

TORT

If there is a tortious breach which does not involve negligence, use contract approach.

CONTRACT

If there is a contractual breach which does not involve negligence, use contract approach.

CIVIL LIABILITY ACT

5A

(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 3B.

Causation

Causation in fact:

- Is the defendant's conduct a **necessary condition** of the loss?
- **'But-for'** test (*Barnett v Chelsea & Kensington Hospital* [1969])
- Where facts are too complex for but-for, common sense approach
 - was the conduct a **material cause** of loss? (*March v E & MH Stramare* (1991))
- **Accumulation** of causes? *Bonnington Casting v Wardlaw* (1956) Defendant was found liable for all of the loss as it was not possible to apportion the different sources of harm
- **Material increase** in risk? *Fairchild v Glenhaven Funeral Services* [2003]

Causation in law:

- Ought the defendant be held liable?
- Remoteness

Novus Actus Interveniens

- Unforeseen/extraordinary; or
- Where the plaintiff acts unreasonably (eg, contributory negligence or failure to mitigate overwhelms defendant's wrong)
- *M'Kew v Holland & Hannen & Cubitts* (Scotland) Ltd 1970 SC (HL) 20
- *March v E & MH Stramare* (1991)

Causation

Causation in fact:

- Is the defendant's conduct a **necessary condition** of the loss?
- **'But-for'** test (*Alexander v Cambridge Credit Corporation* (1987))
- Where facts are too complex for but-for, common sense approach - was the conduct a material cause of loss? (*Alexander v CCC* (1991))

Causation in law:

- Ought the defendant be held liable?
- Remoteness

Contributory Negligence

Contributory negligence does not apply to claims in contract, unless the breach of contract is a breach of duty of care that is "concurrent and co-extensive with a duty of care in tort": *Law Reform (Miscellaneous Provisions) Act 1965*, s 8.

- Damages are to be reduced to such extent as the court thinks just and equitable having regard to P share in responsibility (s 9 *Law Reform (Miscellaneous Provisions)*)

TEST:

- Involves "Involves comparison both of culpability", i.e. of the degree of departure from the standard of care of the

Causation

*Onus on the plaintiff (s 5E)

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**").

For (a) → Necessary condition: *Strong v Woolworths Limited* (2012)

For (b) → *Hadley v Baxendale*

Contributory Negligence

Law Reform (Miscellaneous Provisions) Act 1965 (NSW):

- (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