

Topic 7

Causation and Proportionate Liability

- Once breach of duty established, P must then prove a causal link between D's breach of duty and P's harm
 - o **RTA v Royal**
- P always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation
 - o **S 52 Wrongs Act**
- Once causal link established on the balance of probabilities, the damage becomes a 'legal certainty' and P can recover the full amount of the damage
 - o **Amaca Pty Ltd v Ellis [2010] HCA 5 at [70]**
 - o **Tabet v Gett [2010] HCA 12**

Section 51 Wrongs Act: Factual and Legal Causation

- (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)

Para (1)(a): Factual Causation

- Was the defendant's negligence a 'necessary condition' of the occurrence of the harm?
- A legislative enactment of the common law 'but for' test
 - o 'But for' the defendant's negligence would the plaintiff have suffered injury?
 - o D's negligence does not have to be the *sole cause*, but it must be *a cause*, ie an event without which the accident would not have occurred.
 - o Thus, must show that D's negligence *caused* (i.e. was the sole cause) or *materially contributed* (was one of the causes) of the accident
 - **Strong v Woolworths Limited t/as Big W**
 - See, e.g. **March v E & M H Stramare Pty Ltd**
 - o 'But for' test rejected as a comprehensive or exclusive test of causation (majority in *March v E and MH Stramare Pty Ltd*):

- 'But for' effective at *eliminating* negligence as a cause; ie as a 'negative criterion' (*Tabet v Gett* [2010])
- But High Court has been increasingly strict in its application of 'but for'

- ***Adeels Palace Pty Ltd v Moubarak* [2009]**
 - 'But for' test of factual causation not established
 - No evidence that presence of security staff would have deterred or prevented the re-entry of a man armed with a gun that he was ready and willing to use on persons unconnected with the previous altercation; gunman bent on revenge, not acting rationally
 - Mere *possibility* that security guards could have prevented the shooting insufficient; must be a *probability*
 - Not an exceptional case where but for causation does not need to be established (see s 51(2) below)

- ***Amaca Pty Ltd v Ellis* [2010]**
 - P failed because he could not establish on balance of probabilities that the lung cancer would not have occurred 'but for' the exposure to asbestos:
 - No evidence that exposure to asbestos alone caused Mr Cotton's cancer
 - Epidemiological evidence that the combination of smoking and exposure to asbestos *can* increase risk of lung cancer: but no evidence that they *must* work together to increase risk
 - Inference could not be drawn from epidemiological evidence that combination of smoking and asbestos exposure *had actually caused* P's cancer: Medical evidence that P's heavy smoking by far the most probable cause of his lung cancer
 - 'Knowing that inhaling asbestos *can* cause cancer does not entail that in this case it probably *did*': at [68]

Inferences

- 'But for' causation might be established as a matter of inference from the surrounding circumstances
- ***Strong v Woolworths Limited t/as Big W***
- **But** the evidence must support an inference that the negligent act was the *probable* cause of the plaintiff's injury, not just a *possible* cause
 - o ***Lithgow City Council v Jackson [2011] HCA 36***

Wrongful Diagnosis or Treatment

- ***Hotson v East Berkshire Area Health Authority***
 - o Doctor not liable for misdiagnosis unless it caused the harm on balance of probabilities (51% or more)
 - o Straightforward application of 'but for' test: P must prove on the balance of probabilities that, but for D's negligence, the injury would not have occurred
- Damages not available in Australia for loss of a chance of a better medical outcome ie 'loss of chance' damages N/A
 - o See ***Tabet v Gett [2010] HCA 12***
 - o See in particular Kiefel J (with whom Crennan, Hayne and Bell JJ agreed):
 - Damage is the 'gist' of the cause of action in negligence
 - P must establish causal link between breach of duty and harm
 - Standard of proof is the balance of the probabilities (ie a greater than 50% probability)
 - Where probability of harm is < or = 50%, causal link not established
 - Where a > 50% probability, P gets 100% of damages (all or nothing)
 - The 'harm' is the bodily injury, not the loss of opportunity to secure a better medical outcome
 - o See also Crennan J:
 - Radical change in standard of proof; would require legislative intervention
 - Policy considerations: defensive medicine, impact on Medicare, private insurance and professional indemnity
 - o Same approach taken in UK: *Gregg v Scott*
 - Cf cases involving loss of commercial opportunity: *Sellars v Adelaide Petroleum*

'Exceptional' cases: s 51(2)

In appropriate cases, where negligence is not a necessary condition of the harm, the court must consider (amongst other things) whether or not and why responsibility for the harm should be imposed on the negligent party

- Essentially leaves the matter to common law development
- Criticised for ambiguity and possible extension of common law principles
- Possibly, enacted to deal with the cases dealing with exposure to asbestos and dust (such as *Fairchild v Glenhaven Funeral Services Ltd*) (not examinable)

'But for' less effective at confirming negligence *was* the cause:

1. Identifies background causes and coincidences as factual causes
 - o See, e.g. Windeyer J in *Faulkner v Keffalinos*
 - o *Canterbury Bankstown RLFC v Rogers*
2. Unsatisfactory in determining whether a more immediate cause is a novus act interveniens
 - o These cases determined according to legal causation

Para (1)(b): Legal Causation 'Scope of Liability' (has to be shown in addition to factual causation)

- Court must consider whether or not and why responsibility for the harm should be imposed on the negligent party: s 51(4)
- A normative question: *should* liability *legally* be imposed?
- Involves questions of principle as well as policy considerations, such as personal responsibility
 - o ***Hunter Area Health Services v Presland [2005]***
- At common law courts initially referred to 'value judgments' and 'common sense and experience'.
 - o ***March v Stramare per Mason CJ at 515-516***
- *But seen now ***Travel Compensation Fund v Robert Tambree [2005]****
- Majority: common sense and discretion has no role; causation determined as a matter of principle and policy and by reference to the statutory provision or common law rule that confers a cause of action
- *See now ***Wallace v Kam [2012]*** for application of statutory legal causation test to the duty to warn of material risks*

Novus Actus Interveniens (New Intervening Act)

- An intervening act or event that breaks the chain of causation between D's negligence and P's injury
 - o A voluntary human action or causally independent event 'the conjunction of which the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence'
 - **See *Haber v Walker* [1963] per Smith J at 358**
- If independent event not a *novus actus* – D is responsible for all of the damage, perhaps jointly and severally with third party
- If independent event a *novus actus*, D is not responsible for the damage resulting from the intervening act or event. A third party might be liable

Test for *novus actus*

- Was the act or event reasonably foreseeable?
 - o ***Chapman v Hearse* (1961)**
- If rf, was the act or event 'in the ordinary course of things the very kind of thing likely to happen as a result of D's negligence';
- Was the injury within the 'sphere of risk' created by D's negligence
 - o ***March v Stramare* (1991)**
 - o ***Mahoney v J Kruschich (Demolitions) Pty Ltd* [1985]**
 - o ***Travel Compensation Fund v Robert Tambree* (2005)**

Intervening negligent act of third parties

- Negligent acts of third parties will not break the chain of causation where D's negligence generated the very risk of injury that occurred
 - o ***Chapman v Hearse* (1961)**
- Medical negligence is 'the very thing likely to occur' where D injures P
 - o D and the doctor will be jointly and severally liable for the additional harm

Intervening deliberate act of third parties

- A deliberate or malicious act by a TP will not break the chain of causation where it was within the sphere of risk created by D's negligence
 - o ***Adeels Palace Pty Ltd v Moubarak* [2009]**
 - o ***Curmi v McLennan* [1993]**
- An intervening criminal act might not be 'the very risk likely to occur'
 - o ***Rickards v Lothian* [1913]**
 - o ***SRA (NSW) v Chu* [2008]**
 - o ***Cf Dorset Yacht Co Ltd v Home Office* [1970]**

Intervening Negligent Acts of P

- Negligent acts by P do not break causation where D's negligence has created the very risk that occurred
- P's damages reduced for contributory negligence (percentage wise)
 - o ***March v Stramare per Mason CJ* at [28]:**
 - '[D's] wrongful act in parking the truck in the middle of the road created a situation of danger, the risk being that a careless driver would act in the way that [P] acted. The purpose of imposing the common law duty on [D] was to protect motorists from the very risk of injury that befell [P]

Intervening Deliberate Acts of P

- P's act must be truly voluntary
- Voluntariness negated if D's negligence materially contributed to P's act (ie is a continuing cause)
 - o ***Haber v Walker* [1963]**
 - o ***Medlin v SGIC* (1995)**
- P's conduct must not be judged 'unreasonable as between P and D' or an 'inappropriate response'
 - o ***Medlin v SGIC***
 - o ***Mahoney v Kruschich***
- P's conduct must be 'reasonable' as between P and D

- Courts must assess whether it is appropriate to extend D's scope of liability to the consequences of P's voluntary act (s 51(1)(b))
- Refusal of life saving medical treatment, eg a blood transfusion?
- *Mahoney v Kruschich*: NAI where P has acted unreasonably in the type of treatment or who sought treatment from
 - o ***Boyd v SGIC (1978)***
 - o ***Cf Adelaide Chemical Fertiliser Co v Carlyle [1940]***

Multiple Successive Events: Two Successive Tortious Events

- ***Baker v Willoughby [1970]***
- 'you take P as you find P'
- The second tortfeasor is liable only for the additional damage
- The first tortfeasor's liability generally remains unabated.
- ***Performance Cars v Abraham [1962]***
 - o See now Part IVA *Wrongs Act*
 - Concurrent wrongdoers required to contribute only to extent of responsibility for property damage

Multiple Successive Events: Subsequent Event is Non-Tortious

- ***Jobling v Associated Dairies [1982]***
- A subsequent non-tortious event ('innocent cause') is one of the vicissitudes of life – it will be taken into account in reducing D's damages
- D not liable for losses that would have occurred anyway as a result of that subsequent event.
- Consistent with *Malec* approach
- See also ***Faulkner v Keffalinos***

Failure to warn of a medical risk

- Doctor must warn of all material risks
 - o ***Rogers v Whitaker (1992)***
- P must show a causal link between the failure to warn and the injury suffered

- Causal link is established if P can show she would not have gone ahead with the operation if warned of the risk
 - o **Rosenberg v Percival [2001]**
 - o **Chappel v Hart [1998]**
- **See now s 51(3) Wrongs Act**
 - o 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, the matter is to be determined subjectively in light of all relevant circumstances
- 51(3) probably intended as statutory enactment of **Rosenberg v Percival**
- 51(3) a general provision, not just limited to medical cases:
 - o Applies wherever the issue is what P hypothetically would have done had D not been negligent
 - Eg D employer negligent in not providing a piece of safety equipment; issue is whether P would have used that equipment if provided
 - o Applies to failure to warn cases generally – eg would Mr Vairy and Mr Mulligan have still dived into the water even had a sign been provided?
- See also **Dominic v Riz [2009]**

Res Ipsa Loquitur – The Thing Speaks For Itself

- Concept rarely successful
- An inference of negligence drawn where the accident would not ordinarily occur without negligence on the defendant's part.
 - o **Byrne v Boadle** (barrel fell from a window in the defendant's building)
- Three conditions:
 1. The cause of the accident is unknown or unspecified
 2. The accident would not, in the ordinary experience of mankind, normally occur in the absence of negligence, and
 3. The object or activity was within the exclusive control of the defendant
 - **Mummary v Irvings (1956)**
 - **Schellenberg v Tunnel Holdings Pty Ltd (2000)**
 - But see: **SJ Weir Ltd v Bijok [2011]**
- If D can bring light even to a partial explanation, *Res Ipsa Loquitur* will be unsuccessful

Proportionate Liability

Part IVAA (Part 4 aa) Wrongs Act

- At common law, liability of concurrent wrongdoers is joint and several
- Part IVAA of the *Wrongs Act* now modifies the position in respect of claims in negligence for pure financial loss and property damage **but not claims for personal injury damages**
- Re claims for pure financial loss and property damage:
- A 'concurrent wrongdoer' is a 'person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim: **s 24AH**
- Each D only liable for proportion of loss the court considers just having regard to the extent of D's responsibility for the loss: **s 24AI(1)**
 - o Does not matter that other wrongdoers dead, wound up, insolvent, or has ceased to exist (s 24AH (2)); D still liable only for own responsibility for the loss
 - o For application of s 24AI see *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd*
- Appointment provisions do not apply where D intended to cause, or fraudulently caused, the loss: **s 24AM**
- Part IVAA does not affect vicarious liability principles (principal still fully liable for conduct of agent): **s 24AP**