

LAWS1061 Revision Notes

Sample Notes

(1) Breach

General Test – Standard of Care, RF, Calculus

Step	Legal Test (as will be outlined in exam)	Explanation of CLA and interaction with common law
1	<p>Standard of Care</p> <ul style="list-style-type: none"> • Children – a reasonable child of the same age and experience (<i>McHale v Watson</i>) • Professionals – an ordinary skilled person exercising/professing to have that special skill (<i>Rogers v Whitaker</i>) <ul style="list-style-type: none"> ○ ss 5O and P – CLA provisions relating to professional negligence. 	<ul style="list-style-type: none"> - The standard of care affects Reasonable Foreseeability in s 5B (1)(a); and s 5B (1)(c) – i.e. what precautions should be taken by a reasonable person – link also to s 5B (2) - E.g. For professionals, an engineer would be expected to exercise the standard of care of a reasonable engineer, rather than a reasonable person.
2	<p>A person is not negligent in failing to take precautions against a risk of harm unless: CLA s 5B (1)(a) – (c)</p> <ol style="list-style-type: none"> a) The risk was foreseeable (a risk of which the person knew or ought to have known) b) The risk was not insignificant c) In the circumstances, a reasonable person in the person's position would have taken those precautions 	<ul style="list-style-type: none"> - The CLA is the starting point in all considerations of negligence, but common law retains strong relevance. - (a) In relation to foreseeability, it relates either to: <ul style="list-style-type: none"> ○ What the person knew (e.g. <i>Paris v Stepney</i>) ○ What the person ought to have known (reasonable person standard) - This is an inquiry in general terms, rather than the actual events (<i>Doubleday v Kelly</i>) - (b) A risk that is 'not insignificant' is identical to the 'not far-fetched and fanciful' test outlined in <i>Shirt</i>. <ul style="list-style-type: none"> ○ Could view this as a test for a 'range of likelihoods', which are then addressed by probability in the calculus.

		<p>However, if too far-fetched it is out of the range (e.g. <i>Bolton v Stone</i>).</p> <ul style="list-style-type: none"> - (c) This is determined by considering the calculus of negligence in s 5B (2).
3	<p>In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following factors among other relevant things: CLA s 5B (2)</p> <ol style="list-style-type: none"> The probability of harm The seriousness of harm The burden of taking precautions The social utility of the activity 	<ul style="list-style-type: none"> - CLA s 5B (2) does not alter the common law and is merely a statutory expression of the same principles. - The purpose of the reforms are to draw more direct judicial attention to the factors (<i>RTA v Refrigerated Roadways</i>) - The factors in (a)-(b) should be weighed against (c)-(d).

Obvious Risk (Warnings)

1	<p>Warnings</p> <p>A person does not owe a duty of care to another person to warn of an obvious risk to the plaintiff: CLA s 5H (1)</p> <p>This section does not apply if:</p> <ul style="list-style-type: none"> • The plaintiff has requested advice or information about the risk from the defendant, or: CLA s 5H (2)(a) • The defendant is required by a written law to warn the plaintiff of the risk, or: CLA s 5H (2)(b) • The defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant: CLA s 5H (2)(c) 	
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Inherent Risk

1	<p>Definition</p> <ul style="list-style-type: none"> • A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk: s 5I (1) • An inherent risk is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill: s 5I (2) 	<ul style="list-style-type: none"> - See Mulligan v Coffs Harbour for application to case - See also Carey v Lake Macquarie City Council for application to case
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	<ul style="list-style-type: none"> This section does not operate to exclude liability in connection with a duty to warn of a risk: CLA 5I (3) 	
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Week 6B – Causation (Factual Causation)

12	Causation – Factual Causation	SVW 478-502. Moodle: Rosenberg v Percival [Extract] CLA Part 1 s5D.
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Overview

(SVW 478-502)

- In respect of causation, the **statutory test** in CLA s 5D is the starting point. However, common law authorities such as *March v Stramare* remain relevant in determination of principles such as the 'but-for' test which were subsumed into the statutory test.
- However, these case authorities must now be read in conjunction with post-CLA case authorities such as *Adeels Palace v Moubarak* and *Strong v Woolworths*.

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(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**").

(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.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, 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.

- At common law, for something to be considered causal it must be a necessary condition of the harm, i.e. the plaintiff must prove that the loss could not have

occurred 'but for' the defendant's negligence. It need not be the sole cause of the harm.

- Prior to the CLA, *March v Stramare* was the leading common law case on causation. It is still an important starting point for considering concepts such as necessary condition (the 'but for' test), its limitations, novus actus interveniens and the relationship between remoteness and causation. It also explains some of the historical development of causation, the flexibility of the concept and its relationship with policy.

March v Stramare (1991) 171 CLR 506 – High Court of Australia

Facts:

The respondents negligently parked a truck partially obstructing a road. The appellant driving his vehicle, collided with it while under the influence of alcohol.

In the primary judgment, the trial judge apportioned liability as 70% (appellant) and 30% (respondents).

The High Court allowed the appeal, holding that the sole effective cause of the accident was the appellant's own negligence, as an intervening act.

Issue: d

Legal Reasoning:

- **Mason CJ** – The 'but-for' test cannot be used exclusively as a test for causation, rather causation is to be determined by applying common sense to facts in a particular case.
- This is because difficulties arise in cases with multiple sufficient causes or successive tortious events, or where there is an intervening act. In other words, the 'but-for' test is subject to certain qualifications which is where common sense is involved.
- In such cases a value judgment of common sense is needed to supplement the but for test.
- **Mason CJ** – the 'but-for' test similarly does not provide a satisfactory answer to cases which involved a novus actus.
- An intervening act is an act that breaks the chain of causation and absolves plaintiff of liability for damages.
- With regards to an intervening act - an act cannot be considered an intervening act (which breaks causation) if that act was also the result of the original tortfeasor's negligence.
- "As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of

injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things."

- In conclusion, the causation test is divided into two subcategories:
 - Fact: the 'but-for' test
 - Law: further public policy considerations and value judgements.

McHugh J:

- An application of the 'but-for' test in conjunction with "common sense" means the tribunal of fact apply their own idiosyncratic value judgements.
- "In general, however, the 'but for' test should be seen as the test of legal causation. Any other rule limiting responsibility for damage caused by a wrongful act or omission should be recognised as a policy-based rule concerned with remoteness of damage and not causation
- Did not favour the commonsense notions of causation which limited liability through policy considerations and subjective value judgments. Wanted to divorce the legal question of causation from normative questions of who 'should' be liable. Disagreed with Mason CJ in this regard.

Ratio: The but-for test cannot be an exclusive test for causation, as there are many situations in which it does not provide us with satisfactory outcomes. Therefore, we must apply a general common sense approach to the facts of a particular case.

- The decision in *March* placed great emphasis on the notion that causal questions can be determined by applying common sense. As well as being cast into doubt by the decision in *Adeels*, it paints a deceptively simple picture of what can often be a complex and highly technical enquiry.