LAWS 555 – REMEDIES, REPARATIONS & RESOLUTIONS IN LAW

Causation

Introduction

- The plaintiff's damage or loss must have been caused by the defendant's tortious wrong. The legal tests need to go beyond cause and effect
- Common law has split causation into two issues
    - causation in fact → decided by the 'but for' test. Defendant is liable if, but for the wrong, the loss would not have occurred. Where the court finds as a matter of fact that the defendant did cause the plaintiff's loss, it then decides whether there is causation in law
    - causation in law → question being asked is whether the legal system ought to impose liability on the defendant. Normative (involves policy and value judgments). Generally, limits recoverable damages as court may refuse to award damages for the loss at law even though in fact the loss was caused by defendant
- test of foreseeability became important in 60s. the term 'remoteness' came to be synonymous with causation in law (used to refer to causation in law)

The 'but for' test

- at common law, the defendant is considered to have caused the loss if, but for the wrong, the loss would not have occurred (double negative) → would the plaintiff still have suffered the loss if the defendant's wrong had not occurred
- ***Barnett v Chelsea Hospital*** → simple case
- ***March v E & M H Stramare Pty Ltd*** → uncertainty about how the standard of proof is to be satisfied where there are a number of contributing causes. Proof of a historical fact, such as causation, is ordinarily governed by the general civil standard
    - 'if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain
    - Still difficult when numerous contributions

Multiple causes and common sense

- ***March v E & H Stramare Pty Ltd*** → plaintiff was injured around 1am when his car hit the defendant's truck. Truck was parked in the middle of the street with its parking and hazard lights on, plaintiff was drunk at time of collision. Trial judge found the truck driver was negligent and in breach of duty of care to other road users including careless and drunks. Plaintiff was also negligent and attributed fault at 70% to plaintiff and 30% to truck driver. Full court of supreme court overturned this decision. Given that the truck driver was only 30% to blame, it could not be said to be on the balance of probabilities (more than 50%) that the truck driver's negligence caused the loss. Held that the sole effective cause of the collision was the plaintiff's own negligence
    - If there had been 3 different causes, each equally to blame for the accident (33%), none of them could be proven on the balance of probabilities to be an effective cause
    - Plaintiff appealed to high court and won. Court found that the defendant's negligence in parking the truck was also a cause of the accident and it restored the judgment of the trial judge

    - Mason CJ → the application of the but for test gives the result, contrary to common sense, that neither is a cause because neither is more than 50% to blame
- ***Fitgerald v Penn*** → has to go back to common sense → prevailed in subsequent cases
- The difficulty in applying the but for test was because courts used the test to 'embrace a view of causation which assigned occurrences to a single cause'
- ***March***
    - The plaintiff must establish that his or her injuries are 'caused or materially contributed to' by the defendant's wrongful conduct → material contribution approach doesn't assume that there is one cause → don't confuse with cases in which the defendant may have materially increased the risk of harm, but cannot be proven that the risk came to fruition and actually caused the harm

Factual causation under the **Civil Liability Acts**

- Recommendations of Ipp Report → the Civil Liability Acts adopted the necessary condition test in the approach to causation, similar to that preferred by McHugh J in March. He rejected common sense approach
- **NSW CLA** → 5D: General Provisions
    (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 is appropriate for the scope of the negligent person's liability to extend to the harm so caused ('scope of liability')
- This approach requires the factual issue of causation (necessary condition) to be treated as a separate question from whether there ought to be liability ('scope')
- Where the ***Civil Liability Act*** or equivalent statutes are engaged, it is the applicable statutory provision that must be applied ***(Adels Palace)***
- Recently, the 'necessary condition' test has been seen as a statutory implementation of the common laws 'but for' test
- When are the Civil Liability Act's engaged? Claims based in negligence, whether the claim is phrased in tort, contract, under statute or otherwise
- The 'common sense' approach to factual causation only applies in exceptional cases under the civil liability statutes

Intervening events

- Whichever approach to causation is used, the defendant may escape liability if the chain of causation is broken by a later event which is seen as the real cause of the loss → intervening act (novus actus interveniens)
- Even though the original wrongful act may have been a necessary condition for the harm to occur, the subsequent event is seen as overtaking the causal connection
- The subsequent event must arise independently of the original wrong, and must disturb the sequence of events that would have been anticipated.
- Events which are reasonably foreseeable will not break the chain

Contributory negligence

- The approach to causation and contributory negligence in ***March v E & M H Stramare Pty Ltd*** was only made possible by legislation permitting responsibility to be shared
- In NSW the key apportionment provision affecting contributory negligence claims is found in **s 9(1)** of the ***Law Reform (Miscellaneous Provisions) Act 1965***
    - If a person (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
    - **S 8 -** defines 'damage' as including 'loss of life and personal injury'. While **s 13** provides that claims by relatives under the **compensation to relatives act 1897** will not be defeated or reduced by the contributory negligence of the deceased, subject to s 5T(2) of the **CLA 2002 (NSW)**
- ***Joslyn v Berryman***
    - Both had been drinking at party all night. She had lost her licence, but was driving because he kept falling asleep. He knew that she didn't have a licence. She hadn't known the speed, and there wasn't a working speedometer. She went around a corner too sharp and rolled the car, both were seriously injured. He sued her and council because of insufficient signing.
    - NSWDC found her to be 90% negligent, and council 10%. They reduced his damages to 25% because of contributory negligence
    - He appealed to NSWCA and succeeded
    - Went back to High Court, held he was guilty of contributory negligence under s 74(2) of the ***motor accidents act 1988 (NSW),*** which requires a finding of contributory negligence where the plaintiff is a voluntary passenger in a vehicle and is 'aware, or ought to have been aware' that the driver 'was impaired as a consequence of the consumption of alcohol'
- ***Allen v Chadwick***
    - She was 21 and pregnant at the time. She got into car with him because he was overbearing and because she didn't know where they were, it was 2am and pitch dark. They were in accident and she was thrown out and suffered injuries
    - He sought to rely on s 47 of **CLA (SA),** where contributory negligence is presumed unless the injured passenger could not reasonably have avoided relying on the care and skill of the intoxicated driver → appreciation of environment and exercise of reasonable choice between options
    - Court held that she couldn't have avoided the risk of driving with him. She wasn't contributorily negligent for relying on him, but was contributorily negligent in failing to do her seatbelt as she was not prevented from doing so by his bad driving

    - The test for contributory negligence is objective with some subjective elements
- **S 9(1)(b)** of ***Law reform (miscellaneous provisions) act 1965 (NSW)*** provides that damages 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'
    - ***Pennington v Norris*** → the criterion of responsibility is the degree of 'culpability' of the parties; the respective degrees of departure from the standard of care of the reasonable person. The court compares the culpability of each party, their whole conduct and the relative importance of their contribution in causing the damage
    - This approach resulted in courts taking account of the relative danger or potential for harm of the respective activities undertaken by plaintiff and defendant when apportioning responsibility.
    - So in a collision between a car and pedestrian, the car driver tended to be seen as more responsible because their activity was potentially more dangerous
    - NSWCA now rejects this approach, suggesting that the policy behind the CLA is that people take responsibility for their own lives and safety
    - ***T & X Co Pty Ltd v Chivas***
    - ***Verryt v Schoupp***
- ***Corr v IBC Vehicles Ltd*** → workplace accident which caused physical and mental harm. 6 years later committed suicide. Man found to be 0% contributorily negligent to wife's financial loss because of death, was all employers fault

<u>Joint and concurrent tortfeasors</u>

- Where the plaintiff's loss is caused by more than one defendant, a threefold classification is traditionally used →
    - joint tortfeasors - responsible for the same tort and either act in concert or are vicariously liable, such as employer and employee, master and servant, principal and agent
    - several concurrent tortfeasors - act independently and not in concert, but inflict the same damage, for example, two cars negligently collide with the plaintiff's car
    - successive tortfeasors - act interpedently, but the damage is different
- concurrent tortfeasors → generic term used to describe joint tortfeasors and several concurrent tortfeasors
- at common law, each concurrent tortfeasor is liable to the plaintiff for the whole loss - solidary liability
- **s 5(2)** of ***law reform (miscellaneous provisions) act*** provides defendants with a 'right and a remedy' to recover from other tortfeasors part of, or even the whole of, the sum paid to the plaintiff. The amount of the defendant's contribution is that which is 'found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage'
    - the court takes account of the degree of 'culpability' of each party by considering the degree of departure from the standard of care of the reasonable person and the importance of their contribution in causing the