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PART 1: INTRODUCTION

Introduction to the Law of Torts (CHAPTER 1):

The nature of torts law:

Definition of a tort:

- Adopted by English common law, a tort signifies an actionable wrongful act, other than a breach of contract, done intentionally, negligently, or in circumstances involving strict liability (ie where the plaintiff need not prove negligence or fault on the part of the defendant).
- Tort= cause of action.
- The high court of Australia in **John Pfeiffer Ptd Ltd v Rogerson (2000) 203 CLR 503 at 519[21]** noted that a "tort denote[s] not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongfully in the sense that a civil action lies to recover damages occasioned thereby".
- A defendant's conduct will be deemed wrongful where a failure to act in accordance with normative standards of behaviour occasions an injury to the plaintiffs interests.
- Nominate torts = legally recognised wrongs that have specific names.
    - Sets the standard of conduct and duties for the community.
- Innominate torts= known by the names of cases that first legally recognised the wrong involved.
    - For example: the tort of **Wilkinson v Downton [1897] 2 QB 57**.
- The law of torts comprises a miscellaneous group of civil wrongs, other than reach of contractual terms, which afford a remedy in the form of damages to a person who has sustained an injury as a result.
    - Wrongful conduct giving rise to a civil remedy.

Remedies:

- Litigation, arbitration or mediation are all means of obtaining a legal remedy.
- The main object of torts law is to obtain damages for loss suffered as a result of the tortious conduct.
- The central concept of the law of compensation is who should bear the responsibility for the injured party's loss: the injured person or the wrongdoer?
- Before the loss is shifted onto the defendant, the plaintiff must show that:
    1. The injury-causing conduct was legally recognised as wrong.
    2. The injury itself was of a kind recognised by the law of torts.
    3. The injury was not too remote.

- New torts are created either by statute or by the judiciary.

Torts reforms:

- Professionals experienced difficulty in obtaining public liability and professional indemnity coverage at reasonable premiums (ie problems of availability and level of insurance – damages awarded too high).
- In 2002-03 each Australian legislature participated in implementing a series of reforms to the substantive law of negligence and to the law of damages for negligently occasioned injury.
- The legislature intended to modify torts in general through the judicial process of statutory interpretation and construction.
    - Make it harder to sue for negligence and harder to claim damages.
- Each jurisdiction has enacted its own statutory code of tortious liability leading to significant differences between the torts law of the 8 states and territories.

Scope of the reforms:

- Reforms in the different jurisdictions commonly:
    - Caps damages awards (by varying formulae).
    - Prevents claims for minor injuries by introducing threshold requirements in negligence cases (eg, the injury must be 'significant').
    - Introduces structured settlements for personal injury awards.
    - Provides protection for 'Good Samaritans', volunteers and food donor protection.
    - protects providers of recreational services by permitting waiver and voluntary assumption of risk of injury agreements with consumers, and
        - The *Trade Practices Act 1974* (Cth) has been amended to permit recreational service providers to limit their liability for death or personal injury: *Trade Practices Amendment (Liability for Recreational Services) Act* 2002 (Cth).
    - Provides that an apology will not amount to an admission of liability.
    - Codifies the elements of negligence and provisions dealing with controversial areas such as:
        - Obvious risks.
        - Recovery for psychiatric injury.
- As a general rule, work-related injuries covered under various workers compensation schemes, personal injuries which fall within the purview of transport accident compensation schemes, and injuries caused by tobacco products or dust-related disease are excluded from the scope of the legislation.
- Victoria has introduced a statutory defence of 'illegal activity', which may diminish or prevent the award of damages: **Wrongs Act 1958 (Vic)**; depending on interpretation.
- In **John Pfeiffer Ptd Ltd v Rogerson (2000) 203 CLR 503 at 519[21]**, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in a joint judgement determined that *lex loci delicti*, the law of the place of the tort should be applied by all courts within Australia.

- As a general rule, this means that, the laws governing compensation are those of the state or territory in which the tort was committed.
  - The plaintiff was legally certain to suffer the condition by the time he reached hospital, and the hospital's negligence in failing to diagnose the condition was not a cause of his injuries.
  - The hospital took its patient as it found its plaintiff, and it found its plaintiff suffering a legally certain condition.

- Doctor not liable for misdiagnosis unless it caused the harm on balance of probabilities (51%).
- A plaintiff in a medical negligence case cannot recover for the 'loss of a chance' of avoiding the injury sustained.
  - That is, damages are not available for the loss of a chance of securing a better medical outcome.
  - For example: **Hotson v East Berkshire Area Health Authority [1987] AC 750.**
    - A plaintiff is prevented from suing the hospital for the 'loss of a chance' (a 25% chance) not to suffer the condition that eventuated.
    - The plaintiff will fail if she cannot prove that there was a greater than 50% probability (51% probability) that the injury would not have occurred but for the medical practitioner's negligence.
  - The only 'damage' the plaintiff can complain of is the actual harm that eventuated as a result of the negligent conduct, not the loss of opportunity to minimise that harm: **Chappel v Hart.**
  - For example: **Tabett v Gett [2010] HCA 12.**
    - Justice Kiefel recognises that the approach taken by the courts in awarding personal injury damages is an 'all or nothing' approach.
    - If the plaintiff establishes that the harm was caused by the defendant's negligence on the balance of probabilities (ie a greater than 50% probability), the plaintiff gets all of his/her damages.
      - P must establish causal link between breach of duty and harm.
      - Where probability of harm is < or = 50%, causal link not established.
    - There is no reduction to represent the probability that the damage would not have been suffered.
    - However, if the plaintiff cannot prove causation on the balance of probabilities, the plaintiff gets nothing.
      - Where > 50% probability, P gets 100% of damages; where <= 50%, P gets nothing.
      - The 'harm' is the bodily injury, not the loss of opportunity to secure a better medical outcome
  - For example: **Gregg v Scott [2005] UKHL 2.**
    - The House of Lords reaffirmed the **Hotson** principle, and the need for the plaintiff to prove that the doctor caused the plaintiff's losses on the balance of probabilities.
    - Thus a doctor who fails to diagnose a life threatening condition is only liable where, had they properly diagnosed the condition, there was a 51% probability that the plaintiff would have survived.

        - The doctor is not liable because they deprived the plaintiff a lesser chance of avoiding death.
    - There is some authority that a loss of chance analysis will be applied to (non-physical injury) cases where the plaintiff is a claiming a 'loss of commercial opportunity' as a result of the defendant's negligent misrepresentation: **Sellars v Adelaide Petroleum NL**.
        - However, similar principles are yet to be translated across into the personal injury context.

For example: **Tabett v Gett [2010] HCA 12**.

Jurisdiction: High Court

Facts:

- In the six year old plaintiff (Reema Tabet) was admitted to hospital on 11 January 1991 suffering from headaches, nausea and vomiting.
- On 14 January the plaintiff suffered a seizure and she was diagnosed with a brain tumour.
- She suffered irreversible brain damage and disabilities as a result of the tumour, the seizure, and an operation to remove the tumour.

Held (Kiefel J with whom Crennan, Hayne and Bell JJ agreed):

- The damages award overturned and appeal dismissed.
- The loss of a 40% chance of a better medical outcome did not constitute damage for negligence law.
- As the plaintiff could not prove on the balance of probabilities that the negligence of the respondent caused any part of her brain damage, she could not recover anything.
- Recognition of damages for loss of chance would be inconsistent with the long-standing requirement (now enacted in the torts reform legislation) that the plaintiff must prove on the balance of probabilities that the loss claimed was caused by the negligence of the defendant.
- The plaintiff could only establish that had the doctor performed a CT scan on 13 January (the breach of duty) there was a 40% chance that the brain tumour would have been detected and that some (25%) of her disabilities could have been avoided.
- This was insufficient to recover damages for those disabilities, as the requirement both at common law and under ss 5D and 5E *Civil Liability Act* NSW (the equivalent of ss 51 and 52 *Wrongs Act* (Vic) is that that plaintiff must prove that there was a greater than 50% chance that those disabilities would not have been suffered had the CT scan been ordered on that day.
- As the plaintiff on these facts had failed to discharge that burden, damages could not be awarded for those disabilities.

For example: **Hotson v East Berkshire Area Health Authority [1987] AC 750**

Jurisdiction: House of Lords

Facts:

- The claimant as a school boy fell out of a tree from a height of 12 foot.
- He suffered a fracture to his hip and was taken to hospital.
- The hospital failed to diagnose his fracture and sent him home.
- He was in severe pain so he was taken back to hospital 5 days later where an X ray revealed his injury.
- He was treated and suffered an avascular necrosis which resulted in him having a permanent disability and a virtual certainty that he would develop osteoarthritis.
- According to medical evidence, had he been correctly diagnosed initially there was a 75% chance that he would have still developed this condition, but there was a 25% chance that he would have made a full recovery.
- The trial judge awarded damages of £11,500 based of 25% of £46,000 which was what would have been awarded if the claimant had shown that the defendant's conduct had caused the avascular necrosis of the hip.

Issue:

- Was the jury caused by the medical negligence?

Held:

- The claimant had failed to establish on the balance of probabilities that the defendant's breach of duty had caused the necrosis since there was a 75% chance that it was caused by the fall.
- Therefore the claimant was not entitled to receive anything in respect of the necrosis.

Specific illustration of factual causation: Failure to warn of a medical risk:

- A medical practitioner will breach the duty of care owed to the patient by failing to warn her of the material risks associated with treatment: **Rogers v Whitaker (1992) 175 CLR 479**.
- In addition to breach, the patient must further establish a causal link between the breach and the injury suffered.
- The causal link can be established only if the patient proves that she would not have gone ahead with the operation if she had been advised of the material risk which has in fact eventuated: **Chappel v Hart (1998) 195 CLR 232; Bridges v Pelly [2001] NSWCA 31 (2 March 2001).**
    - The doctor should be liable because the risk that materialised was precisely the risk about which (in discharge of the reactive duty) he should have warned the patient.
- A determination of causation will depend on the 'but for' test:
- 'What would the plaintiff have done had s/he been fully informed as to the risks associated with the medical treatment?
    - In **Rosenberg v Percival [2001] HCA 18** the High Court examined the evidentiary rules that apply where a patient alleges she would not have proceeded with treatment had she been properly advised of material risks by the doctor.
- The test is subjective.
- The court must determine what that patient as an individual would have done had she been properly advised by the doctor.

        - In determining what the patient would have done, the court will obviously have regard to evidence given by the plaintiff that she would not have proceeded with the operation.
        - Whether that particular patient would have gone ahead with the operation, not whether a reasonable patient would have proceeded with the operation.
        - It is self-serving and is given with hindsight after the side effect, the risk of which was often extremely small, has occurred.
- The court should also have regard to the objective facts to determine whether or not they support the plaintiff's claim.
    - The objective facts refer to matters that would influence a reasonable person's decision whether or not to proceed with the operation, and include factors such as the significance of the health benefits of the operation to the plaintiff, the degree of likelihood that the relevant risk would eventuate, and the extent of the harm likely to eventuate if the risk does eventuate.
- Section 51(3) of the Wrongs Act now provides:
- If it is relevant to the determination of factual causation to determine what the person who suffered harm (the injured person) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
    - Statutory enactment of the **Rosenberg v Percival** approach.
- The courts should have regard to all the surrounding objective facts when determining the credibility of the plaintiff's assertion that she would not have proceeded with the operation had she been properly advised.
- It was specifically introduced to deal with medical negligence (failure to warn) cases.
- It applies wherever the issue before the court is what the plaintiff's hypothetical conduct would have been but for the negligence.
- Thus, in failure to warn cases, the causation issue will be whether, had the appropriate warning been given, the plaintiff would have heeded the warning and changed his or her conduct with the result that the injuries would not have occurred.
    - For example: if the defendant is found to be negligent in not providing a particular piece of safety equipment to a worker, the causation issue will be whether, had the safety equipment been provided, the worker would have utilised it and thus avoided the injury.
- McHugh J in **Chappel v Hart** gave examples of situations where, although the 'but for' test is satisfied, as a matter of common sense, the negligence is not a cause of the injury.
    - For example: where the happening of the damage was purely coincidental with the breach, in the sense that the breach had no more than a connection in time with the injuries: **Carslogie Steamship Co Ltd v Royal Norwegian Government**.
- There, the plaintiff's vessel was damaged by the defendant's negligence and was delayed in its voyage.
- Upon resumption of its voyage it was damaged in a severe storm.

- The storm damage was held not to be causally connected with the negligence, even though the storm damage would not have occurred but for the delay.
- **Chappel** can be distinguished from other 'mere coincidence' cases (**Carslogie)** where a causal link was not established.
- Ipp J:
    - [I]t is said that a person is not liable for 'coincidental' consequences of their negligence.
    - Suppose that a driver negligently injures a pedestrian, who is further injured when the ambulance in which she is being taken to hospital is involved in a collision as a result of negligence on the part of the ambulance driver.
    - The first driver would not be held liable for the injury resulting from the second accident, because the sequence of events would be considered a 'coincidence', even though the first driver's negligence was a necessary condition of the harm suffered in the second accident.
- This principle of 'no liability for coincidences' is not of universal application.
    - For example: **Chappel v Hart.**
        - The failure of the defendant to warn the plaintiff was accepted to have been a necessary condition of the materialisation of the risk because the plaintiff would not have had the operation, at the defendant's hands or when it was performed, if she had been warned; and in that case she would almost certainly not have suffered the harm.
        - The fact that the risk materialised despite the exercise of reasonable care by the defendant could be called a coincidence.

For example: **Rosenberg v Percival [2001] HCA 18**

Jurisdiction: the High Court of Australia

Facts:

- A dental surgeon failed to warn his patient appropriately about risks associated with a sagittal split osteotomy.
- Following the procedure the patient suffered severe temporomandibular joint complications.
- The patient asserted that if she had been appropriately warned about the risks associated with the procedure she would not have undergone it at that time.

Issue:

- Breach of duty – failure to warn?

Held:

- Rejected the plaintiff's case on the basis she had not established she would have decided not to go ahead with the operation.
- The objective facts did not support the plaintiff's case, taking into account the fact that the risk which eventuated was very small, the health benefits of the proposed treatment were very significant and the plaintiff was an experienced health worker with an understanding that all surgical operations carry a risk of side effects.

For example: **Chappel v Hart (1998) 72 ALJR 1344.**

Jurisdiction: High Court

Facts:

- A procedure to repair a perforation of the oesophagus carried a small inherent risk of infection which could damage the plaintiff's laryngeal nerve and voice.
- The patient, who suffered an infection, was not warned of these risks.
- It was found that had the patient been informed of the risks he would have deferred the procedure and had it performed by a more experienced surgeon.

Issue:

- Breach of duty – failure to warn?

Held:

- Dr Chappel was found in breach of his duty of care to warn the plaintiff of a small risk associated with a throat operation.
- Dr Chappel had not acted negligently in performing the operation.
- Had Mrs Hart been informed of the risk she would have gone ahead with the operation, however would have deferred it to a later point in time and would have wanted it to be done by the most experienced person in the field.
- Had Mrs Hart deferred the operation she would almost certainly not have suffered the injury as the combination of circumstances that brought about the injury where so rare that it was statistically very unlikely that they would have occurred had the operation been performed at a different time.
- The risk of the injury occurring would have been the same when the operation eventually took place.
    - That is, it was an inherent risk of the operation and Dr Chappel's negligence had not increased that risk.
- Gaudron J: causation was established on the basis that the risk of injury would have been reduced had a more experienced surgeon performed the operation, so that the defendant's negligence had increased the risk of injury.
- Kirby J: a more experienced surgeon would have reduced the risk of injury.
- Kirby and Gummow JJ:
    - As a matter of common sense Dr Chappel's failure to warn had caused Mrs Hart's injuries.
    - Had Dr Chappel warned Mrs Hart about the risk of injury she would have deferred the operation and therefore the injury would not have occurred.
- McHugh and Hayne JJ:
    - Rejected causation on the basis that nothing in the evidence suggested that Dr Chappel's negligence had increased the risk of injury to Mrs Hart.
- It is only in those cases where the failure to warn has increased the risk of injury that causation will be established.
- If the injury suffered is simply an inherent risk in the course of action pursued by the plaintiff, the defendant's negligent failure to warn is not a cause of the injury.
- The occurrence of the damage to Mrs Hart was purely coincidental and had no more than a time connection with the breach.

Exceptional cases to factual causation:

- 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.
- Section 51(2) permits the court to dispense with the requirement of factual causation (the but for test) in (undefined) exceptional circumstances.
- In those cases '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'.
- It was enacted to deal with cases where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments: **Fairchild v Glenhaven Funeral Services Ltd**.
    - Industrial safety cases concerning dust and asbestos exposure where the evidence could not establish the precise cause of the plaintiff's harm on the balance of probabilities but it could be demonstrated that the defendant's negligence had materially:
        a) Contributed to the harm: **Bonnington Castings Ltd v Wardlaw [1956] AC 613.**
        b) Increased the risk of harm: **McGhee v National Coal Board [1973] 1 WLR 1; Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22.**
- The 'Ipp Report' recognised that it was 'fair and reasonable' to bridge evidentiary gaps in cases of this type, and it was this recommendation that led to the enactment of the statutory exception in s 51(2).
- The wording of the statutory exception is problematic, as it potentially allows the court to dispense with factual causation (the 'but for' test) in any category of case it deems to be exceptional.
    - It would be contrary to established principles to hold **Adeels Palace** responsible in negligence if not providing security was not a necessary condition of the occurrence of the harm but providing security might have deterred or prevented its occurrence, or might have resulted in harm being suffered by someone other than, or in addition to, the plaintiffs.
- There is a risk that courts will fall back on subjective criteria such as 'justice' or 'fairness' to determine whether a case fits within the exception.
- The High Court of Australia recently declined to consider the principle from **Fairchild** that causation could be established by showing a material increase in the risk of harm by the defendant's conduct: **Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth [2011] HCA 53**.

For example: **Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth [2011] HCA 53**.

Jurisdiction: High Court

Facts:

- John Booth was a mechanic and worked with brake linings containing asbestos.
- He also had minor additional exposure to asbestos in home renovation and cartage work.
- Mr Booth contracted mesothelioma.

- He sued the manufacturers of the brake linings with which he worked, Amaca and Amaba Pty Ltd.
- At trial various medical experts for Mr Booth expressed a view that all asbestos exposures above the ambient background contribute to the cause of mesothelioma.
- Based on that evidence the trial judge (Curtis DCJ) found in favour of Mr Booth and awarded him damages of $326,640.

Issue:

- Did the exposure to the asbestos dust and fibre cause the mesothelioma?

Held:

- The High Court found that the expert evidence before the trial judge supported a finding that cumulative exposure to asbestos was the cause of Mr Booth's injury.
- Gummow, Hayne and Crennan JJ expressly agreed with the Court of Appeal's conclusion that:
    - Findings as to the cumulative effect of exposure to asbestos were undoubtedly open.
- French CJ stated:
    - The cumulative effect mechanism, accepted by [the trial judge], implicated the products of both Amaca and Amaba in the development of Mr Booth's disease.
    - Distinguished **Amaca v Ellis** in which a claimant, who was also a smoker, failed to prove that his exposure to asbestos more probably than not materially contributed to his lung cancer.
        - In the **Amaca v Ellis** facts, Paul Cotton's exposure to asbestos was very limited, whereas there was clear epidemiological evidence that smoking caused the fatal lung cancer.
        - In contrast, Mr Booth was not a smoker, had worked with brake linings in his job as a mechanic for 30 years, and Amaca brought no evidence from Mr Booth's medical or social history of anything other than asbestos exposure that might otherwise have caused his mesothelioma.
- All material exposure to asbestos may be deemed a cause of mesothelioma.
- An employer's insurer will be at risk anytime one of its employees is materially exposed to asbestos dust and fibre.
- Heydon J dissented stating that such material (expert evidence) did no more than demonstrate that incremental exposure to asbestos adds to risk but could not be properly characterised as a legal cause of Mr Booth's injury.

Scope of Liability/ legal causation:

General principles of legal causation:

- S 51(1)(b) is a normative test of causation.
    - This causation element operates to determine whether the factual cause is also to be considered a legal cause of the plaintiff's harm.
    - The statutory test directs the court to consider whether the scope of liability of the defendant should extend to the harm suffered.
- Section 51(4) states that in answering the normative question, the Court must consider 'whether or not and why responsibility for the harm should be imposed on the negligent party'.

- At common law, the courts used to determine the question of legal causation according to 'common sense and experience'.
- The test of common sense and experience originated in the decision of **March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506** in particular the judgments of Mason CJ and Deane J. According to Deane J at 522:
    - 'For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility: whether the identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it.'
- The High Court has moved away from the common sense test in favour of a 'purpose' test.
    - Causal requirements should not be considered to be 'autonomous expressions of some form of logic or judicial instinct', but as rules of law that must be given content: **Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 [2002] UKHL 22.**
    - In **Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568** Gummow, Hayne and Heydon JJ rejected the test of common sense causation and opted for an approach that examines the purpose and scope of the cause of action or statutory enactment as a means of attributing legal responsibility for the harm.
    - A similar approach was adopted by **Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates (2005) 225 CLR 627.**
    - It is against this common law background that s 51(1)(b) was enacted.
        - This paragraph requires a court to determine that it is 'appropriate for the scope of the negligent person's liability to extend to the harm'.
        - Section 51(4) states that in answering this normative question, the Court must consider 'whether or not and why responsibility for the harm should be imposed on the negligent party'.
            - This appears to be a reference to the need for courts to have regard to the principles and policies of the rule imposing liability when addressing a particular case of causation, as opposed to using 'common sense' notions to determine the question.
- An important decision on the scope of liability provisions is the decision of the High Court of Australia in **Wallace v Kam [2013] HCA 19** where the Court emphasised that for legal causation to be established there must be a connection between the risk that negligently was not disclosed and the harm that materialised.
- Factual causation injury will determine causation: P must prove if warned of risk, would not have gone ahead with the procedure.

For example: **Wallace v Kam [2013] HCA 19**

Jurisdiction: High Court

Facts:

- Mr Wallace suffered from a condition of the lumbar spine and Dr Kam, a neurosurgeon, performed a surgical procedure on him.
- There were various risks of this procedure but the argument focussed on two of them.
    - Minor risk = the patient could suffer 'temporary local damage to nerves within his thighs resulting from lying face down on the operating table for an extended period' (bilateral femoral neurapraxia).
    - Serious risk = A 'one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to his spinal nerves'.
- Dr Kam did not mention either of these risks to the patient before undertaking the surgery. It was not successful.
- The patient's lumbar spine condition did not improve and he sustained neurapraxia causing severe pain for some time.
- He did not develop paralysis, the more serious of the two risks.
- Mr Wallace sued Dr Kam, alleging that he had negligently failed to warn him about the two risks of the surgery and that the failure to disclose had caused the patient's injury, because if he had been warned about either of the risks, he would not have agreed to the surgery and so would not have suffered the injury.

Issue:

- Whether doctors should be held responsible for the patient's injury or loss in certain duty to warn cases?
- If a doctor negligently does not inform a patient about two or more material risks of a treatment, is the patient entitled to compensation if he or she would have agreed to take the risk that materialised, but not a risk that should have been mentioned but did not materialise?
- If the patient had been warned about the risk/s, would he still have agreed to the surgery?

Held:

- Doctors have a legal duty to inform patients about material risks of a proposed treatment: **Rogers v Whitaker.**
    - This duty to warn 'is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment'. In other words, it is up to the patient to choose which risks he or she is willing to take; and the patient is entitled to be compensated for the loss of the opportunity to make that choice: **Wallace.**
- The defendant was held to be negligent in failing to advise the plaintiff of 2 material risks inherent in a spinal operation.
- These were the risk of temporary local nerve damage from lying on the operating theatre for an extended period (risk A) and the risk of permanent paralysis (risk B).
- The Court acted on the basis that the plaintiff would have accepted risk A and would have agreed to go ahead with the operation had he been informed of this risk.
- It also acted on the basis that the plaintiff would not have accepted risk B; that is, he would not have agreed to go ahead with the operation had he been informed of this risk.
- Accordingly, factual causation was established: 'but for' the failure of the defendant to warn of risk B the plaintiff would not have proceeded with the operation.
- However, it was risk A, not risk B, which materialised to cause the harm which was the subject of the claim.

- In this circumstance, the Court was required to address whether it was appropriate to extend the scope of the defendant's liability to the harm resulting from the materialisation of risk A, where this was a risk that the plaintiff was prepared to accept.
- The Court held that it was not appropriate to extend liability for this harm and therefore legal (scope of liability) causation could not be established.
- The policy underlying the duty to warn of material risks was that patients should be adequately informed of all material risks so as make an informed decision whether to proceed with the procedure.
    - This policy has no application where the risk that materialised was one that the plaintiff was fully prepared to accept.
    - Therefore, as a matter of law, the defendant should not be responsible for the harm resulting from the materialisation of a risk which the plaintiff was prepared to accept.
- A doctor is not liable if s/he negligently fails to inform a patient about two or more material risks of a treatment, of which the patient would have agreed to take the risk that materialised, but not a risk that should have been mentioned but did not materialise anyway.
- The patient's claim could only succeed if the doctor negligently failed to mention a risk that the patient would not have been prepared to accept; and that risk materialised.
- The patient could not succeed only by satisfying the court that the patient would not have agreed to the treatment if properly informed of the other risk; that is, but for the doctor's negligence in not disclosing the other risk, the patient would not have had the treatment and suffered the injury.
    - Proof of that matter might establish factual causation but not that the doctor should be held responsible ('scope of liability').

Specific illustration of legal causation: Novus actus interveniens:

- Where the defendant argues that an intervening act or event has occurred which breaks the chain of causation between the defendant's negligence and the plaintiff's injury.
- A novus actus consists of either a voluntary human action or a supervening event, such as a lightning strike, 'the conjunction of which with the wrongful act or omission is by ordinary standards so