

TOPIC 2: LEGAL REMEDIES

(DAMAGES - IN TORT AND CONTRACT)

- Damages in tort – to award expectation loss
- Damages in contract – to award for the compensation of expected benefits/disappointed expectations

→ in both scenarios it is important to compare the current situation of the plaintiff vs. the situation they would have been in if not for the wrong doing

Fink v Fink (1946) 74 CLR 127

"Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages." (Dixon and McTiernan JJ)

Date of Assessment	<p>The right of damages accrues when the cause of action is complete</p> <p>In the case of <u>Contracts</u>: this is the <u>day of breach</u></p> <p>In the case of <u>Tort</u>:</p> <p>In the case of <u>Negligence</u>: When the plaintiff suffers loss</p> <p>In the case of <u>Trespass</u>: when the trespass occurs</p> <p>In the case of <u>Detinue</u>: When delivery of the chattel is refused</p> <p>Theoretically, the amount of damages is assessed at the day the cause of action accrues. However, routinely the court will change the date of assessment to properly compensate the plaintiff (eg, assessed at the date of the trial)</p> <p>→ assessing at date of trial is often more beneficial to the plaintiff due to issues of inflation etc</p> <p>→ the court is more and more assessing damages at the date of the judgement (<i>Gagner Pty Ltd trading as Indochine Café v Canturi Corporation Pty Ltd [2008]</i>)</p> <p>→ The court must also take into consideration the plaintiff's actions or failures to mitigate their own loss</p> <p>CALCULATING DAMAGES IS A FLEXIBLE PROCESS WITH AN OVERRIDING PRINCIPLE OF COMPENSATING THE PLAINTIFF</p>
Once and for all rule	<ul style="list-style-type: none"> • The plaintiff has one chance to plead their case • Once an award is made, it is final and completely disposes of the cause of action <p><i>Lim Poh Choo v Camden and Islington Area Health Authority [1980] AC 174</i></p> <p>"The award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate." (Lord Scarman)</p> <ul style="list-style-type: none"> •

CAUSATION IN CONTRACT AND IN TORT

For any claim for damages, the plaintiff must prove;

1. Loss/damage; and
2. The defendant's wrong caused the loss/damage – MATERIAL CAUSE

LOSS + CAUSATION = DAMAGES

CAUSATION →

- 1) COMMON LAW
- OR
- 2) CIVIL LIABILITY ACT 2002 (NSW)

Negligence

- > Loss/damage is the gist of the action.
- > Establishing the cause of action will establish the right to damages.

Contract / intentional torts

- > Breach of contract, trespass, conversion, etc do not require proof of loss/damage to be actionable.
- > Right to damages will be a separate question from the cause of action.
- > Failure to demonstrate loss/damage caused by the wrong will result in an award of **nominal damages** only.

*****CAUSATION AT COMMON LAW**

Causation in fact

- The defendant's wrong must be a necessary condition for the loss
- The 'but for' test (*Barnett v Chelsea & Kensington Hospital*)
- Material Cause (*March v E & MH Stramare (1991) 171 CLR 506*)

Summary

- > The usual test of causation is the 'but for' test.
- > The defendant's wrong need only be a material cause of the loss, not the only cause of the loss
- > In complex fact scenarios where multiple causes cause loss, the court asks whether as a matter of 'common sense' the defendant's wrong was a material cause of the loss.

Limitation of evidence

Sometimes the state of knowledge/science at the time of the trial cannot determine whether the defendant's wrong was the probable cause of the plaintiff's loss.

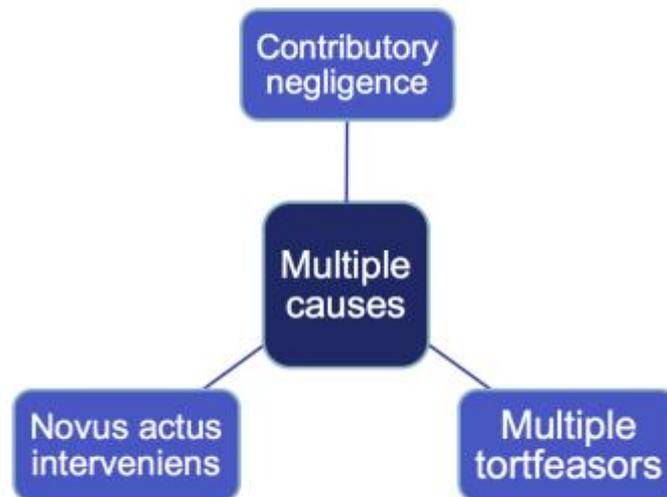
The common law can make a policy decision to find causation despite the limitations of the evidence.

Two recognised categories

- 3. The plaintiff's loss is caused by an accumulation of factors and it is impossible to determine the extents of the role the defendant's wrong played;
- 4. The defendant's conduct materially increased the risk of harm.

<u>Causation in law</u>	<ul style="list-style-type: none"> • Normative question • Ought the defendant be held liable? • Remoteness
<u>Accumulation of causes</u>	<p><i>Bonnington Casting v Wardlaw [1956] AC 613</i></p> <ul style="list-style-type: none"> - Bonnington was liable for all of the harm, despite the fact that he did not negligently cause all of the harm. It was on the basis that they materially contributed to the harm.
<u>Material Increase in risk</u>	<ul style="list-style-type: none"> - Ordinarily, proof of mere increase in risk does not establish causation. - Ultimately, the plaintiff must show that it was more probable than not that the defendant's negligence caused the plaintiff's loss. - Sometimes a plaintiff can only prove an increase in risk because of the limitations of science and evidence available. - In exceptional cases, the court may relax the requirement to show that the defendant's negligence was the probable cause of the loss. <p><i>Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32</i></p> <p>The plaintiff developed mesothelioma after exposure to asbestos while working for two employers.</p> <p>The evidence could not show whether it was caused by either:</p> <ol style="list-style-type: none"> 1. Exposure to asbestos while working for the first employer; 2. Exposure to asbestos while working for the second employer; <p>or</p> <ol style="list-style-type: none"> 3. Cumulative exposure <p>All the plaintiff could prove was that they had materially increased the risk of him developing mesothelioma.</p> <p>Causation established:</p> <p>It would be contrary to ordinary notions of justice to hold that neither employer was liable just because the plaintiff could not show which of the two probably caused the mesothelioma, where their negligence created the very risk that eventuated.</p> <p>→ They found that it was more just to allow damages for the plaintiff when they weren't sure of the cause rather than denying him damages</p>

<u>Causation in contract</u>	<p>The same common law tests apply</p> <ul style="list-style-type: none"> - But for - Material cause - Common sense <p>Alexander v Cambridge Credit Corporation (1987) 9 NSWLR 310 In 1971, Auditor negligently failed to discover that CCC was insolvent. If CCC had been wound up in 1971 it would have had \$10m in losses. CCC continued to trade for another 3 years: losses increased to \$155m. Auditor sued for causing loss of \$145m No causation established.</p>
<p>**CAUSATION IN CIVIL LIABILITY ACT</p>	
<p>Civil Liability Act 2002 (NSW) Section 5A – Application of Part</p>	<p>(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise. (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section</p>
<p>Section 5D – General principles</p>	<p>(1) A determination that negligence caused particular harm comprises the following elements:</p> <ul style="list-style-type: none"> a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability). <p>(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.</p>
<ol style="list-style-type: none"> 1. Legislation unlikely to have had a major impact on causation at common law. 2. More explicitly separates the factual causation (but for test) from the policy questions. 3. Section 5D(1)(a) reflects the ‘but for’ test of causation, insofar as the defendant’s wrong must be a ‘necessary condition’ (ie, a necessary material cause) of the plaintiff’s loss. 	
<p><u>s. 5D(2)</u></p>	<p>Provides scope for the court to apply a lesser standard of causation as contemplated by <i>Bonnington Casting v Wardlaw</i> [1956] AC 613 and <i>Fairchild v Glenhaven Funeral Services Ltd</i> [2003] 1 AC 32.</p>



1. CONTRIBUTORY NEGLIGENCE

Where the defendant's liability is reduced because the plaintiff caused some of their loss by failing to take reasonable care of their own interests.

Tort

Historically, proof of contributory negligence was a complete defence. It is now possible for a court to apportion liability under legislation.

Law Reform (Miscellaneous Provisions) Act 1965 (NSW)

Section 8 – Definitions

In this Part:

claimant—see section 9(1).

contributory negligence—see section 9(1).

court, in relation to any claim, means the court by or before which the claim falls to be determined.

damage includes loss of life and personal injury.

wrong means an act or omission that:

- (a) gives rise to a **liability in tort in respect of which a defence of contributory negligence is available at common law**, or
- (b) amounts to a **breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort**.

Section 9 – Apportionment of liability in cases of contributory negligence

(1) If a person (the claimant) suffers damage as the result partly of the **claimant's failure to take reasonable care** (contributory negligence) and partly of the **wrong of any other person**:

- (a) a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant, and
- (b) **the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage**.

(2) Subsection (1) does not operate to defeat any defence arising under a contract.

(3) If any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of subsection (1) is not to exceed the maximum limit so applicable.

Civil Liability Act 2002 (NSW)

Section 5R – Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent **also apply** in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.