ground were not present, there would be no fear of persecution.”⁶⁹ It is said that this standard “would appear to equate roughly with the common law ‘but for’ test of causation, and perhaps even the ‘true reason’ test, which have been the subject of divergent views in the Federal Court and elsewhere.”⁷⁰

This serves to highlight the confusion in existing understandings of the nexus clause. In particular it is paradoxical that some Australian courts have rejected the “but for” test on the basis that it would encom-

encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.

Hon. Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Second Reading Speech, House of Representatives, 28 August 2001.

68. The new Section 91R (1)(a) of the *Migration Legislation Amendment Act, No.6* (2001) provides that:

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless: (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution.

Id.

69. The background material to the Legislation states that Australian courts have found refugee claims to have been successful where “the Convention-based elements have not been the dominant reasons for” the harm, suggesting that the “essential and significant” reason test equates to the requirement of finding the “dominant” motive. *Migration Legislation Amendment Bill (No 6) 2001*, *supra* note 67, at “Section 91 R: Persecution” para. 19, 21 (emphasis added).

70. *BILLS DIGEST No. 55 2001–02*, *supra* note 67, at 11. The legislative background material claims courts have allowed refugee claims even where the Convention-based elements have not been the dominant reasons for the harm. This allowance has contributed to a widening of the application of the Convention “beyond the bounds intended.” It then goes on to say that

[t]he Refugees Convention does not require that persecution for non-Convention grounds be taken into account in assessing whether a person is owed protection obligations under the Convention. Where the harm feared is attributed to a number of motivations, the proposed legislation will make it clear that it is insufficient that there are merely minor or non-central Convention related motivations in order to bring the persecution within the scope of the Convention. However, persecution for multiple motivations will satisfy the proposed legislative requirements where the Convention ground or grounds in aggregate constitute at least the essential and significant motivation for the harm feared.

Migration Legislation Amendment Bill (No. 6) 2001, *supra* note 67, at “Section 91 R: Persecution” para. 19, 21.

pass situations not properly within the purview of the Convention, whilst the legislature has attempted to tighten and narrow the causation standard by raising the emerging “one factor” test to a “but for” standard.

In summary, the “but for” test involves more than one interpretation, as seen particularly in the contrast between Hathaway’s interpretation and the traditional tort law formulation. Simultaneous criticisms that the test is both too broad (finding nexus where none should exist) and too narrow (failing to find nexus where a protected ground is one of several causes) further indicate the existence of other interpretations of this standard. The greatest confusion arises over how this test accommodates (or fails to accommodate) cases involving multiple causes. It remains unclear, for example, whether the “but for” test requires a claimant’s race to be the only cause of persecution, or the predominant cause, or a cause of particular proportion relative to other non-protected grounds. Such ambiguity creates problems for claimants and decisionmakers alike.

C. Contributing Cause

The “contributing cause” test provides the most inclusive standard, requiring merely that an act be motivated *at least in part* by a Convention ground or that a Convention ground constitute *a factor* in the well-founded fear of being persecuted. This test is often expressed as the corollary of a rejection of the sole test approach.⁷¹ The application of the “at least in part” test does not require the decisionmaker to ascertain the relative weight of each of several causes, but rather requires only a finding that a Convention ground is a contributing cause.⁷² In North America, United States Federal Circuit courts⁷³ and the BIA cite this test, as does the Canadian Federal Court,⁷⁴ although the analysis is

71. See cases cited *supra* notes 13–17, rejecting the sole cause test.

72. *In re S-P, I. & N. Dec. 486, 497* (BIA 1996) (“Notably, the Board in *Matter of B* did not become entangled in the impossible task of determining whether harm was inflicted because of the applicant’s acts or because of his beliefs underlying those acts.”).

73. *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000) (“That CPM members may have had an additional economic reason to persecute Mr. Maini does not affect our conclusion that the CPM persecuted him and his family at least in part on account of a protected ground.”); *Borja v. INS*, 175 F.3d 732, 732 (9th Cir. 1999); *Gutierrez v. INS*, 1999 U.S. App. LEXIS 29235, at *1; *Singh v. Ilchert*, 63 F.3d 1501, 1501 (9th Cir. 1995); *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994); *In re T-M-B, B.I.A. Interim Dec. 3307* (Feb. 20, 1997); *In re S-P, I. & N. Dec. 486* (BIA 1996); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988).

74. See *Zhu v. Canada* (Minister of Employment & Immigration), [1994] F.C.J. 80 (per MacGuigan, J.) (“[I]t is enough for the existence of political motivation that one of the motives was political.”). See also *Shahiraj v. Canada* (Minister of Citizenship and Immigration), No. IMM-3427-00, 2001 Carswell 969 para. 20 (Fed. Ct. of Can., Trial Div., May 9, 2001) (finding “there is reason to believe that the applicant was not randomly targeted for extortion by the police, but that they targeted him based at least partially on his own association with his brother (who had ties to militants) and /or his own imputed political ties to militants”).

undertaken, at least in the United States, in the context of a search for the motives of the persecutor.⁷⁵ The Court of Appeals for the Ninth Circuit has articulated the approach as follows:

As this court has made clear, the statute covers persecution on account of political opinion even where the persecutor acts out of mixed motives. Put another way, the protected ground need only constitute *a* motive for the persecution in question; it need not be the *sole* motive.⁷⁶

This approach has also been adopted in Australian decisions involving mixed motives.⁷⁷

The “contributing cause” approach has often been applied in extortion cases, in which it is difficult to separate the elements of personal interest and Convention grounds such as race and nationality as factors contributing to the applicant’s predicament. Appellate and superior courts have often been critical of an approach, adopted by lower tribunals and decisionmakers, which determines a claim “by the application of a simple dichotomy”: “Was the perpetrator’s interest in the extorted personal or was it Convention related?”⁷⁸ In rejecting this simplistic assessment, superior courts have required decisionmakers to undertake a more sophisticated evaluation, allowing “for the possibility that the extorsive activity has [a] dual character.”⁷⁹ As the Federal Court of Canada has explained, “[p]eople frequently act out of mixed motives, and it is enough for the existence of political motivation that one of the motives was political.”⁸⁰

75. See *supra* note 12.

76. *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (citing its previous decision in *Borja*, 175 F.3d at 736, where it had explained that, “Given this test, we conclude that Ms. Borja’s undisputed testimony compels the conclusion that she was persecuted by the NPA, at least in part, on account of her political opinion.”).

77. See *Minister for Immigration & Multicultural Affairs v. Abdi*, (1999) 162 A.L.R. 105, 112 (per O’Connor, Tamberlin & Mansfield, JJ.); *Minister for Immigration & Multicultural Affairs v. Sarrazola*, (1999) 166 A.L.R. 641, 645–46 (per Einfeld, Moore & Branson, JJ.); *Chokov v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 823 para. 29, 32 (per Einfeld, J.).

78. *Rajaratnam v. Minister for Immigration & Multicultural Affairs*, (2000) Fed. Ct. Unreported Judgments (Reed Int’l Books Austl.) 1111 (Fed. Ct. Austl. Aug. 10, 2000) (para. 48) (per Finn & Dowsett, JJ.). See also *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000). In *Zhu*, Judge MacGuigan of the Canadian Federal Court explained that: “[t]he panel was in error in setting up an opposition between friendship and political motivation. His motives were “mixed” rather than “conflicting.” [1994] F.C.J. 80 para. 2 (Can.). See also *Shahiraj*, No. IMM-3427-00, 2001 Carswell 969.

79. *Rajaratnam*, (2000) Fed. Ct. Unreported Judgments para. 48 (per Finn & Dowsett, JJ.) See also *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000).

80. See *Zhu*, [1994] F.C.J. 80 para. 1.

What remains unclear, however, is whether there is a minimum threshold that must exist before a protected ground falls within the scope of the test. Isolated comments suggest that some courts envisage that a minimum level of significance of the factor to the well-founded fear of being persecuted is required, although rarely is this minimum element elucidated in any meaningful way. For example, in *Jahazi*, French, J. stated that while it is not necessary that the fear of persecution be solely attributable to membership of a relevant social group, a decisionmaker “can have regard to the extent to which membership of the relevant group is a factor in the risk of persecution.”⁸¹ In other cases, terms such as “significant motivation” have been mentioned, although a close reading of these cases suggests that such references are made in relation to the nature of the particular evidence in the cases rather than to a minimum test that must be satisfied.⁸²

Overall the language engaged by the courts, namely, “in part” and “a factor,” suggests that the Convention factor need not be the most important, essential or central factor in the well-founded fear of being persecuted. This is borne out by an analysis of the reasoning undertaken by the courts. For example, in *Lim*, the Ninth Circuit described its previous holding in *Borja* as an “extortion plus” case; that is, a case of extortion with a political element. Extrapolating from that reasoning, the court found that the facts in *Lim* suggested that it was a “revenge plus” case—“revenge partly motivated by (and thus on account of) imputed adverse political opinion.”⁸³ It is clear that, according to this approach, the “on account of” or “for reasons of” clause can be satisfied notwithstanding that the Convention ground was not the dominant nor primary ground for the persecution.

Of course, it should be noted that the analysis above in relation to the “sole ground” test reveals that despite formulating a liberal test in principle, courts do not always apply the test to the facts in individual

81. *Jahazi v. Minister for Immigration & Ethnic Affairs*, (1995) 61 F.C.R. 293, 300 (Austl.) (per French, J.) (proceeding to affirm the rejection of the refugee application, but not on the basis that the Convention ground was not sufficiently significant). *See also Sarrazola v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 101 para. 47 (Austl. Feb. 7, 1999) (per Hely, J.) (setting aside the decision of the RRT to reject the applicant’s refugee claim on the basis that the RRT “erred in law in deciding that the applicant’s fear of persecution was not for reason of her family membership without at least considering the extent to which membership of the family is a factor in the risk of persecution”); *Minister for Immigration & Multicultural Affairs v. Sarrazola*, (1999) 166 A.L.R. 641 (upholding on appeal).

82. *See, e.g., Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (“The evidence compels a finding that Geovanni’s sexual identity was a significant motivation for the violence and abuse he endured . . . We have recognized that persecutory conduct may have more than one motive, and so long as one motive is of one of the statutorily enumerated grounds, the requirements [for asylum] have been satisfied.”) (alteration in original).

83. *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000).

cases. Notwithstanding this, it remains true that the “contributing cause” or “a factor” test is the most liberal in the existing case law.

Interestingly, the United States Department of Justice has recently proposed an amendment to the Immigration and Naturalization Service regulations governing the determination of asylum eligibility that would provide that in cases “involving a persecutor with mixed motivations” the applicant “must establish that the applicant’s protected characteristic *is central* to the persecutor’s motivation to act against the applicant.”⁸⁴ This is similar to the recently enacted legislation in Australia, requiring that the Convention reason constitute the “essential or significant” reason for the well-founded fear of being persecuted. The United States amendment is said to be necessary to achieve clarity and uniformity of interpretation following “conflicting interpretations of the extent to which the persecutor’s motivation must relate to a protected characteristic.”⁸⁵ However, this assertion of conflicting interpretations is questionable since although there may be inconsistencies in the application of the standard among the Circuit Courts of Appeal, the exposition of principle is quite consistent.⁸⁶ Moreover, the public responses to the proposed rule submitted pursuant to the Administrative Procedures Act⁸⁷ have been overwhelmingly critical of this restrictive interpretation with commentators expressing concern that the more restrictive test will impose a prohibitively high and unrealistic burden on applicants and that the use of the word “central” might lead some adjudicators to apply a sole cause test on the basis that only one motivation/cause can be central.⁸⁸

84. Asylum and Withholding Definitions, 65 Fed. Reg. 236 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (emphasis added).

85. *Id.*

86. The explanatory note to the proposed amendment cites only one case in support of the more onerous position. In *Gebremichael v. INS*, the court said that “[a]n applicant qualifies as a ‘refugee’ under the INA if membership in a social group is at the root of persecution,” such that membership itself generates a “specific threat to the applicant.” 10 F.3d 28, 36 (1st Cir. 1993). However, it is important to note that the court was there considering the definition of “social group” within the meaning of the Convention and was not considering the nexus clause. In a later portion of the judgment the court turned to a consideration of the latter, when it stated “We now turn to the question of causation.” *Id.* at 37. It is therefore by no means clear that the court was intending to impose a higher burden on applicants in respect of the nexus determination. See also Memorandum from Harvard Immigration and Refugee Clinic of Greater Boston Legal Services, Inc. and Harvard Law School on Asylum and Withholding Definitions, to INS 8–9 (Jan. 19, 2001) (on file with author) [hereinafter Harvard Immigration Memo].

87. Administrative Procedures Act, 5 U.S.C. §§ 551 et seq. (2001).

88. See, e.g., Comments of the Lawyers Committee for Human Rights on INS No. 2092–00 (on file with author); AG Order No. 2339–2000 at 9–10 (Jan. 20, 2001) (on file with author); Harvard Immigration Memo, *supra* note 86, at 9; and Memo from the American Immigration Lawyers Association on Asylum and Withholding Definitions, to the INS, at 6 (Jan. 17 2001) (on file with author) (describing the proposed amendment as a “major step

D. Tests in Progress

Some courts have acknowledged that the “for reasons of” clause involves “a question of causation”⁸⁹ but have deferred the formulation of an appropriate test to a future time, on the basis that it is unnecessary to decide such a difficult issue unless strictly necessary. For example, in the decision of the House of Lords in *Ex parte Shah*, Lord Steyn turned to the “causation test” and noted that various tests had been put forward by the parties in the case, including a “but for” test (by the applicants) and an “effective cause” test (by the Secretary of State), although Lord Steyn did not elucidate the meaning or intended operation of the different tests. His Lordship ultimately considered that the facts of that case so clearly manifested a causal connection that “the legal issue regarding the test of causation . . . need not be decided.”⁹⁰ Similarly, in Refugee Appeal No. 71427/99, the New Zealand Refugee Status Appeals Authority, following a thoughtful analysis of the nexus issue, concluded, “we do not in this decision have to decide what, in the refugee law context, is the appropriate causation test, an issue also left open by Lord Steyn in *Shah*.”⁹¹

E. No Test

Despite the existence of this wide variety of approaches to the causation question, courts often fail to define a specific causation standard or to undertake any reasoning in relation to the “for reasons of” clause at all. Alternatively, some courts have explicitly approached the nexus question as purely one of intent which, as alluded to above, is not an answer to the question of what *standard* of causation is applicable. For example, in *Elias-Zacarias*, the United States Supreme Court made a nexus determination without any explicit examination of the issue of causation. Rather it approached the question of the linking mechanism by focusing solely on the persecutor’s motive or intent.⁹² However, as

backwards in evolving jurisprudence” and warning that it “would place an impossibly high evidentiary burden on asylum seekers to prove their attacker’s motivations, and result in judges and asylum officers denying asylum to individuals who could not prove their attackers’ central motivations. These are precisely the types of situations the mixed motives case law was designed to remedy.” See also Memorandum from Hastings College of Law, Center for Gender and Refugee Studies on Asylum Withholding Definitions, to the INS, at 6 (Jan. 18, 2001) (on file with author).

89. *R. v. Immigration Appeal Tribunal, ex parte Shah*, *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, 646, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999).

90. *Id.*

91. *Refugee Appeal No. 71427/99*, Refugee Status Appeals Authority, para. 115 (N.Z. 2000).

92. See *INS v. Elias-Zacarias*, 502 U.S. 478, 478 (1992). That this is the approach of United States courts is borne out by subsequent lower court decisions. For example, in

Daniel Steinbock observes, “[t]he plain meaning of ‘on account of’ does not provide a definitive answer to whether such a factor may be one of several reasons for the harm, must be the predominant reason, or must be the only reason.”⁹³ Canadian courts have also displayed an unwillingness to engage in any detailed discussion of the meaning of the nexus clause, taking the view that the nexus determination is “largely a question of fact” and “therefore entirely within the tribunal’s expertise to make.”⁹⁴ Where Canadian courts have discussed the nexus clause, they have tended to analyze it from the perspective of the intention of the alleged persecutors.⁹⁵ On the other hand, the Federal Court of Canada has warned that adjudicators should not “base [their] determination as to whether or not a claimant has established a nexus to the Convention on the subjective belief of the alleged persecutors themselves, especially since these alleged persecutors are obviously not present at the hearing . . . and cannot testify as to their own subjective state of mind,”⁹⁶ leaving the position somewhat unclear.

Canas-Segovia, the Ninth Circuit explained that in a pre-*Elias-Zacarias* decision, “we took pains to explain that although evidence of a persecutor’s intent was relevant, it was not required.” *Canas-Segovia v. INS* 970 F.2d 599, 601 (9th Cir. 1992). However, following the decision of the Supreme Court in *Elias-Zacarias* and the remand of *Canas-Segovia* to the Ninth Circuit by the United States Supreme Court, the Ninth Circuit held that it had been wrong to grant the petitioner’s application on the basis of his well-founded fear of being persecuted for religious reasons, since although “*Canas-Segovia* argues that (1) it is undisputed that his sincere religious convictions require him to refuse to serve in the military, (2) his refusal to serve is a religious practice and (3) he is being persecuted because of his religious practice i.e. his refusal to serve,” he was unable to show evidence of his persecutor’s intent and therefore, his claim based on religious persecution had to be rejected. *Canas-Segovia*, 970 F.2d at 601.

93. Daniel J. Steinbock, *Interpreting the Refugee Convention*, 45 UCLA L. REV. 733, 763 (1998).

94. *Leon v. Canada (Minister of Employment and Immigration)*, [1995] 58 A.C.W.S. (3d) 289.

95. See *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (“[T]he mental element which is decisive for the existence of persecution is that of the government, not that of the refugee.”). See also *Rizkallah v. Canada (Minister of Employment and Immigration)*, [1992] 156 N.R. 1; *Canada v. Ward*, [1993] 2 S.C.R. 689, 747 (stating that “[t]he examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution.”); *id.* at 749 (distinguishing the United States decision of *Elias-Zacarias* since “[i]n Ward’s case, a contrario, his act was inconsistent with any other possible motives The rational underlying his decision was unequivocal, both in his eyes and in those of the INLA,” thus implicitly approving of the approach in *Elias-Zacarias*).

96. *Shahiraj v. Canada (Minister of Citizenship and Immigration)*, No. IMM-3427-00, 2001 Carswell 969 para. 19 (Fed. Ct. of Can., Trial Div., May 9, 2001). See also *Zhu v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. 80; *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250, the seminal civil war case, where the Canadian Federal Court appeared to approach the nexus question from the perspective of the applicant’s fear:

A novel variation in approach is that taken by the High Court of Australia in *Chen Shi Hai*, a case involving the Chinese government's persecutory treatment of "black children" (children born outside the parameters of China's one child policy). The Court there suggested that devising a single causation test or analysis for all Convention grounds may not be feasible, instead proposing that "the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct."⁹⁷ The Court then proceeded to elucidate an approach to the nexus inquiry that closely resembles the adjudication of constitutional rights in the United States. It set out a hierarchy of scrutiny, with race, religion, and nationality requiring the strictest scrutiny, since "ordinarily, race, religion, and nationality do not provide a reason for treating people differently"; thus, "if persons of a particular race, religion, or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality."⁹⁸ In relation to membership of a particular social group and political opinion, the position was said to be more complex, since different treatment of persons falling within those groups may be warranted if appropriate and adapted to "achieving some legitimate object of the country [concerned]." Thus, an analysis of the "for reasons of" clause could involve the court in an examination of the justification for different treatment and a balancing of the degree and severity of the different treatment against the purported legitimate aims and objects of the sanction.⁹⁹

A situation of civil war in a given country is not an obstacle to a claim provided that the fear felt is not that felt indiscriminately by all citizens as a consequence of civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition.

Id.

97. *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (2000) 201 C.L.R. 293, 302 (Austl.) (per Gleeson, C.J., Gaudron, Gummow & Hayne, JJ.).

98. *Id.* at 302-03.

99. See, for example, the jurisprudence of the United States Supreme Court in interpreting the equal protection clause of the Fourteenth Amendment. The Court has constructed a hierarchy of review whereby race is the most "suspect" category on which to base a distinction in treatment, giving rise to the strictest scrutiny by the courts, while "gender" is quasi-suspect, yielding an intermediate level of review. There are other limited categories that might also give rise to heightened review (i.e., heightened beyond rational basis review) such as alienage and illegitimacy. In cases involving race, the government must establish that a racial classification is "necessary to the accomplishment of some permissible state objective." See *Loving v. Virginia*, 388 U.S. 1, 11 (1967). That is, the distinction must be "justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

This is a curious method of approaching the nexus question. The statement that a different causation test may apply to different Convention grounds is not justified in the Convention text; nor is an approach that implies a stronger connection to a Convention ground merely by reference to a superimposed hierarchy of scrutiny. In truth however, the reasoning can be understood as more appropriately directed to the question whether particular treatment or conduct amounts to persecution than to the nexus question. Indeed, it tends to presuppose that the evidence is clear, or that a determination has already been made, that a distinction in treatment is explained by reference to one of the Convention grounds. It does not assist in ascertaining whether persecutory treatment is in fact for a Convention reason since it starts from the premise that the discriminatory treatment at issue is based on a Convention ground and to that extent is not actually a causation standard or test.¹⁰⁰

Ultimately the Court in *Chen Shi Hai* undertook the nexus determination based on the presumptive analysis that once it is accepted that “black children” are a social group for the purposes of the Convention, that they are treated differently from other children, and that the different treatment amounts to persecution, “there is little scope for concluding that that treatment is for a reason other than his being a ‘black child.’”¹⁰¹ Interestingly, the Court stated that a different conclusion would be open only where the persecution was referable solely to some other attribute or characteristic, other than the fact of being a “black child,” clearly envisaging the possibility of mixed reasons in a Convention claim.¹⁰²

In a concurring opinion in *Chen Shi Hai*, Kirby, J. eschewed the adoption of a particular formula or test to assist in the application of the “for reasons of” standard, on the basis that “it is neither practicable nor desirable to attempt to formulate ‘rules’ or ‘principles’ which can be substituted for the Convention language.”¹⁰³ His Honour instead proposed that,

the decision-maker must evaluate the postulated connexion between the asserted fear of persecution and the ground suggested to give rise to that fear. The decision-maker must keep in mind

100. This approach is also highly context-specific; a different analysis of causation would presumably be required in the case of persecution by non-state agents, since it is difficult to imagine persecution by non-state agents (which the state is unable or unwilling to control) ever being considered appropriate and adapted to achieving some legitimate object of the country concerned.

101. *Chen Shi Hai*, (2000) 201 C.L.R. at 304 (per Gleeson, C.J., Gaudron, Gummow & Hayne, JJ.).

102. *Id.*

103. *Id.* at 314.

the broad policy of the Convention and the inescapable fact that he or she is obliged to perform a task of classification. Quite simply, many acts lend themselves to ready assignment to different 'reasons.' Human conduct is rarely, if ever, uni-dimensional.¹⁰⁴

One very important aspect of the Court's decision in *Chen Shi Hai* is that the Court acknowledged that, in the context of the question whether a law of general application can amount to persecution for a Convention reason, "general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily,"¹⁰⁵ thus moving away from an intent-focused approach. Moreover, in rejecting the need to prove "enmity," "malignity," or "adverse intention" on the part of the persecutor, Kirby, J. warned against subjecting the words of the Convention "to earlier more extreme meanings of persecution" which placed greater emphasis on persecutory intent.¹⁰⁶

In sum, courts recognize the complexity of the nexus issue. However, the pervasive confusion and inconsistent application of causation standards in nexus determinations have resulted either in poorly articulated standards, incomplete or inconsistent analyses, or a complete failure to examine the nexus element altogether.

II. DEVELOPING AN APPROPRIATE STANDARD IN THE REFUGEE CONTEXT

A. Causation Should be Context-Specific

As the above discussion displays, when discussing causation standards in the refugee context by reference to standards in other areas of law, courts often draw on tort principles, almost to the exclusion of other

104. *Id.* at 314–15. *See also* Gersten v. Minister for Immigration & Multicultural Affairs, (2000) F.C.A. 855 para. 28 (Austl.).

105. *Chen Shi Hai*, (2000) 201 C.L.R. at 301 (per Gleeson, C.J., Gaudron, Gummow & Hayne, JJ.). *See also* Wang v. Minister for Immigration & Multicultural Affairs, (2000) F.C.A. 1599 para. 63 (per Merkel, J.) where his Honour said:

While, generally, punishment for breach of a criminal law of general application will not constitute persecution for a Convention reason, the proposition contended for by the Minister that prosecution under generally applicable laws cannot amount to persecution for a Convention reason is erroneous. Before such a conclusion can be reached in a particular case the circumstances of the individual concerned must be considered. That consideration will usually occur in the context of an inquiry into the nature of the law, the motives behind the law, whether the law is selectively or discriminatorily enforced *or impacts differently on different people.* (emphasis added).

106. *Chen Shi Hai*, (2000) 201 C.L.R. at 312.

areas of law in which causation plays a role. Moreover, this reference is made without any real analysis of its relevance or appropriateness to the refugee context; rather it is merely assumed that tort law provides an obvious model. This is a serious deficiency because “[q]uestions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise.”¹⁰⁷

Different aims and policy objectives inform different areas of the law. As a result, one danger of transplanting doctrines from one area of law into another is that the principles appropriate in one area with one set of objectives might become irrelevant or even inappropriate in an area with different objectives.¹⁰⁸ Justice MacLachlin (now Chief Justice) of the Canadian Supreme Court described this phenomenon in a discussion concerning the wisdom of importing tort doctrines into consideration of equitable principles. Her Honour expressed concern with “proceeding by analogy with tort” in that such an approach “overlooks the unique foundation and goals of equity.”¹⁰⁹ Rather,

the better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy. In so far as the same goals are shared by tort and breach of fiduciary duty, remedies may coincide. But they may also differ. The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty.¹¹⁰

The dangers inherent in “transplanting” arise particularly in the refugee context where courts have referred to and borrowed concepts from other areas of the law. Rather than focusing on the object and purpose of the Convention, which is concerned with providing international protection to persons at serious risk of harm, courts too often adopt tests more appropriate to ascertaining criminal or civil liability, without acknowledging these doctrinal differences or attempting to adapt the imported tests accordingly.

The most poignant example of the dangers inherent in such an approach is contained in the reasoning of the Federal Court of Australia in

107. *Chappel v. Hart*, (1998) 195 C.L.R. 232, 238 (Austl.) (per Gaudron, J.). *See also* H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* 26 (1959).

108. *See, e.g.*, *IW v. City of Perth*, (1997) 191 C.L.R. 1, 66 (Austl.) (Kirby, J.) (stating that in the context of causation in anti-discrimination law, that the tribunal below was “led into error by its use of inapplicable analogies instead of concentrating on securing the objects of this particular Act as expressed in its language.”).

109. *Canson Enter. Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 545 (per McLachlin, J., delivering the judgment of Lamer, C.J., and L’Heureux-Dubé, J.) (Can.).

110. *Id.*

*Gersten v. Minister for Immigration & Multicultural Affairs*¹¹¹ wherein it was held:

If the ‘but for’ test is not to be used exclusively in [the refugee] context, but its application is to be ‘tempered by the making of value judgments and the infusion of policy considerations,’ then, it appears to me, one may consider for transfer to that context those value judgments and policy considerations which have tempered the application of that test in the negligence context.¹¹²

One such tempering matter in the negligence context which the court in *Gersten* thought relevant to the adjudication of refugee determinations was that “it may be ‘unjust’ to hold a defendant legally responsible for an injury which, though it may be traced back to the wrongful conduct of the defendant, was the immediate result of unreasonable action on the part of the plaintiff.”¹¹³ The court then said:

No good reason appears to me why, in the context of ascertaining legal responsibility for persecution in the Convention context, the ‘but for’ test of causation should not be tempered by the use of a matter similar to that which was referred to by Gummow and Kirby JJ in *Chappel*, namely, unreasonable action by the person claiming to have been persecuted, the immediate result of which unreasonable action was the suffering by that person of the alleged persecution.¹¹⁴

111. (1999) F.C.A. 1768 para. 101–11 (per Katz, J.).

112. *Id.* para. 108.

113. *Id.* para. 110 (quoting from Gummow, J. in *Chappel v. Hart*, (1998) 195 C.L.R. 232).

114. *Id.* para. 112. The court then applied these principles to the facts in *Gersten* as follows:

To translate that matter to the present case, it appears to me to have been open to the Tribunal to conclude that, although there might be here an appearance of responsibility in the State Attorney’s office for Mr. Gersten’s detention, because, but for the State Attorney’s office investigation into the theft of Mr. Gersten’s car, Mr. Gersten would not ultimately have been detained, nevertheless that appearance of responsibility was displaced by Mr. Gersten’s unreasonable action of refusing to comply with Dean, J.’s order to answer certain questions put to him by Mr. Band, his detention being the immediate result of such unreasonable action by him.

That, in fact, is what I interpret the Tribunal to have been saying when giving its reasons for refusing to attribute legal responsibility for Mr. Gersten’s detention to the State Attorney’s office and attributing it instead to Mr. Gersten’s own conduct.

Id. para. 112–13.

The decision of the single judge of the Federal Court, referred to here, was appealed to the Full Federal Court. *See Gersten v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 855. In the course of dismissing the appeal, the Full Federal Court did discuss the “for reasons of” clause but did not refer specifically to the importation of tort-related

The reasoning in this case has led one commentator to conclude that “some conduct by [refugee] applicants, if it is unreasonable will sever any causal connection which might otherwise have existed.”¹¹⁵

The obvious problem with this approach is that it fails to take into account the different objectives and underlying aims of the different areas of law. While it is true that the object of causation and other elements of tort law is to ascertain legal responsibility for a wrong, it is not the case that the object of the Refugee Convention is to “ascertain[] legal responsibility for persecution.” On the contrary, the sole aim of the Convention is to provide protection, including certain rights and benefits, to those falling within the definition of “refugee” and is not, on any possible reading of its terms, concerned with ascertaining “liability” or guilt for persecutory acts. As the United Nations High Commissioner for Refugees (UNHCR) has observed, “[t]he legal regime of refugee protection . . . is centered on the grant of a humanitarian benefit, not on the punishment of persecutors.”¹¹⁶ Moreover, the introduction of notions of disqualifying “unreasonable conduct” on the part of refugee applicants ignores the fact that the Convention sets out the circumstances in which a person will be excluded from its operation in very specific

concepts undertaken by Katz, J. *See id.* para. 23–35. Therefore it is not clear whether the Full Federal Court was impliedly rejecting this approach or, by declining to comment upon it and affirming the judgment below, was in fact impliedly accepting it. The fact that the court affirmed the statement of Kirby, J. in *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (2000) 201 C.L.R. 293, 315, that “it is neither practicable nor desirable to attempt to formulate ‘rules’ or ‘principles’ which can be substituted for the Convention language,” *Gersten*, (2000) F.C.A. 855 para. 28, may suggest that it would reject a tort based approach. Ultimately it may be that the failure to discuss these issues reflects the way it was argued by counsel. Following the decision of the Full Federal Court, the applicant sought special leave in the High Court of Australia, which was refused on 2 October 2001. *See Ex parte Gersten*, S78/2001 (2 Oct. 2001), *transcript available at* <http://www.austlii.edu.au/au/other/hca/transcripts/2001/S78/2.html>. Interestingly, these issues were not canvassed by the applicant at the High Court stage, thus the Court did not refer to them in oral argument or in its reasons for refusing special leave. *See id.*

115. Leeming, *supra* note 50, at 100, 102.

116. Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent at 16, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). *See also* Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?* 18 SUFFOLK TRANSNAT’L L. REV. 53, 107.

Foremost, the standards for establishing refugeehood are unmistakably different from the standards of a criminal investigation. Allegations of asylum seekers are not to be read as ‘charges,’ and the asylum procedure is not about the ‘guilt’ of the persecutor. The allegations provide a basis for the agency’s decision on the well-foundedness of the applicant’s fear of being persecuted. The important question of whether or not there are good reasons to fear persecution can only be answered if the agency takes the victim’s perspective and—to decide upon the well-foundedness—the perspective of an informed observer.

Id.

and definite terms,¹¹⁷ and it is not open to state parties, as a matter of international law, to formulate new exclusionary provisions outside the scope of the Convention terms.¹¹⁸ Finally, the introduction of the notion of “unreasonable conduct” on the part of the claimant is inconsistent with the well-recognised principle that, in relation to other aspects of the refugee definition, entitlement is not forfeited merely because the risk arises from claimant’s own conduct no matter how unreasonable. That is, it has been held that an assumption that a person with a strongly held religious or political belief “should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention.”¹¹⁹ Thus, to introduce the notion that “unreasonable conduct” can sever the causal connection is dangerous and inconsistent with existing authority.

This practice of introducing tort notions of negligence and contributory fault into refugee law appears to be restricted to this case, but nonetheless dramatically demonstrates the risks involved in adopting tests from other contexts into refugee law. The tendency to draw on the tort analogy with implicit faith in its adaptability to the refugee context should give courts pause to consider what the consequences of such action may be. As *Gersten* illustrates, this practice is fraught with hazard.

This is not to say that decisionmakers and policymakers should not “take wisdom where we find it, and accept such insights offered by the law of tort” among other areas.¹²⁰ However, any test that courts adopt in the refugee context must be grounded in an understanding of the aims and purpose of the Convention and must be framed in a manner which gives full effect to the Convention definition.¹²¹ As recently emphasized by the New Zealand Court of Appeal, “[o]ur concern must be the policy

117. See Convention, *supra* note 1, art. 1(F) (setting out the persons to whom the Convention shall not apply). Article 1(C) sets out the persons to whom the Convention will cease to apply. *Id.* art. 1(C).

118. *Id.* art. 42 (stating Article 1 of the Convention may not be derogated by state parties).

119. *Omar v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 1430 para. 38 (per Black, C.J., Ryan & Moore, JJ.), *cited in* *Wang v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 1599 para. 85 (per Merkel, J.). See further authority discussed in *Wang* at para. 82–91, 99.

120. *Canson Enter. Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 545–46 (per McLachlin, J., delivering the judgment of Lamer, C.J., and L’Heureux-Dubé, J.) (Can.).

121. This approach has recently been adopted by the 15 Member States of the European Union at the Tampere European Council of October 1999 where Member States agreed to work toward establishing a common European Asylum System “based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principal of non-refoulement.” Tampere European Council, Presidency Conclusions, 15–16 October 1999, para. 13 at <http://europa.eu.int/council/off/conclu/oct99/>.

of the statute [or Convention] rather than the policy of the common law.”¹²²

B. *The Particular Challenges of Refugee Adjudication*

Determinations of causation in refugee law grow increasingly more complex. The kinds of situations that precipitated forced migration (within the auspices of the Convention) at the time the Convention was drafted do not necessarily represent the majority of circumstances in which people seek international protection today. For example, persecution by non-state agents, whose aims and motivations may be diverse and complex, are far more common in contemporary cases, thus raising the issue of multiple causes.¹²³ Indeed as reflected in the case law, cases involving “multiple causes” are now the rule rather than the exception.¹²⁴ Multiple causes arise frequently in situations of guerilla warfare and attacks by insurgent groups and in the situation of civil wars, where decisionmakers must determine whether harm was due to purely generalized violence, civil strife related to a protected ground, or some complex combination thereof.¹²⁵

Even in cases where courts are able to determine the multiple causes, gaps in the available evidence are often so significant as to seriously impede the nexus determination. Difficulties in cross-cultural communica-

122. *Atkinson v. Accident Rehab. Comp. and Ins. Corp.*, N.Z. Court of Appeal, 9 October 2001, para. 25 at <http://www.brookers.co.nz/legal/judgments>.

123. Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 240 (1996).

In today's chaotic world, the identity and the motivations of the persecutor are more elusive. Not only have many totalitarian regimes fallen, the state itself has vanished in some refugee-producing locales. Repression comes at the hands of shadow organizations whose links to state authority are deliberately obscured or who portray themselves as antagonists of the formal state Criminal profit motives are increasingly and more visibly linked to the impulse for political dominance.

Id.

124. THE QUESTION OF A GENERAL APPROACH TO THE PROBLEM OF REFUGEES FROM SITUATIONS OF ARMED CONFLICT AND SERIOUS INTERNAL DISTURBANCE 14 (G.J.L. Coles ed., 1989). “Today, the international refugee problem is essentially that of one or more of a number of different but closely related conditions within the country of nationality which can compel the exodus of nationals.” *Id.*

125. N.Z. Refugee Status Appeals Authority, *Refugee Appeal No. 71462/99*, 27 September 1999, para. 30.

It is common to find that in civil wars and other situations of generalized violence that human rights abuses are committed not only by the combatants on the different sides . . . but also by other groups and individuals who may have no connection with either the state or any of the warring factions. Very often the reasons for the commission of human rights abuses will be mixed.

Id.

tion,¹²⁶ lack of access to corroborating evidence in foreign countries, inability to procure witnesses, faulty interpreting or incomplete transcription into the court record, a reluctance to discuss traumatic events, a fear or mistrust of interrogating officials, and simple memory failure comprise only a few of the obstructions to evidence-gathering in refugee cases.¹²⁷ Some courts have acknowledged the particular difficulty of fact-finding in the civil war context.¹²⁸ As the New Zealand Refugee Status Appeals Authority observes, “the very nature of civil war situations will often preclude access to the facts required for judgments of this kind to be made. More often the decisionmaker will, of necessity, be forced to make a broad and general assessment.”¹²⁹

Multiple causes and evidentiary gaps—so characteristic of refugee law—pose serious challenges to successful nexus determination. Ultimately, causation standards in the refugee context must operate clearly and consistently to accommodate both multiple causes and evidentiary ambiguity.

C. Obtaining Guidance from Causation Standards in Different Fields of Law

Causation is a complex and controversial issue in many areas of law and it is difficult to find a simple test that is uniformly applied and understood in almost any area of the law. Indeed it has been admitted that in considering the question of what is the appropriate test of causation, “[j]udges have been known to despair in their quest for the answer.”¹³⁰ Part of the problem arises from the artificial nature of a legal analysis of causation. For example, courts have frequently stated that the

126. See generally Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 22 INT’L MIGRATION REV. 230 (1986).

127. See generally ROBERT F. BARSKY, *CONSTRUCTING A PRODUCTIVE OTHER: DISCOURSE THEORY AND THE CONVENTION REFUGEE HEARING* (1994).

128. *Minister for Immigration & Multicultural Affairs v. Abdi*, (1999) 162 A.L.R. 105 para. 21 (per O’Connor, Tamberlin and Mansfield JJ.)

In order to appreciate what is covered by such civil or clan warfare, it is essential for a decision-maker to look beyond the existence of a state of war to determine whether the war is directed to objectives such as securing power, property and access to resources, or whether in reality it is directed against persons or groups because of race, religion or group membership. Unless attention is focused on the reasons for the war, it is difficult, if not impossible, to determine whether the antagonism is based on Convention grounds. It is not enough to dismiss an application simply on the basis that there is a war without looking at the motivations or purposes involved. Civil wars vary greatly in character and objectives.

Id.

129. N.Z. Refugee Status Appeals Authority, *Refugee Appeal No. 71462/99*, at para. 51.

130. *Bank of N.Z. v. N.Z. Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. 213, 239 (per Fisher, J.).

legal concept of causation differs from scientific and philosophical notions of causation:

In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.¹³¹

This dichotomy between “legal” causation and scientific or philosophical causation should be kept in mind when analyzing causation in the refugee context, particularly since, as explained above, the Convention focuses solely on protecting those who are persecuted and not on apportioning liability and blame for wrongful acts. By contrast, nearly every other area of law is concerned with ascertaining liability for civil and criminal wrongs. Therefore, the development of appropriate tests of causation in those contexts is largely influenced by policy considerations which inform the issue of what legal consequences should attach to certain conduct.¹³²

Moreover, other bodies of law are concerned with developing appropriate tests for ascertaining what caused an event in the past rather than looking forward to a potential future risk. For this reason, decisionmakers in these contexts deal with issues that are more certain and definable, and are more likely to have access to evidence to assist in their findings of fact. By contrast, refugee law is concerned with assessing whether a person has a well-founded risk or fear of *future* persecution in another country, making the evidentiary burden on the applicant much heavier. Past persecution is relevant, but only as it bears upon the question of future risk.¹³³

With these important caveats in mind, and remaining cognizant of the dangers of “transplanting” discussed above, the following discussion surveys the role and meaning of causation in three fields of law in order to gain perspective from different existing tests. This survey is not undertaken with a view to locating the particular causation test that should be “transplanted” from an area of domestic law into the Refugee Convention. Rather, the aim is to provide an overview of broad approaches to causation in order to understand the role that it plays in different fields of law and the distinct approaches to its determination in various contexts.

131. *March v. E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. 506, 509 (per Mason, C.J.).

132. Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518 (1975).

133. See generally HATHAWAY, *supra* note 37, at 66–70.

In particular, it is useful to gain an understanding of the law's ability to mould causation standards to accommodate particular challenges prevalent in different fields of law. This is principally useful in assuaging concerns that adopting a liberal standard of causation in the refugee context would be novel or that to do so would effectively abandon a causal analysis altogether.¹³⁴

The Article aims to identify those areas where the conceptual underpinnings and policy concerns are most analogous to the context of refugee law and to discount those that are least analogous. As an example of something in the latter category, criminal liability presents a body of law and policy that is largely irrelevant to the refugee context. The aims of the criminal justice system are fundamentally different from the objectives of the Refugee Convention, leaving little utility in using it to illuminate an investigation of causation in the refugee context. Criminal law is concerned with ascertaining liability or culpability for an offence and thus focuses solely on the responsibility of the perpetrator of a crime. Given the consequences for the defendant of a criminal conviction, the prosecution faces a high burden of proof—namely, proof beyond reasonable doubt—which extends to every element of an offence, including the issue of causation.¹³⁵ Similarly, although an initial consideration of the question of causation in international refugee law might lead one to turn to causation in international law more generally, closer consideration suggests against seeking guidance from the law on state responsibility (the key area of international law in which causation is relevant) since the policy bases of the two areas are fundamentally different.¹³⁶

134. *See generally* Gafoor v. INS, 231 F.3d 645, 652–63 (dissenting opinion).

135. The UNHCR has recognized the distinct policy goals of refugee and criminal law, commenting that, “refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof.” *See* DEBORAH ANKER, *LAW OF ASYLUM IN THE UNITED STATES* ch. 5, 271 n.33 (1999) (quoting from UNHCR, Inter-Office Memorandum, Mar. 1, 1990).

136. The doctrine of causation in the field of state responsibility is concerned with attributing liability for an internationally wrongful act since it is only “injury . . . caused by the internationally wrongful act of a State for which full reparation must be made.” *Report of the International Law Commission* (53rd Sess.), U.N. GAOR, 56th Sess., Supp. No. 10, at 227, U.N. Doc. A/56/10 (2001)(adopting draft articles on state responsibility). The ILC has explained:

[T]he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses ‘attributable [to the wrongful act] as a proximate cause,’ or to damage which is ‘too indirect, remote and uncertain to be appraised’ . . . Thus causality in fact is a necessary but not sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of

Instead the Article turns to three areas of domestic law, namely, tort law (negligence), equity/breach of fiduciary duty, and anti-discrimination law. First, tort law is considered because refugee judges most frequently refer to this when formulating tests for the “for reasons of” clause. It is therefore useful to consider the extent to which reference to this body of law is helpful in the refugee context. Second, the Article moves from the common law to the equitable field, and particularly to breach of fiduciary duty, since the policy goals underlying equity are similar to those in the refugee context, and courts in the field of equity have attempted to modify and ameliorate the strictness of the common law in order to provide maximum protection to vulnerable groups. Finally, the analysis turns to anti-discrimination law because although concerned with civil liability, the underlying principles resonate with those underpinning refugee law. In considering these three areas of law, the Article focuses on those issues that correlate to the particular challenges facing refugee law, namely, multiple causes and evidentiary gaps.

1. Tort

Causation has “plagued courts and scholars more than any other topic in the law of torts.”¹³⁷ The function of the doctrine of causation in the context of unintentional torts or negligence is to “assign a duty to take reasonable steps to prevent a foreseeable risk of harm of the kind in issue.”¹³⁸ It is concerned with “the allocation of legal responsibility rather than [merely] the determination of what has happened.”¹³⁹ Given this conceptual framework, the law of torts addresses both factual and legal causation. Weinrib explains the distinction as follows:

Under the rubric of cause in fact, the focus is a historical one, and attention is directed to the simple questions of what happened, of whether the defendant’s conduct produced the injury. The second rubric, that of proximate cause or remoteness, deals with what is usually a much more complex question: Assuming that the defendant’s conduct did result in the injury, what legal

reparation. In some cases the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity.’

Id. at 227–28.

137. JOHN G. FLEMING, *THE LAW OF TORTS* 172 (7th ed. 1987). See also Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985).

138. *Chappel v. Hart*, (1998) 195 C.L.R. 232, 238 (Austl.) (per Gaudron, J.).

139. *March v. E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. 506, 529 (per McHugh, J.).

consequences should the law attach to the defendant's conduct?¹⁴⁰

It is important to emphasize that the only aspect of causation relevant to the refugee context is that of factual causation: the "simple questions of what happened" or, in the case of refugee law, "what *may* happen." Since refugee decisionmakers are not concerned with apportioning liability, it is unnecessary to ascertain the second level of causation, that is, what should, as a matter of policy, be the legal ramifications or consequences of a "defendant's" conduct. This means that notions of "proximate cause," "foreseeability," "novus actus interveniens," and "direct cause" are irrelevant in the refugee context as they are principles developed by courts to limit legal liability on policy grounds.

This is vital because the most prevalent problem with the use of tort doctrines in refugee law, at least in common law systems, is the importation of both factual and legal notions of causation. The most common method of importing issues of legal causation in refugee cases is via the "common sense" approach to causation analysis, discussed above.¹⁴¹ The elision of factual and legal causation is easily (and seemingly unconsciously) made in the refugee context because in many common law countries the question whether a person is responsible in tort for a certain event involves "considerations of policy" which "have a prominent part to play, as do accepted value judgments" in the task of attributing responsibility for tortious activity.¹⁴² In other words, the test of factual causation, the "but for" test, is modified by the application of policy considerations as an additional layer of the test of legal causation, which is most often encapsulated in the shorthand phrase "common

140. Weinrib, *supra* note 132, at 518.

141. See *R. v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629, 654, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999) (per Steyn, J.). See also *Hellman v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 645 para. 36–39 (Austl.) (per Branson, J.); *Gersten v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 1768 para. 108 (Austl.) (per Katz, J.); *Okere v. Minister for Immigration and Multicultural Affairs*, (1998) 87 F.C.R. 112, 117–18 (Austl.) (per Branson, J.).

142. *E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 515 (per Mason, C.J.). In the same case, McHugh, J. explained that "common sense" like other doctrines such as "proximity" is "the product of a policy choice that legal liability is not to attach to an act or omission which is outside the scope of that rule even though the act or omission was a necessary precondition of the occurrence of damage to the plaintiff." *Id.* at 531. This is the position in the United Kingdom, Australia, Canada, and New Zealand. See generally *Chappel*, (1998) 195 C.L.R. 232 (per Gaudron, J.); *Farrell v. Snell*, [1990] 2 S.C.R. 311 (Can.); *Env'tl. Agency v. Empress Car Co. (Abertillery) Ltd.*, (1999) 2 A.C. 22; *Alphacell Ltd. v. Woodward*, 2 All E.R. 475 (1972); *Sew Hoy & Sons Ltd. v. Coopers & Lybrand*, [1996] 1 N.Z.L.R. 392.

sense.”¹⁴³ Because the notion of “common sense” is well entrenched in the common law legal tradition, it is tempting, as evidenced above, to import similar notions into the refugee context. However, this raises some fundamental problems and should be strongly resisted.

The test itself is vague, largely because courts have declined to elucidate the test in a way which provides any meaningful guidance to decisionmakers. Indeed, whether it can even be described as a test is questionable. One judge of the New Zealand Court of Appeal has said that “common sense is not itself a test” and that causation in tort is not resolved by reference to a formula but “by the application of a Judge’s common sense.”¹⁴⁴ A common sense approach introduces an element of arbitrariness into the refugee determination process in that notions of “common sense” and “policy” are inherently subjective. For example, in the context of Australian tort law it has been acknowledged that a conclusion on causation “is often reached intuitively,”¹⁴⁵ and that since the test “is not susceptible of reduction to a satisfactory formula”¹⁴⁶ this branch of the law is “highly discretionary and unpredictable.”¹⁴⁷ Indeed one Justice has criticized the unprincipled nature of such a test in the tort context on the basis that it allows “tribunals of fact, under the guise of using commonsense, to determine legal responsibility by applying their own idiosyncratic values” and “subjective, unexpressed and undefined extra-legal values.”¹⁴⁸

Given the arbitrariness of this standard, its application can lead to vastly different results.¹⁴⁹ Not only may there be “different answers to questions about causation when attributing responsibility to different people under different rules” but there may be “different answers when attributing responsibility to different people *under the same rule*.”¹⁵⁰

143. See *E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 515 (Mason, C.J.) (explaining the difference between factual and legal causation. The court is to apply “common sense to the facts of the particular case” in order to ascertain liability.). See also *Chappel*, (1998) 195 C.L.R. at 238 (per Gaudron, J.) (citing *Studey v. Gypsum Mines Ltd.*, (1953) A.C. 663, 681 (per Reid, L.J.)); *Farrell*, [1990] 2 S.C.R. 311; *Empress Car Co. (Abertillery) Ltd.*, [1999] 2 A.C. 22; *Alphacell Ltd.*, 2 All E.R. 475 (1972); *Coopers & Lybrand*, [1996] 1 N.Z.L.R. at 392.

144. See *Coopers & Lybrand*, [1996] 1 N.Z.L.R. at 408–09.

145. *Chappel*, (1998) 195 C.L.R. at 290 (per Hayne, J.).

146. *Penn*, (1954) 91 C.L.R. at 277–78.

147. *Chappel*, (1998) 195 C.L.R. at 264 (per Kirby, J.) quoting A.M. Honoré, *Causation and Remoteness of Damage*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW XI Ch. 7 § 105 (K. Zweigert ed., 1981)).

148. *E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 533 (per McHugh, J.).

149. See *Minister for Immigration & Multicultural Affairs v. Khawar*, (2000) 178 A.L.R. 120, 134–35 (Austl.).

150. *Empress Car Co. (Abertillery) Ltd.*, [1999] 2 A.C. at 30.

This discrepancy is borne out by a consideration of the method by which refugee decisionmakers have dealt with the notion of “common sense.” In some cases it may provide a positive result for the applicant.¹⁵¹ However, in other cases the courts introduce it as a way of rejecting applicants from the protection of the Convention.¹⁵² The dangerous potential of such a malleable and subjective test appears starkly in the decision of the Full Federal Court of Australia in *Chen Shi Hai*, where Justices O’Loughlin and Carr stated, after referring to the “common law test of causation,”:

In terms of the policy reflected by the Convention, we do not think that it was part of that policy to enable parents, who have been held not be refugees, to confer refugee status on their children by bringing those children into the world in circumstances where that very procreation is contrary to the policy of laws of general application in their country of origin. The policy of the Convention is to require a great deal of international altruism and benevolence on the part of a receiving State, *but unless a common sense line is drawn to distinguish between those who are real refugees from those who are not, there will be a risk that genuine refugees will be penalized* Once one appreciates that purpose and scope, one can give a common sense answer to the question of causation in the present matter.¹⁵³

This effectively “abandon[s] the quest for standards”¹⁵⁴ by positing the test as whether the particular decisionmaker views the applicant as a “real” or “genuine” refugee who is “worthy” of protection. It also invites an “I know it when I see it approach”¹⁵⁵ reminiscent of the “self-definition” so vividly criticized by Lord Atkin in *Liversidge v. Anderson* by reference to Lewis Carroll’s Alice in Wonderland.¹⁵⁶

151. See, e.g., *Okere v. Minister for Immigration & Multicultural Affairs*, (1998) 87 F.C.R. 112, 112 (Austl.).

152. See, e.g., *R. v. Immigration Appeal Tribunal, ex parte Shah; Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, 649, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999) (per Hoffmann, L.J.).

153. *Minister for Immigration & Multicultural Affairs v. Chen Shi Hai*, (1999) 92 F.C.R. 333, 342–43, *rev’d*, (2000) 201 C.L.R. 293 (Austl.) (emphasis added).

154. See *Applicant A v. Minister for Immigration & Ethnic Affairs*, (1997) 190 C.L.R. 225, 369 (Austl.) (per Gummow, J.).

155. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

156. *Liversidge v. Sir John Anderson*, [1942] A.C. 206, 245 (H.L. 1942). See also *Minister for Immigration & Multicultural Affairs v. Yusuf*, (2001) 180 A.L.R. 1, para. 112 (Austl.) (per Kirby, J.).

Similarly, in *Minister for Immigration & Multicultural Affairs v. Khawar*,¹⁵⁷ a decision involving very similar facts to *Ex parte Shah*, Hill, J. dissented from the majority's decision to affirm the claim for refugee status,¹⁵⁸ stating:

I do not think that a common sense approach would lead to the conclusion that the situation the applicant found herself in, and the situation in which she might find herself were she repatriated to Pakistan, would warrant a finding that she was persecuted just because she was a woman. *No doubt the fact that she was a woman had a part to play in the alleged persecution, both because it was the foundation of her marriage to an alcoholic and abusive husband and because of the fact that she was a married woman meant that the police offered her no assistance. But I do not think that it is correct to say in all the circumstances that her persecution was by reason of her membership in any particular social group.*¹⁵⁹

This reveals the highly subjective nature of the common sense test, which effectively allows a decisionmaker to eschew objective analysis and a reasoned assessment of why the "for reasons of" clause is not satisfied even where "the fact that she was a married woman meant that the police offered her no assistance," in favor of a conclusory statement that the case at bar just doesn't seem like one that should fall within the Convention.

The adoption of a subjective "common sense" test also contradicts the notion of a non-derogable, uniformly-applied definition.¹⁶⁰ Most

157. See *Minister for Immigration & Multicultural Affairs v. Khawar*, (2000) 178 A.L.R. 120, 120 (Austl).

158. The majority of the Full Federal Court of Australia dismissed the appeal against the single judge of the Federal Court who had set aside a decision of the RRT by which the RRT had affirmed a decision of the delegate of the Minister refusing to grant protection visas to the respondents. *Id.* Although the decision has not been delivered at the date of publication of this Article, the High Court of Australia has granted special leave to the Minister to appeal in this case.

159. *Id.* at 135 (emphasis added).

160. Article 42(1) of the Convention provides "any State may make reservations to articles other than to Article 1." Although some flexibility and autonomy is accorded state parties in interpreting Article 1 of the Convention, wide divergences in interpretation pose a threat to the validity of an international protection regime. Accordingly, the Executive Committee of UNHCR has sought to develop greater consistency within the refugee regime. For example it has acknowledged "the value of regional harmonization of national policies to ensure the persons who are in need of international protection actually receive it and calls upon States to consult UNHCR at the regional level in achieving this objective." United Nations High Comm'r for Refugees, Executive Committee, Conclusions, No. 74 (XLV) [1994] General Conclusions on International Protection, para. (p). Similarly, the UNHCR has stated that, "The UNHCR has constantly sought to bring about a certain measure of uniformity in the elaboration of eligibility criteria with a view to ensuring that all applicants are treated according to

importantly, since the “common sense” test is concerned with attributing liability, it is of no conceptual relevance to refugee law. Thus, any guidance to be obtained from tort law should focus on tests relevant to factual causation.

a. Factual Causation in Tort Law

The most common method of ascertaining causation in fact remains the “but for” test which Prosser explains as, “the defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it.”¹⁶¹ Others have described the “but for” test as asking whether the particular condition was necessary to complete a set of conditions jointly sufficient to account for the given occurrence.¹⁶²

The “but for” test provides at least one element of the test of factual causation in a wide array of both common law and civil law jurisdictions.¹⁶³ However, despite its universal application, the “but for” test has been extensively criticized as being both over and under-inclusive.¹⁶⁴ First, it can be over-inclusive because “the mere fact that something constitutes an essential condition (in the ‘but for’ sense) of an occurrence does not mean that, for the purposes of ascribing responsibility or fault,

the same standards.” Executive Committee, Report on International Protection (submitted by the High Commissioner), 27th Sess., para. 30, U.N.Doc. A/Ac.96/527.

161. WILLIAM L. PROSSER & W. PAGE KEETON, *PROSSER & KEETON ON THE LAW OF TORTS* 266 (5th ed. 1984).

162. See FLEMING, *supra* note 137, at 173–74.

163. See PROSSER & KEETON, *supra* note 161, at 263–72; Chappel v. Hart, (1998) 195 C.L.R. 232 (Austl.); Athey v. Leonati, [1996] 3 S.C.R. 458 (Can.). In a recent survey of causation issues in tort law in Austria, Belgium, England, France, Germany, Greece, Italy, South Africa, Switzerland, and the United States it was concluded that all of these jurisdictions recognize causation as a requirement of tortious liability, and all legal systems consider a *condicio sine qua non* [but for test] as such as a first test.

All jurisdictions recognize causation as a requirement of tortious liability and all legal systems consider a *condicio sine qua non* [but for test] as such as a first test . . .

According to the *condicio sine qua non*-requirement, also known as the but for-test, equivalence theory, ‘cause-in-fact’ or factual cause, one should, in order to determine whether an act or omission was a cause of the loss, eliminate the act or omission mentally and consider whether or not the loss would still appear. If the loss does not occur when the act or omission is eliminated, the act or omission is a *condicio sine qua non* for the loss. If the loss would still occur, even where the act or omission in question is disregarded, the loss has not been caused by this act or omission.

Jaap Spier & Olav A. Haazen, *Comparative Conclusions on Causation*, in UNIFICATION IN TORT LAW: CAUSATION 127 (Jaap Spier ed., Kluwer Law International 2000).

164. The “but for” test “frequently fails as a means for determining whether the minimal requirements for causal relationship have been met.” Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 88 (1956).

it is properly to be seen as a 'cause' of that occurrence as a matter of either ordinary language or common sense."¹⁶⁵ For example, a factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not necessarily causally connected with the injury.¹⁶⁶ For this reason it has been described as a "test of exclusion."¹⁶⁷ These concerns resonate with those raised by Sedley, L.J. in the refugee context, in *Velasco*, discussed above, wherein his Lordship expressed concern that the application of a "but for" test could lead to "an infinity of causes."¹⁶⁸

Second, it is under-inclusive in that its strict application can result in a finding of no liability (and hence no remedy for the plaintiff) in cases of "overdetermination,"¹⁶⁹ that is, where two separate but equally causative factors combine to produce the tortious damage. The classic example is the case where a fire started through the negligence of a railroad merges with a fire of undetermined origin and the two together destroy the plaintiff's property. In such a case it cannot be said that either of the fires was the "but for" cause of the plaintiff's loss, since the loss would have occurred in the absence of either of the fires.¹⁷⁰ However such an outcome, as the law recognizes, is clearly unjust.¹⁷¹ Thus, it has been said that the assumption that a defendant can only be liable when his or her conduct was a *causa sin qua non* of injury "has its dangers" since there are situations in which the law may wish to regard a defendant as having caused an injury even though it would have occurred without his participation.¹⁷²

Another major problem with the "but for" test is that it is speculative; it requires one to consider a hypothetical scenario in which the

165. *March v. E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 523 (Austl.) (per Deane, J.)

166. *Id.* at 516 (per Mason, C.J.).

167. Weinrib, *supra* note 132, at 518.

168. Transcript: Smith Bernal, *Velasco v. Sec'y of State for the Home Dep't*, para. 7, 2000 LEXIS (C.A. April 2000) (Eng.).

169. *E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 516-17 (per Mason, C.J.).

170. This example comes from the decision in *Valentine v. Minneapolis, St. P. & S.S.M. Ry.*, 118 N.W. 970, 974 (Mich. 1908) as cited in David W. Roberston, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1776 (1997). See also D.M.A. Strachan, *Variations on an Enigma*, 33 MOD. L. REV. 378, 391-95 (1970); Malone, *supra* note 164, at 81-89; Cook v. Lewis, [1952] D.L.R. 1 (Can.).

171. See, e.g., *E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. at 516-17; *id.* at 523 (per Deane, J.).

172. Strachan, *supra* note 170, at 378. Courts have acknowledged the shortcomings of the "but for" test in the context of multiple causes. In *E. & M.H. Stramare Proprietary Ltd.*, Mason, C.J. explained, "In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury." (1991) 171 C.L.R. at 516.

relevant factor or ground is not present and ascertain what would have been the outcome in that case.¹⁷³ Malone describes the problems with this approach:

At other times the but-for test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture.¹⁷⁴

It has been said that the “but-for” theory of causation places “unrealistic expectations on our adversary system” when “we ask a judge to find as a matter of fact what *would have* occurred” in the absence of the relevant factor.¹⁷⁵

This is particularly problematic and indeed exacerbated in the refugee context since the decisionmaker’s task is already hypothetical to a certain degree in that it requires an assessment of the likelihood that the applicant may face persecution in the *future*.¹⁷⁶ The evidentiary difficulties in assessing likely future events in a foreign country compound the difficulties for the decisionmaker in making this hypothetical assessment.

Furthermore, although the “but for” test does not, in theory, equate to a “sole cause” test, in practice it can risk focusing the decisionmaker on finding a sole cause. *Chen Shi Hai* demonstrates this problem where, rather than assessing the situation as a whole, and considering the multifarious factors that led to the predicament which the applicant faced, the Full Federal Court narrowly sought to pinpoint the one “but for” cause, as though it existed in isolation from the complex matrix of facts.¹⁷⁷

173. Weinrib, *supra* note 132, at 522 (“[W]e slide into the question of what did not happen or rather what would have happened if what had happened had not happened.”).

174. For this reason the “but for” test has been discredited by its originator even for philosophical usage. Malone, *supra* note 164, at 67. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 263 (1989).

175. Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 320 (1982). Courts have recognized these difficulties with the “but for” test; for example, in *E. & M.H. Stramare Proprietary Ltd.*, Mason, C.J. said, “it is often extremely difficult to demonstrate what would have happened in the absence of the defendant’s negligent conduct.” (1991) 171 C.L.R. at 514.

176. Hamer points out that the distinction between past and future is not limited to the law. He explains, “[P]hilosophers have suggested that our everyday experience of time is asymmetric. The past has already happened and is, in principle, knowable. The future on the other hand, is a matter of chance, and is a far less certain object of knowledge.” David Hamer, *‘Chance would be a fine thing’: Proof of Causation and Quantum in an Unpredictable World*, 23 MELB. U. L. REV. 557, 559, 562–566 (1999).

177. Minister for Immigration & Multicultural Affairs v. Chen Shi Hai, (1999) 92 F.C.R. 333, 342 (“In our opinion, in terms of causation, the respondent does not face persecution ‘by

The shortcomings of the “but for” test have generated various modifications and it is clear that it rarely suffices as the sole test of factual causation.¹⁷⁸ As mentioned above, the “but for” test has been criticized in the tort context on the basis of its inability to deal adequately with multiple causes, particularly where either of two causes (either concurrent or successive) was capable of causing the loss. In such a case, some have called the “but for” test “unworkable”¹⁷⁹ and have therefore substituted or modified it with a “substantial factor” test¹⁸⁰ to be applied in these “joint causation” cases.¹⁸¹ This is particularly applied in the United States where courts formulate the modified test as follows: the defendant’s conduct causes the event if it was “a material element and a substantial factor in bringing it about.”¹⁸² If the defendant’s conduct was a substantial factor in causing the plaintiff’s injury, then the defendant remains liable, notwithstanding the fact that another person’s negligence was a contributing cause and that that person also remains liable.¹⁸³

Prosser criticizes the substantial factor test which, in his view, “can scarcely be called a test,” and posits an alternative formulation that addresses directly the problem with the “but for” test in the multiple cause scenario as follows:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause of the event.¹⁸⁴

This alternative formulation has the advantage of simplicity—one does not need to address whether a factor is “substantial,” a concept that

reason of’ being a member of the social group ‘black children.’ He faces such persecution by reason of his parents’ conduct (as Chinese nationals) in contravening the relevant laws of China.”) In overturning the decision of the Full Federal Court, Kirby, J. explained that the RRT’s error was in part “because the Tribunal thought itself obliged to classify the ‘reasons’ for the persecution which it found by ascribing them solely to the breach by the parents of laws and programmes of general application in the PRC designed to uphold that country’s population control policy.” *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293, 316.

178. See *Spier & Haazen*, *supra* note 163, at 127–30.

179. *Athey v. Leonati*, [1996] 3 S.C.R. 458, 466 (Can.); PROSSER & KEETON, *supra* note 161, at 266.

180. Most notably the United States. See *Robertson*, *supra* note 170, at 1776; *Wright*, *supra* note 137, at 1776.

181. It is said that in the United States context, “‘but for’ causation is still a requirement in all cases except special joint causation cases.” See *Kester*, *supra* note 39, at 534.

182. PROSSER & KEETON, *supra* note 161, at 267.

183. See ALLEN M. LINDEN, *CANADIAN TORT LAW* 102–04 (5th ed. 1993); FLEMING, *supra* note 137, at 172.

184. PROSSER & KEETON, *supra* note 161, at 268.

is not necessarily self-evident. It has significant potential for use in the refugee context in cases of multiple reasons/factors in which decision-makers are simply unable to unravel the particular degree of significance of each individual factor.

Another modification of the “but for” test in the context of multiple possible causes is the formulation of a test which asks whether the negligence of the defendant *materially contributed* to the loss of the plaintiff.¹⁸⁵ However, courts often interpret this strictly, so that a mere increase in risk alone will not suffice to constitute a material contribution.¹⁸⁶ In Australia the harshness of the test has been said in some cases to give rise to “a lingering sense of injustice.”¹⁸⁷ On the other hand, some authority exists for the proposition that in order to accommodate acute evidentiary difficulties, particularly in areas that depend on medical knowledge, the plaintiff can establish liability by proving merely that the defendant’s conduct *increased the risk* of contracting the disease.¹⁸⁸ A distinction that has been drawn in order to explain these differing approaches of common law courts is between independent and cumulative causes. In cases involving multiple possible (independent) causes, courts tend to require a “but for” standard to be satisfied by the plaintiff,¹⁸⁹ whereas in cases involving cumulative causes, courts have been more willing to find that “guilty exposure may still be considered a cause, though a lesser cause than the innocent exposure, on the basis that it may have ‘tipped the scale.’”¹⁹⁰ In other words, in the latter category courts have held that a mere *increase in risk* can suffice to establish liability.¹⁹¹

185. Chappel v. Hart, (1998) 195 C.L.R. 232, 239 (Austl.) (per Gaudron, J.); Athey v. Leonati, [1996] 3 S.C.R. 458, 458 (Can.). However, it is unclear whether this is merely a modification of the “but for” test or whether it is effectively a different and less onerous test. Justice Major’s judgment (of the Canadian Supreme Court) in *Athey* suggests that it is a lower test, where his Honour stated that “[a] contributing factor is material if it falls outside the *de minimis* range.” *Id.* at 466. “[A]s long as a defendant is *part of* the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury.” *Id.* at 467; *cf.* Chappel, (1998) 195 C.L.R. at 232.

186. Bendix Mintex Proprietary Ltd. v. Barnes, (1997) 42 N.S.W.L.R. 307, 316 (Austl.) (per Mason, J.).

187. *Id.* at 317 (per Mason, J.).

188. *Id.* at 345; McGhee v. Nat’l Coal Bd., 1 W.L.R. 1 (H.L. 1973); Naxakis v. W. Gen. Hosp., (1999) 197 C.L.R. 269, 278–79 (Austl.); Chappel, (1998) 195 C.L.R. at 244 (per McHugh, J.); Seltsam Proprietary Ltd. v. McGuinness, (2000) 49 N.S.W.L.R. 262 (Austl.). *See also* John G. Fleming, *Probabilistic Causation in Tort Law*, 68 CAN. BAR REV. 661 (1989); Donna H. Smith, Note, *Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U. L. REV. 275 (1985). However, this has been subjected to criticism in the torts context. *See* Weinrib, *supra* note 132, at 523. For an overview and explanation of the cases, see Hamer, *supra* note 176, at 614–26.

189. Hamer, *supra* note 176, at 628.

190. Wilsher v. Essex Area Health Auth., 1 Q.B. 730, 752 (C.A. 1987) (per Mustill, L.J.).

191. This has also been recognized in the United States. *See* Wright, *supra* note 137, at 1814. *See generally* Smith, *supra* note 188.

This has particular resonance with the causation issue in refugee law since in many cases the Convention ground will operate as a cumulative, rather than truly independent, cause of the person's risk of being persecuted. For example, in an extortion case, the persecutor may be motivated by personal greed to a certain degree, however the applicant's race may "tip the scale" in his decision to threaten the applicant with serious harm. Whilst it may be impossible to ascertain the relative weight of these factors, it is possible to identify race as a factor that increased the risk of persecution.

b. Tentative Conclusions From Tort Law

The above analysis suggests that the doctrine of legal causation in tort law offers little of use to the refugee decisionmaker. Turning to factual causation, the most prevalent test, the "but for" test, has been criticized in the tort context and many of the identified problems are further exacerbated in the refugee context. However, some of those formulations developed to "soften" the test may offer some assistance. While tests such as "materially contributed" and "substantial factor" may be too onerous, especially given that they are thought to produce injustice in some tort cases, Prosser's alternative formulation which focuses on the fact that a particular cause can contribute to the totality of causes offers a helpful framework. Similarly, contemporary developments that respond to the particular evidentiary challenges presented by cases of cumulative causes, whereby a factor that contributes to or increases risk may be sufficient to establish a claim, offer valuable insight in responding to the challenges faced in refugee determination.

2. Equity

Equity embodies the rules and principles developed by the Court of Chancery in England, which "corrected, supplemented and amended the common law."¹⁹² It originated as an attempt to "soften[] and modif[y]" the harshness of the common law,¹⁹³ and to provide remedies where the common law was deficient so as to deliver justice in individual circumstances.¹⁹⁴ The law of equity recognizes and regulates certain proprietary interests (equitable interests and estates, including the position of the

192. R.P. MEAGHER ET AL., *EQUITY DOCTRINES AND REMEDIES* 3 (3d ed. 1992).

193. *Id.*

194. Although the reorganization of the court system achieved by the Judicature Acts of 1873 and 1875 produced one court administering both common law and equity, this effected "not a fusion of two systems of principle but of the courts which administer the two systems." *O'Rourke v. Hoeven*, (1974) 1 N.S.W.L.R. 622, 626 (Austl.) (per Glass, J.). Thus, both the common law and equity continue to operate as independent bodies of principles and doctrines.

beneficiaries under discretionary trusts),¹⁹⁵ imposes duties and obligations on persons found to be in a fiduciary relationship with others, and provides equitable remedies not available at common law.¹⁹⁶ Although equity is also concerned with the imposition of liability, it holds the potential to provide significant insight into the role of causation in the refugee context.

First, the concepts of breach of trust, and in particular breach of fiduciary duty, are analogous to failure of state protection—both sets of concepts involve a breach by one party of special obligations owed to another.¹⁹⁷ As has been emphasized throughout this Article, refugee law is designed to provide surrogate or substitute protection when “the degree of protection normally to be expected of the government is either lacking or denied.”¹⁹⁸ Refugees receive international protection when “a state will not or cannot comply with its classical duty to defend the interests of citizenry.”¹⁹⁹

Second, the key doctrinal differences between tort and contract on the one hand, and equitable principles on the other, suggest that equitable principles relating to causation may offer more assistance than does the common law in ascertaining the appropriate test in the refugee context. Justice McLachlin of the Canadian Supreme Court explained the conceptual difference between common law and equitable remedies, in the context of fiduciary duty, as follows:

The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving

195. MEAGHER ET AL., *supra* note 192, at 103.

196. For an explanation of the nature of the fiduciary relationship see *Hospital Prods. Ltd. v. U.S. Surgical Corp.*, (1984) 156 C.L.R. 41, 96–97 (Austl.) (per Mason, J.).

197. The Supreme Court of Canada has described the fiduciary relationship in this way:

From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others . . . the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability.

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, 405 (Can.). It has been suggested that the following indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary’s legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.” *Id.* at 408–09.

198. G. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, 26 VA. J. INT’L L. 897, 901 (1986), *cited in* HATHAWAY, *supra* note 37, at 124.

199. HATHAWAY, *supra* note 37, at 125.

optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken—an obligation which ‘betokens loyalty, good faith and avoidance of a conflict or duty and self-interest’ . . . In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.²⁰⁰

In cases involving breach of fiduciary duty, the purpose of the law is to restore the beneficiary to the position it would have been in if the fiduciary had complied with its duty.²⁰¹ Equity focuses more closely on providing full relief to the victims; thus the liability of the defaulting trustee/fiduciary is of a “more absolute nature.”²⁰² In contrast, in areas such as tort and contract law, the law effectively engages in a balancing exercise of allocating the burden of risk between the plaintiff and defendant.²⁰³ This focus on providing remedies as opposed to limiting liability thus provides another reason why equitable principles may provide more assistance than common law principles.

a. Causation in Equity

It should be noted at the outset that it is difficult to provide an accurate “snapshot” of causation principles in equity across common law jurisdictions, as this area of law is evolving and has undergone changes in recent years. Notwithstanding these changes, consideration of the traditional approach and justifications underpinning it offers assistance in thinking about causation in the refugee context.²⁰⁴

200. *Canson Enter. Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 543. *See also* Maguire v. Makaronis, (1997) 188 C.L.R. 449, 492–93 (Austl.) (per Kirby, J.); *U. S. Surgical Corp.*, 156 C.L.R. at 96–97 (per Mason, J.); *Target Holdings Ltd. v. Redfems*, [1995] A.C. 421, 438–39 (appeal taken from Eng. C.A.) (per Browne Wilkinson, L.J.).

201. *Breen v. Williams*, (1996) 186 C.L.R. 71, 93 (Austl.) (per Dawson & Toohey, JJ.).

202. *Commonwealth Bank of Austl. v. Smith*, (1991) 102 A.L.R. 453, 480 (per Davies, Sheppard and Gummow, JJ.). *But see* *Pilmer v. Duke Group Ltd.*, (2001) 180 A.L.R. 249, 293 (Austl.) (employing equitable relief as a means of punishment rather than retribution).

203. *Bendix Mintex Proprietary Ltd. v. Barnes*, (1997) 42 N.S.W.L.R. 307, 317 (Austl.) (per Mason, J.). “Nevertheless, our law remains wedded to the principle that if the risk does not come home in a way that is causally linked to the particular defendant’s negligence, then it is the plaintiff who must bear the loss.” *Id.*

204. This is particularly so given that recent restrictive developments have been precipitated by concerns about the harshness of imposing liability on defendants, a concern not relevant in the refugee context.

It is clear that traditionally the element of “causation” in equity cases such as breach of fiduciary duty was formulated far less strictly than in cases of contract or tort. In assessing equitable compensation for breach of fiduciary duty, it has long been held that the liability of the defaulting fiduciary is not limited by common law principles governing legal, as opposed to factual causation, such as the concept of *novus actus interveniens*.²⁰⁵ In a frequently cited passage, Justice Street of the New South Wales Supreme Court explained that “causation, foreseeability and remoteness do not readily enter into the matter.”²⁰⁶

The mere “distant nexus” required in cases of breach of fiduciary duty is contrasted with the “close nexus” requirements inherent in cases involving breach of contract and tortious negligence.²⁰⁷ The classic statement of the relevant principles in the equity context is in the decision of the Privy Council in *Brickenden v. London Loan & Savings Co.*, where Lord Thankerton stated:

When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent’s action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts *were material*, speculation as to what

205. *Maguire v. Makaronis*, (1997) 188 C.L.R. 449, 470 (Austl.); *Hill v. Rose*, (1989) 1990 V.R. 129, 144 (Austl.) (“[T]he obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation.”).

206. *In re Dawson*, (1966) 2 N.S.W.L.R. 211. It is frequently emphasized that common law notions of causation are not relevant. See *Rose*, 1990 V.R. at 149; *Witten-Hannah v. Davis*, [1995] 2 N.Z.L.R. 141; *Bank of N.Z. v. N.Z. Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. 213, 213; *Smith*, 102 A.L.R. at 453. See also MEAGHER ET AL., *supra* note 192, at 637. In *Target Holdings v. Redfern*, the House of Lords reiterated that “the common law rules of remoteness of damage and causation do not apply.” [1995] A.C. 421, 434.

207. *N.Z. Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. at 243 (Fisher, J.).

[T]he ‘distant nexus’ approach is exemplified in trust loss cases (i.e. breaches of trust causing loss to the trust estate), breaches of fiduciary duty, deceit, and certain other intentional torts To establish even a distant nexus there must be some causal link between breach and loss. Not required, however, are causal directness or reasonable foreseeability. Once the primary breach has been established the general approach is to treat the claim benignly, for example by reversing the onus of proving fiduciary duty counterfactuals.

Id. at 248.

course the constituent, on disclosure, would have taken is not relevant.²⁰⁸

This test is expressed in other ways.²⁰⁹ As a Justice of the New South Wales Court of Appeal recently explained (extra curially):

Contributory negligence has never been a defence to an action for legal or equitable fraud. A plaintiff is entitled to relief if the fraud was ‘*a cause of the loss, even if there were more weighty causes for in this field the court does not allow an examination into the relative importance of contributory causes.*’ This principle also applies to breaches of fiduciary duty.²¹⁰

The “materiality” test has also been expressed as whether the lack of information or misrepresentation constituted “an inducing cause,”²¹¹ “a factor”²¹² in the decision, or “influenced the decision” of the beneficiary.²¹³ The test has also been framed in a negative manner by asking whether the defendant could establish that his breach of duty “was not a factor” in the relevant decision.²¹⁴ The test is also sometimes described as a simple “but for” test in order to denote that mere factual

208. *Brickenden v. London Loan & Sav. Co.*, [1934] 3 D.L.R. 465, 469 (Can.) (emphasis added). For more recent cases citing and applying this principle, see *Stewart v. Layton*, (1992) 111 A.L.R. 687, 713 (Austl.); *Wan v. McDonald*, (1992) 105 A.L.R. 473 (Austl.); *Farrington v. Rowe McBride & Partners*, [1985] 1 N.Z.L.R. 83.

209. Although it should be noted that more often than not, courts simply reiterate the “material” test without providing any elucidation as to its meaning.

210. K.R. Handley, *Reduction of Damages Awards in FINN*, ESSAYS ON DAMAGES 127 (1992) citing *Barton v. Armstrong*, [1976] A.C. 104, 188 (emphasis added). See also *McCann v. Switz. Ins. Austl. Ltd.*, (2000) 176 A.L.R. 711, 715 (Austl.) (per Gleeson, C.J.) (explaining that a “negative answer to that question [i.e. whether there was a sufficient causal connection between a fiduciary’s dishonest act and loss] does not follow from the circumstance that there were also dishonest or fraudulent acts of third parties which resulted in the disappearance of the funds after they left Mr. Powles’ bank account”). As to contributory negligence in equity, see *Pilmer v. Duke Group Ltd.*, (2001) 180 A.L.R. 249, 249.

211. SPENCER BOWER & TURNER’S ACTIONABLE MISREPRESENTATION (3d ed. 1974) cited in *Witten-Hannah v. Davis*, [1995] 2 N.Z.L.R. 141, 148 (per Richardson, J., with whom Casey, J. agreed).

212. *Haira v. Burbery Mortgage Fin. & Sav. Ltd.*, [1995] 3 N.Z.L.R. 396, 408 (per Richardson, J., delivering judgment of the court).

213. *Davis*, [1995] 2 N.Z.L.R. at 148–50 (per Richardson, J., with whom Casey, J. agreed). This approach is also taken by some United States Circuit Courts of Appeal in misrepresentation cases. See *Casella v. Webb*, 883 F.2d 805 (9th Cir. 1989); *Steckman & Connor, Loss Causation Under Rule 10B-5 A Circuit-By-Circuit Analysis: When Should Representational Misconduct be deemed the cause of legal injury under the Federal Securities Laws?* 1061 *PLI/Corp* 375 (1998). Steckman and Connor set out the most “plaintiff-friendly” test, taken by the Eighth Circuit, which is to require only “some causal nexus” between defendant’s alleged representational misconduct and plaintiff’s injury; thus, “so long as defendant’s conduct played a role in the causal chain of events ultimately resulting in the injury, an issue of fact will likely be deemed to exist precluding summary judgment.” *Id.* at 466.

214. *Davis*, [1995] 2 N.Z.L.R. at 150.

as opposed to legal causation is relevant. However, the *Brickenden* approach is not a true “but for” test in the sense that the plaintiff does not have to establish that the loss “would not have occurred but for that conduct.”²¹⁵

While the *Brickenden* rule remains the governing principle in some jurisdictions, other common law courts have begun to move toward a less onerous position (from the defendant’s point of view), particularly in the context of cases of minor or non-fraudulent breaches of fiduciary duty, whereby the *Brickenden* rule operates as an evidentiary presumption open to rebuttal by the defendant.²¹⁶ It is still the case however that “the more expansive approach of equity to causation remains as the prima facie position,”²¹⁷ which requires a plaintiff to satisfy a “low causal threshold” in order to enliven the presumption of liability.²¹⁸

The policy basis underlying the adoption of a relaxed standard of causation in equity traditionally resulted from “a need to maintain strict standards for fiduciaries and to avoid obfuscatory arguments as to

215. PROSSER & KEETON, *supra* note 161, at 266.

216. This is now the position in the United Kingdom, New Zealand, and Canada. *See* *Canson Enters. Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 534 (Can.); *Target Holdings Ltd. v. Redfern*, [1995] 1 A.C. 421, 421 (appeal taken from Eng. C.A.); *Bank of N.Z. v. N.Z. Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. 213, 664. In these jurisdictions defendants are now given the opportunity to escape liability by demonstrating that the plaintiff’s loss would have occurred irrespective of the breach. In relation to breach of fiduciary duty, “[q]uestions of foreseeability and remoteness do not arise in this kind of case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.” *N.Z. Guardian Trust Co. Ltd.*, [1999] N.Z.L.R. at 688. The retreat appears to have begun in *Redfern*, adopting the minority judgment in *Canson Enters. Ltd.*. *See also* *N.Z. Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. at 664. The New Zealand Court of Appeal moved toward an approach that considers “not so much the historical source, be it equity or the common law, fiduciary duty or tort, but rather the nature and content of the obligation which has not been fulfilled.” *Id.* at 687 (per Tipping, J.). *See also* Julie Maxton, *Equity*, N.Z. L. REV. 319, 330–31 (1999). For a criticism of this approach, see Leeming, *supra* note 50, at 539–40. In Australia, the *Brickenden* rule still applies. *See* *Bennett v. Minister of Cmty. Welfare*, (1992) 107 A.L.R. 617; *Maguire v. Makaronis*, (1997) 188 C.L.R. 449, 449 (it was not necessary directly for this issue to be considered). However, Brennan, C.J., Gaudron, McHugh and Gummow, JJ. noted that although the application of the *Brickenden* rule may appear rigorous, that was not necessarily a reason to displace the rule against delinquent fiduciaries and Kirby, J. explicitly endorsed it. *Makaronis*, (1997) 188 C.L.R. at 474, 488–94. It appears that in Australia, the *Brickenden* test precludes the court from considering the issue at all. *See* *Stewart v. Layton*, (1992) 111 A.L.R. 687, 687 (per Foster, J.); *Gemstone Corp. of Austl. v. Grasso*, (1994) 13 A.C.S.R. 695.

217. Rt. Hon. Justice Tipping, *Causation at Law and in Equity: Do We Have Fusion?*, 7 CANTERBURY L. REV. 443, 447 (2000).

218. Maxton, *supra* note 216, at 330. This is said appropriately to balance “the policy reasons for the adoption by equity of a generous attitude to causation, with the inequity of allowing a plaintiff to recover, if the defendant can show that the loss in suit would probably have occurred in any event.” Rt. Hon. Justice Tipping, *supra* note 217, at 447.

causation of loss where fiduciaries have been found in breach.”²¹⁹ Since the fiduciary relationship has “trust, not self interest as its core,” on breach “the balance favours the party wronged.”²²⁰ This resonates with the concerns of refugee law, namely, to provide maximum protection to those in danger of persecution for Convention grounds, and to avoid complicated and confusing arguments which erect artificial barriers to applicants seeking asylum.

In addition to these concerns, the broad understanding of causation in equity usefully responds to two key issues in refugee adjudication: multiple causes and evidentiary voids. In support of the principle in *Brickenden*, Justice Kirby of the Australian High Court has recently alluded to these issues as follows:

A purely causative approach, which relieved a defaulting fiduciary of liability unless it were positively shown that such liability was caused by the breach of fiduciary duty would have several disadvantages. It would involve courts in the embarrassing and difficult task of untangling the *multiple causes of losses* which have followed an undoubted breach. Such a task would be specially difficult where further transactions and new interests had intervened. *It would present the risk, although such breaches were proved, of effectively sanctioning or at least ignoring the breach by affording no relief to the beneficiary* It is a rule which helps to fulfill the purposes of equity, which are somewhat different from those of the common law. These include, relevantly, ensuring the strict loyalty and good faith to beneficiaries, the dutiful enforcement of obligations; the deterrence of breaches by fiduciaries of their powers, and, where such occurs, the ready restitution and reinstatement of the beneficiary to the fullest extent possible.²²¹

The reluctance of courts administering equity to formulate a strict test of causation appears also to stem from a concern about the onerous evidentiary burden that this would place upon a plaintiff. Judgments which emphasize the danger in speculating as to what the plaintiff *might have done* absent the breach of trust reflect this concern. Even where courts have begun to move away from the strict *Brickenden* approach by permitting defendants to raise the “same outcome” defense, they have made clear that they are “not prepared to speculate” or “conjecture” as to what would have happened had the plaintiff not suffered a breach of

219. *Layton*, (1992) 111 A.L.R. at 713 (per Foster, J.) *citing* *Mouat v. Clark Boyce*, (1991) Austl. & N.Z. Conv. Rep., Issue 118, 578, 590.

220. MEAGHER ET AL., *supra* note 192, at 637.

221. *Makaronis*, (1997) 188 C.L.R. at 492 (per Kirby, J.) (emphasis added).

fiduciary duty.²²² In *Haira v. Burbery Mortgage Finance & Savings Ltd.*, the New Zealand Court of Appeal concluded that “there is no justification in the evidence for an inference that breach of duty was not a factor in decision making.”²²³ To hold otherwise would be “a matter of speculation, rather than a conclusion from the evidence” and “a matter of conjecture, not inference.”²²⁴ Rather, there must be a “proper evidentiary foundation for the conclusion” which should be “cogent and should not be lightly reached.”²²⁵

These comments demonstrate that in the equitable context courts recognize that evidentiary voids make it difficult definitively to identify the precise “cause” of a certain loss. Indeed, in many situations it is impossible to assess what might have happened given alternative conditions. In such a case, courts have formulated broad and flexible standards of causation, placing the overriding focus on ensuring restitution for plaintiffs. In other words, the policy basis of equity, namely repairing breach of trust and providing “protection” for victims of breach of trust, has led courts to develop a test of causation that favors plaintiffs over defendants, lest “the beneficiary suffer a double disadvantage” of enduring a breach of trust followed by a denial of protection by the courts.²²⁶

These concerns are particularly pertinent in the refugee context, where a consideration of the applicant’s plight absent the Convention factor such as race or political opinion, will almost always involve a measure of speculation. In many cases, no evidence will exist on which a decisionmaker can base a finding as to what might be the plight of the applicant absent the Convention ground. Given the underlying policy concerns of the Convention and the overwhelming need to avoid *refoulement*, courts must adopt a standard of causation that is as flexible and broad as the language of the Convention will allow.

222. See *Witten-Hannah v. Davis*, [1995] 2 N.Z.L.R. 141, 155 (per McKay, J.). See also *Taylor v. Schofield Peterson*, [1999] 3 N.Z.L.R. 434, 445–56; *Gilbert v. Shanahan Partners*, [1998] 3 N.Z.L.R. 528, 535 (“To establish the point the errant fiduciary cannot invite speculation.”). In *Hodgkinson v. Simms*, the Canadian Supreme Court emphasized that “mere ‘speculation’ on the part of the defendant will not suffice.” [1994] 3 S.C.R. 377, 442. See also *Wan v. McDonald*, (1992) 105 A.L.R. 473, 473 (Austl.). “It is not open to [the defendant] to evade that responsibility [to make good the loss flowing from his breach of fiduciary duty] upon the basis of any speculation about what might afterwards have been done with the money if it had not been lost by reason of his breach of fiduciary duty.” *Id.* at 502. See also *Palmisano v. Hyman*, No. E1353 (N.S.W. S. Ct. filed Mar. 30, 1977) (Austl.) (per Deane, J.) (“I do not consider it any part of my function in the present matter to engage in any such speculation.”)

223. *Haira v. Burbery Mortgage Fin. & Sav. Ltd.*, [1995] 3 N.Z.L.R. 396, 408.

224. *Id.*; see also *Simms*, [1994] 3 S.C.R. at 441 (Can).

225. *Everist v. McEvedy*, [1996] 3 N.Z.L.R. 348, 355 (per Kirby, J.).

226. *Makaronis*, (1997) 188 C.L.R. at 493 (per Kirby, J.).

3. Anti-Discrimination Law

The final area of law to be considered is anti-discrimination and equality law, an area that provides a useful guide to the issue of “causation” in the refugee context since conceptually it is one of the most analogous areas of law for a number of reasons. First, domestic anti-discrimination legislation often incorporates or is premised on principles of international human rights law²²⁷; thus although it addresses liability in one sense, it aims not so much to “punish” the discriminator but rather to “protect persons against treatment which amounts to unfair discrimination,”²²⁸ to “remov[e] . . . discrimination” and to “provide relief for the victims of discrimination.”²²⁹ Moreover, given its derivation or inspiration from international human rights standards, domestic anti-discrimination legislation is often interpreted broadly in order to give effect to its wide societal objectives.²³⁰

227. Anti-Discrimination legislation in many jurisdictions was passed in order to comply with obligations under international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 and the Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 [hereinafter Women’s Convention]. For example, the objects of the Australian Sex Discrimination Act of 1984 include “to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women.” Sex Discrimination Act, 1984, § 3(a) (Austl.). In *New Zealand Van Lines Ltd. v. Proceedings Comm’r*, [1995] 1 N.Z.L.R. 100, 102 (per Smellie, J.), the High Court of New Zealand explained that the Human Rights Commission Act of 1977 “together with the Race Relations Act 1971, and the recently enacted Human Rights Act 1993 ‘all sit within a broad international human rights framework.’ They were enacted in part to comply with New Zealand’s international obligations pursuant to certain covenants and ratifications.” See also *North Reg’l Health Auth. v. Human Rights Comm’n*, [1998] 2 N.Z.L.R. 218.

228. *City Council of Pretoria v. Walker*, 1998 (3) BCLR 257, para. 43 (CC).

229. *Ontario Human Rights Comm’n & Therese O’Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, 547 (Can.). See also *IW v. City of Perth*, (1997) 191 C.L.R. 1, 58–59 (Austl.) (per Kirby, J.). The British Race Relations Board (as it then was) summarized the role of anti-discrimination legislation in its first annual report which included “providing protection and redress to minority groups.” MARTIN MAC EWEN, *TACKLING RACISM IN EUROPE: AN EXAMINATION OF ANTI-DISCRIMINATION LAW IN PRACTICE*, 27–28 (1995).

230. In the anti-discrimination context, it is repeatedly emphasized in many jurisdictions that anti-discrimination legislation should be interpreted so as to give effect to the “special nature and purpose of the enactment . . . and give to it an interpretation which will advance its broad purposes.” *Ontario Human Rights Comm’n & Therese O’Malley*, [1985] 2 S.C.R. at 546–47. See generally *City of Perth*, (1997) 191 C.L.R. at 12 (per Brennan, C.J. & McHugh, J.), 22–23 (per Dawson & Gaudron, JJ.), 26–27 (per Toohey, J.), 39 (per Gummow, J.), 58–59 (per Kirby, J.); *Waters v. Pub. Transp. Corp.*, (1992) 173 C.L.R. 349, 359–60 (Austl.); *North Reg’l Health Auth.*, [1998] 2 N.Z.L.R. at 218; *Coburn v. Human Rights Comm’n*, [1994] 3 N.Z.L.R. 323, 333 (per Thorp, J.) (“The proper construction of both sections requires an appropriate regard for the substantial body of authority, both in New Zealand and abroad, as to the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one”). In *New Zealand Van Lines Ltd.*, the High Court emphasized that “it is clear that legislation of this kind is to be accorded a liberal and enabling interpretation.” [1995] 1 N.Z.L.R. at 103 (per Smellie, J.). It should be

Second, the language of anti-discrimination law echoes that in the Refugee Convention. Legislation prohibiting discrimination usually expresses concern with discrimination “on the ground of,” “on the basis of,” “by reason of, or “because of” certain enumerated grounds or reasons.

Third, where issues of multiple causes arise in anti-discrimination law, they tend more closely to resemble the types of inquiries in refugee law than does the “multiple cause” issue in tort law. In other words, rather than dealing with multiple independent causes, anti-discrimination law often requires an adjudicator to divine the reason why a single person or organization acted in a particular way—a difficult task because, just as in the refugee context, it involves dealing with “a tangle of human motivations, which are not truly independent or separable.”²³¹

a. Causation in Anti-Discrimination Law

Different theories of establishing discrimination exist in many jurisdictions, the most obvious being the distinction between direct discrimination or disparate treatment and indirect discrimination or disparate impact.²³² Direct discrimination involves a policy that is discriminatory on its face or an action taken according to a discriminatory criterion whereas indirect discrimination involves a facially neutral standard or condition that discriminates in effect or impact.²³³ The question of “causation,” that is, the question whether the predicament of the applicant/plaintiff is a result of discriminatory treatment, usually arises in cases involving direct discrimination, where the question is whether a difference in treatment is on the ground of, basis of, or by reason of discrimination on one of an enumerated list of prohibited grounds.²³⁴

It is clear that in all common law jurisdictions considered for the purpose of this Article, courts and legislatures have rejected the notion that a prohibited ground must be the sole ground for the relevant

noted however that some courts are more willing than others to give precedence to the policy objectives of equality legislation and generally speaking, the United States Supreme Court, has been less willing to do so.

231. Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 21 (1998).

232. This mirrors the definition of discrimination in international human rights instruments that refer to purpose or effect of a discriminatory act. See, e.g., Women's Convention, *supra* note 227, art. I, at 13. I note, however, that the Canadian Supreme Court has now abolished this distinction in interpreting anti-discrimination legislation. See *B.C. Gov't & Serv. Employees' Union v. B.C. Pub. Serv. Employee Relations Comm'n*, [1999] 3 S.C.R. 3 (Can.).

233. See, e.g., Women's Convention, *supra* note 227, at 15.

234. This is because in indirect discrimination cases, the proof that a neutral policy disproportionately impacts on a protected group automatically deals with the “causation” issue. The analysis then turns to a consideration of whether the policy is justified.

action.²³⁵ Further, although the relevant test is sometimes framed by reference to the “but for” test, courts have more often than not rejected it as presenting too high a barrier for applicants to satisfy,²³⁶ particularly in the context of cases involving mixed motives.²³⁷ Moreover, even where it is adopted, it is important to understand the context in which it is applied. For example, while the United Kingdom is one of the few jurisdictions explicitly and clearly to rely upon the “but for” test in determining causation in the discrimination context,²³⁸ it is important to consider the background against which this test has been developed. Significantly, the courts and legislatures of many common law countries (excluding the United States²³⁹) have rejected a subjective test of intention, even in cases of disparate treatment or direct discrimination,²⁴⁰ in favor of an objective assessment of whether the treatment suffered by the applicant can be explained by reference to a discriminatory policy or act. This involves a

235. The jurisdictions considered were: United States, United Kingdom, Canada, Australia, New Zealand, and South Africa. *See* Human Rights Comm’n v. Eric Sides Motors, [1981] 2 N.Z.A.R. 447, 456–57; *Ontario Human Rights Comm’n & Therese O’Malley*, [1985] 2 S.C.R. at 536; *Owen & Briggs v. James*, [1995] I.R.L.R. 87 (C.A.) (Eng.). The rejection of the “sole cause” approach is evident in cases discussing mixed motives. *See infra* notes 247–71.

236. *See*, for example, *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983), where then-Judge Scalia wrote “[i]t is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition [to the fact that unlawful discrimination has been applied against him], the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor.” *Id.* at 1366. *See also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989) discussed below at notes 252–55. The “but for” test has also been rejected in Canadian anti-discrimination law. In *Holloway v. MacDonald*, (1983) 4 C.H.R.R. D/1454 para. 12481, the British Columbia Board of Inquiry explained that, pursuant to the British Columbia Human Rights Code, “if the decision was in fact influenced by membership in the group, I do not believe it would be a defence that a hypothetical employer might have made the same determination solely on the basis of permissible factors, though the existence of such factors might sometimes be relevant to the issue of damages.”

237. *See, e.g., Hopkins*, 490 U.S. at 228.

238. *See James v. Eastleigh Borough Council*, [1990] 2 A.C. 751 (Eng.); *R. v. Birmingham City Council*, [1989] A.C. 1155 (Eng.). It has also been said that the European Court of Justice adopts a “but for” test in the same objective sense. *See also* COLIN BOURN & JOHN WHITMORE, *ANTI-DISCRIMINATION LAW IN BRITAIN* 43 (1996); *Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen*, (1990) I.R.L.R. 27 (Eng.).

239. The United States was the only jurisdiction located in undertaking this research which requires intent in disparate treatment cases. In the context of discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, this has long been the key requirement for a successful discrimination claim. In *Int’l Bd. of Teamsters v. United States*, the Supreme Court held that “[p]roof of discriminatory motive is critical.” 431 U.S. 324, 335 n.15 (1977). *See also Hazen Paper v. Biggins*, 507 U.S. 604, 609 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

240. Of course in cases of indirect discrimination or disparate impact, intent is not relevant since the question is the impact or effect of a neutral policy or condition. Even in the United States it is recognized that Title VII permits an action to be brought under the theory of disparate impact, an action that does not require the plaintiff to prove the intent of the defendant. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

rejection of the necessity for the plaintiff to prove an intent to discriminate or the existence of subjective elements such as racism or sexism on the part of the perpetrator of the relevant treatment.²⁴¹ Thus, although consideration of subjective material such as the intention of the defendant may be appropriate and relevant as evidence of discrimination, it is not a necessary element of a successful discrimination claim.²⁴² It has been said that although “[t]here is some force” in the argument that expressions such as “on the ground of” look to an intent or motive on the part of the alleged discriminator that is related to the protected status of the other person,²⁴³ to require the plaintiff to establish an intent to discriminate would “significantly impede or hinder the attainment of the objects of” anti-discrimination legislation²⁴⁴ and would “subvert the achievement of the purposes of the Act.”²⁴⁵ It is in this context that the British House of Lords has referred to the “but for” test as the appropriate criterion in discrimination cases in order to denote that the test is objective and not subjective. In *R. v. Birmingham City Council*, ex parte

241. This is the position in Canada, Australia, South Africa, and the United Kingdom. See *Waters v. Pub. Transp. Corp.*, (1992) 173 C.L.R. 349 (Austl.); *Ontario Human Rights Comm’n & Therese O’Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, 547; *James*, (1990) 2 A.C. at 751; *Birmingham City Council*, [1989] A.C. at 1155; *City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC). It is worth noting that some legislatures in Australia have specifically provided that motive is not vital to establishing discrimination. See *Equal Opportunity Act*, 1995 § 10 (Vic.); *Anti-Discrimination Act*, 1992 § 20(4) (NT). See also CHRIS RONALDS, *DISCRIMINATION LAW AND PRACTICE* 32–33 (1998) (discussing *HR&EO Comm’n v. Mount Isa Mines Ltd.*, (1993) 118 A.L.R. 80 (per Lockhart, J.)).

242. See RONALDS, *supra* note 241, at 32–33.

243. *Waters*, (1992) 173 C.L.R. at 359 (per Mason, C.J. & Gaudron, J.).

244. See *id.* (per Mason, C.J. & Gaudron, J.).

245. *IW v. City of Perth*, (1997) 191 C.L.R. 1, 40 (per Gummow, J.). Indeed, in *Ontario Human Rights Comm’n & Therese O’Malley*, Justice McIntyre of the Supreme Court of Canada explained, in the context of interpreting the Canadian Human Rights Code, that:

To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy Furthermore, as I have endeavored to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. *The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.*

It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.

Ontario Human Rights Comm’n & Therese O’Malley, [1985] 2 S.C.R. at 549–50 (emphasis added). See also *Brooks v. Canadian Safeway Ltd.*, [1989] 1 S.C.R. 1219. This reasoning has also been applied in the context of the equality guarantee contained in § 15 of the Canadian Charter of Human Rights and Freedoms. For example, in *Andrews v. Law Society of British Columbia*, Justice McIntyre defined discrimination as “whether intentional or not.” [1989] 1 S.C.R. 143, 144. See also *B.C. Gov’t & Serv. Employees’ Union v. B.C. Pub. Serv. Employee Relations Comm’n*, [1999] 3 S.C.R. 3.

Equal Opportunities Commission,²⁴⁶ Lord Goff explained that the “intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned . . . is not a necessary condition to liability. It is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the grounds of sex.”²⁴⁷ Considering this approach in a subsequent decision, Lord Bridge of Harwich explained that Lord Goff’s test “is not subjective, but objective” and “[a]dopting it here the question becomes: would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?”²⁴⁸ Indeed the House of Lords envisaged that phrasing the relevant inquiry by reference to this objective “but for” test would produce clarity and remove the conflation of causation, intention and motive that frequently occurs in this context. As Lord Goff explained in *James*, the “simple” but for test,

possesses the double virtue that, on the one hand, it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex and on the other hand it avoids, in most cases at least, complicated questions relating to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms.²⁴⁹

Yet even in those jurisdictions that do refer to the “but for” formulation, courts have nonetheless capitulated to criticisms that it can present an overly onerous standard to applicants, particularly in the context of mixed grounds or motives, and have thus developed alternative formulations to accommodate these difficulties.²⁵⁰ In other words, courts,

246. [1989] A.C. 1155 (H.L. 1989).

247. *Id.* at 1193–94.

248. *James v. Eastleigh Borough Council*, [1990] 2 A.C. 751, 765 (H.L. 1990). I note that judges in other jurisdictions have appreciated that this is the significance of the application of the “but for” test in *James*. See, e.g., *City of Perth*, (1997) 191 C.L.R. at 21 (per Toohey, J.).

249. *James*, [1990] 2 A.C. at 774.

250. Justice Brennan writing for the plurality, refers to the classic problem of the “but for” test in the mixed motives example as follows:

Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a ‘cause’ of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply ‘in the air’ unless we can identify at least one of them as a but-for cause of the object’s movement. Events that are causally over determined, in other words, may not have any cause at all. This cannot be so.

Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

including those in the United Kingdom, have acknowledged that failure to satisfy the “but for” test does not automatically preclude a successful discrimination claim.²⁵¹ In *Price Waterhouse v. Hopkins*, four justices of the United States Supreme Court explicitly rejected the “but for” test in the context of “mixed motives” cases.²⁵² Justice Brennan (for the plurality) stated that, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them.” He further explained:

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words ‘because of,’ Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer *relied* upon sex-based considerations in coming to its decision.²⁵³

His Honor explained that while the phrase “but for” had been engaged in previous decisions, it was not intended to suggest that the plaintiff must show but-for cause, merely that if she does so, she prevails.²⁵⁴ Ultimately his Honor preferred to characterize the test as whether the prohibited ground was a motivating factor, a test now embodied in Title VII by virtue of the passage of the Civil Rights Act 1991²⁵⁵ and also consistent with that adopted by the Supreme Court in cases under the Fourteenth Amendment.²⁵⁶

251. Indeed in *James*, Lord Goff explained that the “but for” test was also not appropriate for cases of indirect discrimination, “because there may be indirect discrimination against persons of one sex under that subsection, although a (proportionately smaller) group of persons of the opposite sex is adversely affected in the same way.” [1990] 2 A.C. at 774. In mixed motives cases in the United Kingdom, tests such as “important factor” have been adopted. *See infra* note 257.

252. *Hopkins*, 490 U.S. at 228. Note that the “but for” test was rejected in the plurality opinion of Justice Brennan in which Justices Marshall, Blackmun, and Stevens joined. Justice White concurred although declined to enter into “semantic discussions” about whether the test was properly described as a “but for” test, preferring the formulation “substantial factor.” *Id.* at 258. Justice O’Connor also concurred although explicitly equated the “substantial factor” test with a “but for” test. *Id.* at 261.

253. *Id.* at 239 (emphasis added).

254. *Id.* at 240.

255. *See* MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 186 (5th ed. 2000). It is not clear whether it applies to cases brought under § 1981 or the Age Discrimination Employment Act (ADEA). *See id.* at 189.

256. *See* *Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 270 n.21 (1977), (holding that “[p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would . . . have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”).

The question of the requisite causal link between a prohibited ground and the ultimate treatment or outcome has usually arisen and is therefore more closely analyzed in cases involving mixed motives or reasons for a particular decision. Three possible approaches can be identified in the case law, although they are not mutually exclusive.

First, some courts have attempted to articulate the degree of relevance that the prohibited ground must have to the ultimate decision. As a result, they have asked whether the protected reason or ground was an "important factor" in the decision,²⁵⁷ an "effective and predominant cause,"²⁵⁸ the "real and efficient cause,"²⁵⁹ a "motivating factor,"²⁶⁰ "a substantial factor,"²⁶¹ a "substantial and operative factor"²⁶² or "a substantive reason in the totality of reasons."²⁶³ Courts often use tests interchangeably and rarely analyze them in terms of a hierarchy of degree of proof, although it is often emphasized that the tests do not suggest that the prohibited factor must be the only or even the main cause.²⁶⁴ However, confusion exists as to what standard is conveyed by the use of a particular term. For example, courts have used the terms "motivating factor" and "one of th[e] reasons" interchangeably, notwithstanding the fact that those two phrases do not appear to posit the same test.²⁶⁵

The second method eschews the "jurisprudence of adjectives"²⁶⁶ approach outlined above, and instead adopts a simple and uncomplicated

257. This is the position taken in the United Kingdom. *See O'Neill v. Governors of St Thomas More RCVA Upper School*, [1996] I.R.L.R. 372 (Eng.); *Nagarajan v. Agnew*, [1994] I.R.L.R. 61 (Eng.). Interestingly, this test is elucidated against the background of the "but for" test and it is clear that the English courts consider that they are consistent, although little analysis is undertaken of this issue, since the "but for" test is not usually referred to in "mixed motives" cases.

258. *O'Neill*, [1996] I.R.L.R. at 372.

259. *Id.*

260. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989). Indeed, following this decision, Congress amended Title VII by the Civil Rights Act of 1991 which provides that an unlawful employment practice is established when the plaintiff demonstrates that the prohibited ground was a motivating factor for the employment practice. The adoption of Justice Brennan's approach presumably involves a concomitant rejection of the "but for" test, at least in mixed motives cases.

261. *Id.* at 258. *See also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983).

262. *Human Rights Comm'n v. Eric Sides Motors*, [1981] 2 N.Z.A.R. 447, 457.

263. *Id.*

264. *See O'Neill*, [1996] I.R.L.R. at 377; *Fuller v. Candur Plastics Ltd.*, (Review Tribunal) [1981] 2 C.H.R.R. D/419 (Can.).

265. *Hopkins*, 490 U.S. at 248.

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id.

266. *Starcon, Inc. v. NLRB*, 176 F.3d 948, 951 (7th Cir. 1999).

test of whether the prohibited ground is “one of the reasons” for the relevant decision.²⁶⁷ This is the approach adopted in interpreting anti-discrimination legislation in Canada and Australia. In Canada, plaintiffs can prove discrimination under federal and provincial Human Rights Codes²⁶⁸ if the prohibited ground “affected the employer’s decision”²⁶⁹ or “was one of the factors that influenced the respondent in refusing the applicant the position; it does not have to be the sole or primary reason for that decision.”²⁷⁰ The Federal Court of Canada takes the view that “it is sufficient that the discrimination be *a basis* for the employer’s decision.”²⁷¹ Concomitant with this straightforward approach is a rejection of an inquiry that sets up a “false dichotomy” between permissible and impermissible factors.²⁷²

This simple test has not prevented different tribunals from expressing the test in a variety of ways; for example as “operative factor or proximate cause,”²⁷³ “an operative [but not major] element,”²⁷⁴ “the effective cause,”²⁷⁵ “a material cause, that is, a proximate cause, one that played a part even if subconsciously and even if present with other causes,”²⁷⁶ and even “the straw that broke the camel’s back.”²⁷⁷ However, despite the different formulations, the Canadian Federal Court consistently takes the view that although the “verbal formulations” vary, the overriding test is whether the prohibited factor was “one of the factors in the decision.”²⁷⁸

This “one factor” test appears the least demanding test in the anti-discrimination field and it is also the approach adopted in Australian state and federal anti-discrimination law. For example, Section 18 of the

267. See *Iancu v. Simcoe County Bd. of Educ.*, (Review Tribunal) [1983] 4 C.H.R.R. D/1203, D/1207 (B.C. Human Rights Council Dec.).

268. For an explanation of the structure and application of human rights legislation in Canada, see RUSSELL W. ZINN AND PATRICIA BRETHOUR, *THE LAW OF HUMAN RIGHTS IN CANADA: PRACTICE AND PROCEDURE*, 1-1 (2000).

269. *McKee v. Hayes-Dana Inc.*, [1992] 17 C.H.R.R. D/79, D/80 ¶ 5 (Can.).

270. *Toth v. Sassy Cuts, Inc.*, (Review Tribunal) [1987] 8 C.H.R.R. D/4376, D/4377 (Can.).

271. *Holden v. Canadian Nat’l Railway Co.*, [1990] 14 C.H.R.R. D/12 at *8 (Fed. Ct. of Can., App. Div.) (emphasis added).

272. *Holloway v. MacDonald*, [1983] 4 C.H.R.R. D/1454 para. 12482 (Can.).

273. *Taylor v. Via Sec. Sys., Inc.*, (Review Tribunal) [1987] 8 C.H.R.R. D/3925, D/3930 (Can.).

274. *Fuller v. Candur Plastics Ltd.*, (Review Tribunal) [1981] 2 C.H.R.R. D/419, D/420 (Can.).

275. *Holloway*, [1983] 4 C.H.R.R. D/1454 para. 12483.

276. *Hendry v. Liquour Control Bd. of Ontario*, [1980] 1 C.H.R.R. D/160 para. 1458 (Can.).

277. *Holloway*, [1983] 4 C.H.R.R. D/1454 para. 12483.

278. *Holden v. Canadian Nat’l Railway Co.*, [1990] 14 C.H.R.R. D/12 (Fed. Ct of Can., App. Div.); *Canada (Human Rights Comm’n) v. Canada (Dep’t of Nat’l Health & Welfare)*, [1998] 32 C.H.R.R. D/168, *aff’d*, [1999] 41 C.C.E.L. (2d) 3, 160 F.T.R. 287.

Racial Discrimination Act 1975 (Cth) provides that where an act is done for two or more reasons, and one of the reasons is the race, color, descent, or national or ethnic origin of a person (regardless of whether it is the dominant reason or a substantial reason for doing the act) then the act is considered to have been done for that “protected” reason. Similar provisions appear in many anti-discrimination statutes in Australia and were enacted due to controversy in the early case law regarding the question whether the relevant act had to be the only reason, a substantial or dominant reason, or just “a reason.”²⁷⁹ Clearly this uncertainty has now been resolved in favor of a simple and straightforward “one factor” test.²⁸⁰ Of course, courts continue to emphasize that a causal relationship must be established in order for plaintiffs to succeed,²⁸¹ however the factual inquiry is simplified by the lowering of the standard of causation.

The third approach to an analysis of causation in anti-discrimination law is applied in some jurisdictions as an alternative to (and sometimes in conjunction with) the “important factor” or “one factor” approaches

279. See Sex Discrimination Act, 1984, § 8 (Austl.). See also Disability Discrimination Act, 1992, § 10 (Austl.); Equal Opportunity Act, 1984, § 5 (W. Austl.); Anti-Discrimination Act, 1977, § 4A (N.S.W. Austl.). RONALDS, *supra* note 241, at 42. A consideration of cases applying this legislation reveals that overall the test is applied in a very uncomplicated and straightforward manner. Generally courts and tribunals appear to have little difficulty in understanding and applying this test, although see *IW v. City of Perth*, (1997) 191 C.L.R. 1, 64–65 (per Kirby, J.). Cf. *Comm’r of Corrective Servs. v. Aldridge*, (2000) NSWADTAP 5 para. 52–53.

280. I note that in *IW v. City of Perth*, (1997) 191 C.L.R. at 64, Kirby, J. thought that the “but for” test adopted by the House of Lords in *James v. Eastleigh Borough Council*, [1990] 2 A.C. 751, was appropriate in the context of Sec. 5 of the WA legislation which provides the equivalent provision to Sec. 18 of the RDA. His Honour thought that this test “must be applied keeping § 5 of the Act in mind.” However, the two cases cited by his Honour are not authoritative as one was decided prior to the relevant legislative amendment. See *Australian Iron and Steel Ltd. v. Banovic*, (1989) 168 C.L.R. 165 (concerning NSW legislation; Sec. 4A was inserted into the NSW legislation in 1994). The other case cited the House of Lords approach as authority for the objective approach. See *Waters v. Pub. Transp. Corp.*, (1992) 173 C.L.R. 349, 359–60 (Austl.) (concerning Victorian legislation which does not explicitly contain the “one factor” test.). Moreover, this view has been criticized in other contexts. In *Commissioner of Corrective Services v. Aldridge*, (2000) NSWADTAP 5 para. 5, the New South Wales Administrative Decisions Tribunal Appeal Panel noted that Sec. 4A of the New South Wales (NSW) legislation, embodying the “one factor” test, “throws doubt on the usefulness in NSW of the ‘but for’ test of causation in cases of direct discrimination” as it “may distort the meaning of section 4A.” Indeed it was stated that the one factor test set out in Sec. 4A

is inconsistent with the ‘but for’ test which requires the complainant to prove that the less favourable treatment would not have occurred without the presence of that ground or reason. Section 4A only requires the complainant to prove that the prescribed ground or reason was one of the factors which contributed to the less favourable treatment. These tests are, in our view, inconsistent.

Id. This, with respect, is plainly correct.

281. See, e.g., *Commonwealth of Austl. v. Human Rights & Equal Opportunity Comm’n*, (1997) 147 A.L.R. 469.

and involves an evidentiary burden-shifting technique whereby the burden of proof shifts between the plaintiff and defendant once the applicant has established a prima facie case. In this way, proof that the prohibited ground is “a factor” would establish either a prima facie case or an actual violation. The responsibility would then shift to the defendant to establish that the prohibited ground had been irrelevant to the decision or action taken. The U.S. Supreme Court has adopted this approach in “mixed motives” cases in the field of employment discrimination law. This approach requires the plaintiff initially to establish that the prohibited ground was a “motivating factor” in the decision. Once established, the defendant can escape liability only by showing that, even if it had not taken the relevant factor into account, it would have come to the same decision.²⁸² A similar, although even more “plaintiff friendly,” approach has been adopted in a European Community Directive on the burden of proof in discrimination cases²⁸³ and in South Africa’s recently enacted Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.²⁸⁴

The “burden-shifting” approach attempts to strike a balance between the need to avoid an overly onerous standard from the plaintiff’s point of view and the need to ensure a sufficiently minimum level of causation. Moreover, it reflects overriding concerns of fairness; that is, that the burden of proof should be placed on the defendant because the defendant’s actions have created the problem of proof.²⁸⁵

282. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Interestingly, following the passage of the Civil Rights Act in the United States, the proof of a prohibited ground as a “motivating factor” establishes liability and it is only the remedy that is affected by the employer’s “same decision” defense. Following *Hopkins*, the Civil Rights Act of 1991 enacted a new Sec. 703(m) providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C.A. § 2000e-2(m) (1991). Where the plaintiff establishes a motivating factor, a violation of the statute is made out. However, the employer may limit a plaintiff’s remedies if it can demonstrate that it “would have taken the same action in the absence of the impermissible motivating factor.” ZIMMER ET AL., *supra* note 255, at 183–84.

283. Council Directive 97/80/EC, art. 4.1, 1998 O.J. (L 14/6) requires Member States to ensure that, in proceedings alleging breach of the principle of equal treatment, once the applicant has established facts from which it may be presumed that there has been direct (or indirect) discrimination, it shall be for the respondent “to prove that there has been no breach of the principle of equal treatment.” See Jenifer Ross, *The Burden of Proving Discrimination*, 4 INT’L J. OF DISCRIMINATION & L. 95, 101 (2000).

284. Section 13 provides that if the complainant makes out a prima facie case of discrimination, the respondent must prove “that the discrimination did not take place as alleged” or “that the conduct is not based on one or more of the prohibited grounds”; the defendant also has the onus of establishing that if discrimination did take place it was not unfair. Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 § 13(2).

285. See, e.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974) (“Unquestionably, it is now impossible for an individual discriminatee to recreate the

Theoretically, refugee decisionmaking is not adversarial in the traditional sense since the burden of proof is “shared” between the applicant and decisionmaker.²⁸⁶ However, in practice many states’ determination procedures operate along adversarial lines. To the extent that this is so, the idea of burden shifting may, at first blush, appear relevant to refugee law in the context of determining causation. However a closer consideration suggests that it is not appropriate since it would likely introduce a rigid and legalistic proof structure into decisionmaking and (more importantly) does not have the same logical force as in the discrimination context, given that the party to whom the burden would shift (the government of the country in which the applicant is seeking asylum) is not in the same superior evidentiary position vis-à-vis motive as are defendants in discrimination cases.

A number of rationales exist for adopting relaxed standards of causation in the anti-discrimination context, relating to both policy issues and pragmatic concerns. First, a liberal causation standard is often thought to be important given the overriding policy concerns of human rights legislation, namely, eradicating discriminatory conduct in any form. For example, in the context of the relevant federal legislation in the United States, it has been said, “in the implementation of employment decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise.”²⁸⁷ Since anti-discrimination legislation aims to

past with exactitude.”). *Johnson’s* holding was adopted by the District of Columbia Circuit Court of Appeals in *Day v. Matthews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (“Such a showing is impossible precisely because of the employer’s unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem.”). See also *Hopkins*, 490 U.S. at 272.

Many of these [lower] courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII.

Id.

286. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 196 (1979) (“Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.”).

287. *Hopkins*, 490 U.S. at 272 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801). Some early United States court decisions that favoured a lenient causation standard took the view that

[C]laims of racial discrimination and retaliation are not to be viewed in terms of the degree to which they might or might not have been a factor in challenged actions and must instead be viewed by the Court in terms of whether they played any part at all in such actions. If any element of racial discrimination or retaliation or reprisal

“provide relief for the victims”²⁸⁸ and to achieve “the vindication of a major public interest”²⁸⁹ including the removal of the stigmatic harm of discrimination,²⁹⁰ courts and legislatures display a willingness to relax the causation standard in order to facilitate the achievement of the aims of the legislation.²⁹¹ As one Canadian tribunal expressed it, “the declared purpose of the Act can be better accomplished by the much less involved method of determining merely whether a prohibited reason formed part of the reasons for the decision.”²⁹² Indeed, the Committee on the Elimination of Racial Discrimination, the international body vested with the duty to oversee the implementation of the Convention on the Elimination of Racial Discrimination (CERD)²⁹³ by state parties, has criticized state legislation that confines the prohibition of discrimination to those actions undertaken solely on the basis of race, questioning the legitimacy of such a narrow test in light of the object and purposes of the Convention.²⁹⁴ An overly constrictive test is said to “considerably weaken the

played any part in a challenged action, no matter how remote or slight or tangential, the Court would hold that the challenged action was in violation of . . . the law.

United States v. Hayes Int’l Corp., 6 Fair Emp. Prac. Cases 1328, 1330 (N.D. Ala. 1973). See also *King v. Laborers Int’l Union of N. Am., Union Local No. 818*, 443 F.2d 273 (6th Cir. 1971). However, I note that the causation issue in U.S. employment discrimination law is still contested, and in many respects unclear. See, for example, *supra*, note 252. There is controversy about the nature of the evidence that is required in order to take advantage of the lenient “motivating factor” test. See Tristin K. Green, Comment, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983 (1999); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000).

288. Ontario Human Rights Comm’n & Therese O’Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 547 (Can.); *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143 (Can.).

289. In the context of United States legislation, it has been said that “claims under Title VII involve the vindication of a major public interest.” Section-by-Section Analysis of H.R. 1746, Equal Opportunity Act of 1972 Conference Report, 118 Cong. Rec. 7166, 7168 (1972), *quoted in Brodin, supra* note 175, at 319.

290. In the context of the Fourteenth Amendment of the United States Constitution, for example, the United States Supreme Court has long recognized that “whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.” *Hopkins*, 490 U.S. at 263. See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

291. The broad, purposive approach to interpreting anti-discrimination legislation is recognized in most regimes. See *supra* notes 227–30. For example, in one of the key Canadian decisions setting out the “one factor” test, the Board of Inquiry emphasized that “the primary objective of the Human Rights Code is to provide equality of opportunity. The objective is to ensure that people are judged as individuals rather than on the basis of preconceptions about groups to which they belong.” *Holloway v. MacDonald*, [1983] 4 C.H.R.R. D/1454 para. 12493 (Can.).

292. *Holloway*, [1983] 4 C.H.R.R. D/1454, para. 12485.

293. Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 227.

294. The two states that have been subject to such criticism are Austria and the Netherlands.

scope of the Convention.”²⁹⁵ Interestingly, the Committee has suggested that the Australian example of adopting a “one factor” test might be considered as a model for state parties that are required to modify existing sole factor tests in order to comply with their obligations under CERD.²⁹⁶

A second rationale for adopting the “one factor” test reflects the difficulty and artificiality of separating prohibited from non-prohibited factors when ascertaining the determinant of an act. As Justice Kirby of the High Court of Australia has explained:

That purpose [of legislation similar to s18 of the Racial Discrimination Act] is plain enough. It involves a recognition of the fact that, typically, human motivation is complex. Discriminatory conduct can rarely be ascribed to a single ‘reason’ or ‘ground’. . . . The object of the Act is to exclude the unlawful and discriminatory reasons from the relevant conduct. This is because such reasons can infect that conduct with prejudice and irrelevant or irrational considerations which the Act is designed to prevent. Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons—and because affirmative proof of an unlawful reason is often difficult—the Act has simplified the task for the decision-maker. It is enough that it be shown that the doing of the act was ‘by reason’ or ‘on the ground’ of the particular matter in the sense that the unlawful consideration *was included in* the alleged discriminator’s reasons or grounds. It must be a real ‘reason’ or ‘ground.’ It is not enough to show that it was a trivial or insubstantial one. But once it is shown that the unlawful consideration

295. *Consideration of Ninth and Tenth Periodic Reports of Austria*, Comm. on the Elimination of Racial Discrimination, 41st Sess., Provisional Summary Record of the 947th mtg. at 3, U.N. Doc. CERD/C.SR.947 (Sept. 9, 1992) (The Committee was referring to Article 1 of Austria’s Federal Constitutional Law of 1973, “which prohibited any discrimination on the sole ground of race, colour, descent or national or ethnic origin.”). *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Austria*, Comm. on the Elimination of Racial Discrimination, 54th Sess., U.N. Doc. CERD/C/304/Add. 64, at ¶ 11 (Apr. 7, 1999) (The Committee recommended that “the State party consider amending the relevant provision in the Constitution Act implementing the Convention by deleting the word ‘sole’ in connection with the basis of illegal racial distinctions.”). The Committee has also criticized a similar provision in Sec. 5 of the Equal Treatment Act of the Netherlands, stating: “The wording ‘on the sole grounds of’ various types of discrimination lent itself to a restrictive interpretation since unequal treatment often occurred on both permissible and prohibited grounds and might be justified by the discriminating party on the former grounds.” *Summary Records of the 1252nd Meeting: Netherlands*, Comm. on the Elimination of Racial Discrimination, 52d Sess., 1252d mtg., U.N. Doc. CERD/C/SR.1252 at ¶ 46, (Mar. 10, 1998).

296. *See Consideration of Ninth and Tenth Periodic Reports of Austria*, *supra* note 295, at 3.

truly played a causative part in the decision of the alleged discriminator, that is sufficient to attract a remedy under the Act.²⁹⁷

This is particularly the case when attempting to analyze the motivations of an organization or bureaucratic structure such as a governmental body. As recognized by the United States Supreme Court in the context of a claim under the equal protection clause of the Fourteenth Amendment, “[r]arely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”²⁹⁸

A third and closely related rationale for the “one factor” standard relates to the evidentiary difficulties complainants face in anti-discrimination actions. This has been acknowledged by both legislatures and courts. For example, in a recent decision of the Federal Court of Canada, Justice Richard explained the “one factor” test as appropriate since, “I cannot categorically say that Mr. Basi would have received the position but for the discrimination; however I can say that the circumstantial evidence satisfies me that discrimination played a part in the employer’s failure to offer it to him.”²⁹⁹ Indeed, the existence of evidentiary difficulties facing complainants was a major rationale for the introduction of the “one factor” test in Australian anti-discrimination legislation³⁰⁰ and has been pointed to by the Committee on the Elimination of Racial Discrimination as a significant problem with anti-discrimination legislation that restricts its purview to action undertaken on the sole ground of race.³⁰¹

297. *IW v. City of Perth*, (1997) 191 C.L.R. 1, 63 (emphasis added).

298. See *Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 265 (1977).

299. *Canada (Human Rights Comm’n) v. Canada (Dep’t of Nat’l Health & Welfare)*, [1998] 32 C.H.R.R. D/168 at 5–6, *aff’d*, [1999] 41 C.C.E.L. (2d) 3, 160 F.T.R. 287.

300. See *Australia’s Seventh and Eighth Periodic Reports Submitted under Article 9 of the Convention on the Elimination of Racial Discrimination*, Comm. on the Elimination of Racial Discrimination, 40th Sess., U.N. Doc. CERD/C/194/Add.2, at 11 (June 19, 1991) (stating that, “[t]he adjustments remove the requirements that racial discrimination be shown to be the dominant reason for an action in order for that action to be unlawful. This provision presented a significant range of complainants with problems of proof.”).

301. Country Rapporteur, Mr Nobel, said in response to a question about the appropriateness of the Committee’s commenting on such details as the use of the word “sole” in the Federal Constitution Act, “that the inclusion of the word ‘sole’ made it difficult for complainants against racism in legislative and administrative acts to litigate successfully.” *Summary Record of the 1327th meeting: Austria, Mongolia, Portugal*, Comm. on the Elimination of Racial Discrimination, 54th Sess., 1327th mtg., U.N. Doc. 22/03/99 CERD/C/SR.1327, ¶ 66–68 (Mar. 22, 1999).

b. Tentative Conclusions From Anti-Discrimination Law

This analysis suggests that where the law is concerned with eradicating discriminatory conduct and providing protection and redress for victims, a liberal and straightforward test of causation is deemed preferable. Courts and legislatures have acknowledged that a stringent test of causation is inconsistent with the aims and objectives of remedial legislation. In this context, the “one factor” test holds considerable promise in its flexibility and simplicity. This is especially true when compared with the deficiencies of introducing adjectival uncertainty with notions such as “important factor.”

Another very important insight that is gained from a consideration of causation in anti-discrimination law is that in that context, common law courts have been clear and precise in treating as analytically distinct the separate elements of causation and intent and ensuring that the two are not conflated into a single test, even in the context of direct discrimination or disparate treatment. They have almost uniformly eschewed a subjective analysis in favour of an outcomes based approach. This is not to say that subjective concerns are not relevant, as in many cases they will provide the requisite evidence of discrimination. However, the courts³⁰² have been careful to reiterate that intent is not a necessary element of the causation standard.

The potential relevance of flexible causation standards developed in the anti-discrimination arena to the refugee context has been recognized by two common law courts. In *Chokov*,³⁰³ a single justice of the Federal Court of Australia referred to the “one factor” test provided in federal anti-discrimination statutes as support for the proposition that a similarly flexible test is appropriate in the context of the Refugee Convention,³⁰⁴ and in *Okere*, another single justice of the Federal Court of Australia cited a seminal decision on indirect discrimination in support of an approach to refugee determination that focuses on the impact or effect of a persecutory policy in assessing nexus rather than on searching for the

302. Excluding the United States.

303. *Chokov v. Minister for Immigration & Multicultural Affairs*, (1999) F.C.A. 823 (per Einfeld, J.).

304. *See id.* para. 31. Justice Einfeld explained that two factors, one Convention related and one non-Convention related, are

not competitive or mutually exclusive. In a given case they may both exist. The normal legal result of such a finding would be an allowance of the claim. Indeed a number of federal statutes operating in similar areas expressly provide for such a result in those areas: s.18 Racial Discrimination Act 1975, s.8 Sex Discrimination Act 1984, s.10 Disability Discrimination Act 1992. Parliament has thus repeatedly spoken on such issues of principle.

Id.

motives of the persecutor.³⁰⁵ In addition, in *Gafoor*, the United States Court of Appeals for the Ninth Circuit relied upon anti-discrimination provisions in rejecting the dissent's view that persecution can only be "on account of" a Convention ground if the factor, by itself, was sufficient to bring about the action.³⁰⁶ In the latter case, after summarizing the anti-discrimination standard set out in the federal Civil Rights Act of 1991—that is "that a person may act 'because of' a discriminatory factor even though other factors also motivated the action, and even if the action would have been taken in the absence of the discriminatory factor"—the court noted that the dissent "offers no reason for imposing a higher burden on asylum applicants than on employees in Title VII cases."³⁰⁷ The court reasoned:

Indeed, the equities cut the other way. An employee at least has the opportunity to gather evidence of the employer's motive and to put the employer on the stand to explain the reasons behind the employment action. The evidentiary obstacles for asylum applicants, by contrast, are enormous. 'Persecutors,' we have stated, 'are hardly likely to provide their victims with affidavits attesting to their acts of persecution.' Nor are they likely to submit declarations explaining exactly what motivated them to act. And individuals fleeing persecution do not usually have the time or ability to gather evidence of their persecutor's motives.³⁰⁸

Thus, the court concluded that it was unreasonable to require asylum applicants to establish that the Convention explanation solely accounts for the well-founded fear or even "to require a showing that the persecution would not have occurred in the absence of a protected ground," an effective "but for" test. Rather, the reasonable approach was said to be to adopt the "at least in part" test previously set out by the court in *Borja*.³⁰⁹

In addition to the heightened evidentiary difficulties experienced by refugee applicants, there is another powerful reason for understanding that "the equities cut" in favor of the replication of liberal anti-discrimination standards in the refugee context. That is, while anti-discrimination legislation's primary purpose is to "redress perceived injustices or disadvantages" and is thus "essentially remedial in

305. As mentioned above, Branson, J. in *Okere v. Minister for Immigration & Multicultural Affairs*, (1998) 87 F.C.R. 112, 112 cites the decision of the High Court of Australia in *Australian Iron & Steel Proprietary Ltd. v. Banovic*, (1989) 168 C.L.R. 165, 176–77, 184, in support of her indirect or true reason test.

306. *Gafoor v. INS*, 231 F.3d 645, 653 (9th Cir. 2000).

307. *Id.*

308. *Id.* at 654.

309. *Borja v. INS*, 175 F.3d at 732 (9th Cir. 1999).

character,”³¹⁰ it is nonetheless punitive in the sense that someone is held responsible for the discriminatory conduct and punished (albeit in the civil law) accordingly.³¹¹ As has been repeatedly emphasized in this Article, the non-punitive nature of refugee law is a point of departure, being concerned only with the protection of those who are potentially at risk of persecution for a Convention reason. Thus, if a liberal causation standard is appropriate in the context of a statutory scheme that ultimately imposes liability, it should apply *a fortiori* in one that is purely remedial.

III. A PROPOSED STANDARD OF CAUSATION FOR THE NEXUS CLAUSE

In considering the correct interpretation of the Refugee Convention it must be remembered that the Vienna Convention on the Law of Treaties calls for the examination of a treaty term “in accordance with the ordinary meaning” of its text construed in light of “its object and purpose.”³¹² Consistent with this requirement, superior courts in the common law world have reiterated that international instruments “should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation.”³¹³

In the specific context of the Refugee Convention, it has been repeatedly emphasized that a “broad, liberal and purposive interpretation must be given to the language,”³¹⁴ since “those who framed the [Convention definition] wisely chose broad expressions, which it is not the

310. Evelyn Ellis, *Gender Discrimination Law in the European Community*, in *DISCRIMINATION LAW: CONCEPTS, LIMITATIONS AND JUSTIFICATIONS* 14–16 (Janet Dine & Bob Watt eds., 1996).

311. Justice O’Connor in her opinion emphasizes that “Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989). The fact that such legislation ultimately imposed liability was also acknowledged by the British Employment Appeal Tribunal in *O’Neill v. Governors of St. Thomas More RCVA Upper School*, [1996] I.R.L.R. 372, 376 (Eng.) (“The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of.”).

312. Vienna Convention on the Law of Treaties, *opened for signature* May 3, 1969, art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

313. *Applicant A v. Minister for Immigration & Ethnic Affairs*, (1997) 190 C.L.R. 225, 255 (Austl.) (per McHugh, J.).

314. *Minister for Immigration & Multicultural Affairs v. Abdi*, (1999) 162 A.L.R. 105, 115 (Austl.).

Court's task to constrict."³¹⁵ Moreover the "broad humanitarian purpose" of the Convention has been recognized and reiterated in the case law.³¹⁶

In light of these prescriptions, there are a number of conclusions that can be drawn from the analysis above. The first and most obvious one is that any test that requires the protected ground to be the "sole cause" for the fear of persecution must be rejected. Absolutely no basis exists for such a test in the Convention text, nor is there any justification, based on the aims and objectives of the Convention, for reading the word "sole" into the Convention definition. Moreover, neither courts nor scholars support such a test.

Second, if common law (tort) doctrines of causation are to be relied upon, an approach which incorporates a policy/common sense notion into the test itself should be strongly resisted primarily for the reason that such a test offers little guidance to decisionmakers and produces wide inconsistency, thus subjecting refugees to the possibility that similarly situated claimants will be treated differently. Further, it is premised on an underlying philosophy of limiting liability based on policy considerations, a notion that has no role in refugee adjudication. To this end, it should be emphasized that doctrines limiting legal liability such as *novus actus interveniens*, unreasonable action or contributory negligence on the part of plaintiffs, foreseeability, and proximity have no place in refugee determination.

Third, although the "but for" test has some advantages, it should be rejected as unworkable. It is clear that in many cases the "but for" test can present a convenient shorthand method of displaying that a person's predicament is "for reasons of" a convention ground. Moreover, it helpfully denotes that the proper inquiry is an objective as opposed to a subjective one. However, the problems with the test suggest that it would require significant modification in the refugee context, particularly in relation to multiple cause cases. In addition, it produces a great deal of confusion in refugee case law, and also involves the danger that its link

315. *Ram v. Minister for Immigration & Ethnic Affairs*, (1995) 57 F.C.R. 565, 568 (per Burchett, J. with whom O'Loughlin & R.D. Nicholson, JJ. agreed). See Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent at 8 n.11, *Elias-Zacarias* (No. 90-1342) (In discussion formulating the Convention, one delegate urged that "what had so far been accomplished . . . be reconsidered in a more generous spirit," that the terms be "truly liberal," and that the "definition of refugee to be adopted . . . be as all-embracing as possible." A statement by one of the drafters of the Convention confirms that the definition was meant to be interpreted expansively: "The drafters did not have specific restrictions in mind when they used this terminology. There was an effort to express in legal terms what is generally considered as a . . . refugee." (citations omitted)).

316. See *R. v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629, 646, [1999] 2 W.L.R. 1015, [1995] 2 All E.R. 545 (H.L. 1999) (per Steyn, L.J.); *id.* at 649 (per Hoffman, L.J.); *Chen Shi Hai v. Minister for Immigration & Multicultural Affairs*, (2000) 201 C.L.R. 293, 307 (per Kirby, J.).

with tort law will encourage other tort-based concepts to be introduced inappropriately into refugee determination.

The insight which emerges from an analysis of anti-discrimination law and equity is that where the law is concerned with providing protection for vulnerable persons and is focused more closely on the provision of remedies rather than the allocation of legal responsibility (as is the case in refugee law), courts and legislatures have been amenable to the application of a more liberal and flexible understanding of causation and indeed have considered that such an approach is necessary to uphold the objectives of the law in those areas.

In the context of the Refugee Convention, it has been recognized that a “distant nexus” standard, manifested as the question whether the well-founded fear of being persecuted is “in part” due to a Convention ground, is necessary in order to accommodate the evidentiary challenges inherent in the determination, and to accord full effect to the aims and purposes of the Convention. The difficulties imposed on applicants by the adoption of a more stringent test that requires the Convention ground to be a “sufficient” or “necessary” cause of the well-founded fear have been acknowledged in the case law, even by those judges who nonetheless prefer the higher standard. In the decision of the United States Court of Appeals for the Ninth circuit in *Gafoor*, discussed above, the dissenting judge accepted that a test that requires the applicant to prove that “he would have been treated . . . differently” *but for* the Convention ground, “is not easily satisfied”³¹⁷ and that attempting to separate situational factors as precisely as a strict causation test would demand “requires a degree of inferential hair-splitting” that the court had not previously been willing to attempt.³¹⁸ Indeed, an analysis of existing cases reveals the artificiality that would be involved in an attempt to accord different weight to different explanations for a person’s well-founded fear of being persecuted. In none of the refugee cases reviewed for the purposes of this Article, involving multiple causes, was a court able to ascertain the degree of significance of a certain factor, other than to recognize that it played “a part” in the fear of future persecution. Rather, it is acknowledged that in many cases Convention factors are “inextricably linked” to non-Convention grounds.³¹⁹ In light of these observations, any test that required an asylum applicant to establish that the Convention ground was the “essential”, “substantial,” or “central”

317. *Gafoor v. INS*, 231 F.3d 645, 661 (9th Cir. 2000).

318. *Id.*

319. *See* *Minister for Immigration & Multicultural Affairs v. Sarrazola*, (2001) 107 F.C.R. 184, 199 (Austl.) (per Heerey, J.). Similarly, in *Osorio v. INS*, 18 F.3d 1017, 1029 (2nd Cir. 1994), Judge Oakes of the United States Court of Appeals for the Second Circuit admitted that “[a]ny attempt to unravel economic from political motives is untenable in this case.”

reason for the well-founded fear, could potentially exclude a very significant number of applicants who have nonetheless demonstrated that they have a well-founded fear for a Convention ground. As the UNHCR has recently explained, “[t]here is no requirement in the Convention, Protocol, Handbook or Executive Committee documents that one of the protected grounds be central to the persecutor’s motivation.”³²⁰ Therefore a very strong argument can be made that a less stringent “one factor” or “in part” test is required by a proper reading of the Convention text, in light of its object and purpose.

Moreover, this is not merely a preferable policy perspective but is arguably required by the Convention text in light of the accepted understandings of the degree of certainty that must be established in refugee determination more generally. It is very well established that the standard set out in the Convention text, “well-founded fear,” is satisfied pursuant to evidence of a less than probable chance of being persecuted. The test has variously been described as requiring a “reasonable possibility,”³²¹ “reasonable degree of likelihood,”³²² “reasonable chance,”³²³ and “real chance.”³²⁴ Reading the Convention definition as a whole, it is apparent that an analysis that requires an applicant to establish the precise causal role played by a Convention ground is inconsistent with a proper application of the “well founded fear” test in that it requires a degree of certainty that travels well beyond the “likelihood” standard specified in the text.³²⁵ Judges have warned of the danger in considering each of the elements in the definition as separate

320. Comments on Proposed Rule Regarding Asylum and Withholding Definitions of the UNHCR, Regional Office for the United States of America and the Caribbean, INS No. 2092-00, AG Order No. 2339-2000, at 7 (Jan. 22, 2001) (on file with author).

321. *INS v. Cardoza-Fonseca*, 467 U.S. 407 (1987).

322. *R. v. Sec’y for State for the Home Dep’t, ex parte Sivakumaran*, 1 All E.R. 193, 197–98 (1988) (Eng.).

323. *Adjei v. Minister of Employment & Immigration*, 7 Imm. L.R.2d 169, 172–73 (F.C.A. 1989) (Austl.), cited in HATHAWAY, *supra* note 37, at 79.

324. *Chan v. Minister for Immigration & Ethnic Affairs*, (1989) 169 C.L.R. 379, 389 (Austl.) (per Mason, C.J.).

325. This is well explained in a number of dissenting judgments of the United States Board of Immigration Appeals. For example, Board Member Rosenberg explained in dissent:

There is no statute, regulation, or other authority that requires that a persecutor must seek to harm his victim solely, principally, or probably on account of the offending characteristic. To the contrary, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), recognized that evidence of less than a probability of persecution is sufficient to satisfy the well-founded fear standard. The Supreme Court went on to state that even a 10 percent chance that the victim will be killed, tortured, or otherwise persecuted should be sufficient to satisfy the applicable reasonable fear standard. In other words, even a less than probable chance of persecution resulting from a desire to overcome a racial or family-based characteristic will support a finding that an asylum seeker has a well-founded fear.

elements in the definition as separate and distinct,³²⁶ a warning arguably justified by the many cases that seek to ascertain the precise role that the Convention ground plays by reference to a causation standard divorced from the remainder of the definitional requirements.

It is in light of these considerations that the *Michigan Guidelines*³²⁷ recommend that, in view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. A Convention ground will be a contributing cause if its presence increases the risk of being persecuted.

A focus on the interpretation of the definition as a whole also highlights the fact that the relevant nexus or connection is between the *well-founded fear of being persecuted* and the Convention reason, which uses the passive voice to suggest a predicament-based approach. The precise definition refers to persons who are unable or unwilling to avail themselves of the protection of their country “owing to a well-founded fear of being persecuted” for Convention reasons. This clearly focuses an adjudicator on the reasons for the person’s *well-founded fear of being persecuted* and not on the personal motivations of potential persecutors. While these two inquiries may be co-extensive in some cases, they may not and need not be so in all cases. Indeed, the imposition of persecutorial intent as a necessary element in a refugee claim imposes a limitation not found in the Convention text. For this reason, the *Guidelines* phrase the test as one of “contributing cause” rather than, for example, “motivating cause.”

In re V-T-S, B.I.A. Interim Dec. 3008, 16 (Mar. 6, 1997). See also *id.* at 12 (Chairman Schmidt dissenting); *In re C-A-L*, B.I.A. Interim Dec. 3305, 7 (Feb. 21, 1997) (Chairman Schmidt dissenting); *id.* at 10–13 (Board Member Rosenberg dissenting). This point is also emphasized in the context of the proposed amendment to the INS regulations, discussed *supra* notes 84–88, that would require an applicant to establish that the protected ground was “central” to the persecutor’s motive. As the submission argues, the wording that, in mixed motivation cases, the applicant

must establish that a protected characteristic was central to the persecutor’s motivation, strongly implies that the applicant must establish the persecutor’s motivation to a virtual certainty. This imposes a standard of proof far higher, and entirely inconsistent with, the well-founded fear standard, as defined by the U.S. Supreme Court, the U.N. Convention relating to the status of refugees, and other state parties and international authorities interpreting that standard.

Harvard Immigration Memo, *supra* note 86, at 8.

326. See *Gersten v. Minister for Immigration & Multicultural Affairs*, (2000) F.C.A. 855 (Austl.).

327. James C. Hathaway, *Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 207 para. 13 (2002).

Returning again to the meaning of “well-founded,” it is clear that, while positing a reasonably low standard of certainty, it nonetheless requires some objective basis. For example, in seeking to give content to phrases such as “real chance,” courts have explained that there must be more than a “remote or insubstantial”³²⁸ risk and that there must be “a substantial, as distinct from a remote chance” of the well-founded fear.³²⁹ Accordingly, the *Michigan Guidelines* acknowledge that there may be cases where the Convention ground is so tenuously linked to the well-founded fear that the fear can no longer be characterized as “for reasons of” a Convention ground. Therefore, the “contributing cause” standard is modified by the principle that if the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

Finally, it is important to emphasize the necessity for courts and decisionmakers actually to apply the liberal standard warranted by a proper interpretation of the Convention text. As was made clear above, whilst purporting to reject a sole standard test and thus admit of the possibility of multiple reasons, courts and tribunals nonetheless are prone to dismissing claims by negating the relevance of a Convention ground once a non-Convention factor is identified. This was recognized by the Full Federal Court of Australia in *Sarrazola*,³³⁰ in which Merkel, J. explained that “[t]o elevate having the means to pay to be the only reason motivating the respondent’s persecutors is, bearing in mind ‘the broad policy of the Convention . . . illogical and wrong.’”³³¹ The Court went on to say that the tribunal below “cannot immunize itself from review by correctly stating the tests to be applied in order to determine whether the causal nexus requirements of Art 1(2A) are satisfied. It must correctly apply the tests.”³³² A similar observation might be made about cases involving claims by women who allege a well-founded fear of being persecuted in the context of domestic violence and other gender-specific claims wherein courts and tribunals have fallen into error in isolating the supposedly “private and personal nature” of the threat of harm from the wider (and vital) context of societal discrimination and/or withholding of protection by the state on discriminatory grounds.³³³

328. *Chan v. Minister for Immigration & Ethnic Affairs*, (1989) 169 C.L.R. 379, 407 (Austl.) (per Toohey, J.).

329. *Id.* at 379 (per Mason, C.J.).

330. *Minister for Immigration & Multicultural Affairs v. Sarrazola*, (2001) 107 F.C.R. 184 (Austl.).

331. *Id.* at 199 (citations omitted).

332. *Id.*

333. See, for example, the decision of the Australian Refugee Review Tribunal (RRT) in *Khawar v. Minister for Immigration & Multicultural Affairs*, discussed by the Federal Court in *Khawar v. Minister for Immigration & Multicultural Affairs*, (1999) 168 A.L.R. 190, 192–93. The RRT’s decision was overturned by the Federal Court, *id.*, and the Minister’s appeal to the

CONCLUSION

The analysis undertaken in this Article has revealed that the treatment of the nexus issue by common law courts and tribunals is often complex and overly complicated, and not always undertaken with a clear sense of the aims and objectives of refugee law or with the key challenges of refugee determination in mind. Notwithstanding this, some courts have recognized the difficulties inherent in the nexus question and have thus begun to develop a straightforward and liberal standard of causation, requiring only that the protected ground constitute a contributing cause or partial reason for the well-founded fear of persecution.

A consideration of approaches to causation determination in other areas of law augments the necessity for, and legitimacy of, such an approach, since it reveals that courts have displayed a willingness to respond to the policy implications and practical requirements of causal determination in fields such as equity and anti-discrimination law by developing similarly straightforward and liberal standards of causation.

In light of the insights obtained from the analysis undertaken in this Article and taking into account the humanitarian objectives of the Refugee Convention, it is concluded that the most appropriate approach to nexus determination is an objective one that asks whether the Convention ground is a contributing cause of the applicant's well-founded fear of being persecuted. Such an approach appears to constitute the most appropriate method of fulfilling the aims and objectives of the Convention and of ensuring its contemporary relevance.

Full Federal Court was unsuccessful, *Minister for Immigration & Multicultural Affairs v. Khawar*, (2001) 178 A.L.R. 120. The Minister has been granted special leave to appeal to the High Court. However, the Court's decision had not been handed down at the date of publication.