Introduction

What is a Tort?

- A civil wrong or injury which the law will redress with damages
- The law of torts is concerned with compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.

Aims/Concerns' of Torts:

- Compensation – putting the injured party in the same position they would have been, had the wrong not occurred.
- Deterrence – preventing people for acting in harmful ways by deterring them form engaging in wrongful future conduct.
- Loss spreading – shifting the costs that befall on the victim to another party, the tortfeasor. In modern times, many tortfeasors are insured, so the loss spreading falls upon the insurer, who then passes this on to its customers.

Workers Compensation

- With the introduction of workers compensation legislation, injured workers pursuing common law claims has greatly decreased, and the common law doctrine of negligence is on the verge of legislative extinction

Motor Accident Compensation

- NSW does not have 'no fault' compensation, but does have some special provisions under the *Motor Vehicle (Compensation) Act 1979* for victims of 'blameless accidents', including specific provisions for children.
- For those in NSW who aren't injured in 'blameless accidents' or who are 16 years or older and don't satisfy requirements for Lifetime Care and Support Scheme, the common law is their only remedy → but for non-economic and economic loss claims, there are restrictions.

Criminal Injuries Compensation

- Criminal compensation schemes have been widely enacted to ensure that victims are somewhat compensated → it is unlikely that the criminal would have finances to repay the claim

Tort Reform Legislation

- Great fear of being sued led to detrimental effects on community activities, the Ipp Report found → legislation and courts have reflected this by placing greater weight on the proposition that people will take reasonable care for their own safety, swinging pendulum towards defendant →Former Justice Ipp does believe the changes have made it overly difficult for plaintiffs.
- With different statutes around Australia, different classes of accidents and plaintiffs will be governed by different statutory schemes, resulting in different liability rules and rates of comparison.

- Reasons for reform:

= Insurance Crisis
= Unaffordability of 'generous' awards of damages
= Bias of common law of tort toward plaintiffs
= Need for more 'personal responsibility'

Case v Trespass

- **Case:** Case protects a plaintiff from indirect interference (i.e. D leaving throwing a log on the road, and P coming along and tripping over it and receives injury)
- **Trespass**: Trespass protects a plaintiff from a direct interference (i.e. D throwing a log at P, injuring them)

What interests does Tort Law protect?

- Personal safety and security
- Safety of property
- Reputation
- Psychiatric/Emotional damage
- Economic losses

Trespass

Proof of Damage → actionable per se – it is not necessary to prove damage

Nature of interference → writ based on direct interference

Onus of Proof

- Plaintiff must establish that the defendant caused the act.
- On the defendant to prove a lack of fault/negligence, except in highway cases: *McHale v Watson (1964)*

Elements:

A positive voluntary act – intentional or negligent act: fault

- Intentional deliberate act or a negligent act (*Williams v Miltonin)* directly causing interference – a wilful act
- No trespass without fault: *Holmes v Mather, Stanley v Powell, McHale v Watson*

Holmes v Mather
= Defendant alleged to have trespassed when horses which were drawing defendant's carriage went out of control and hit plaintiff
= COURT HELD: Not intentional or with fault as servant did his best to avoid injury but was unable – it was not the act of guiding the horses away from the plaintiff which had brought the horses to the place where the accident happened

Stanley v Powell [1891]
= D in shooting party, shot at pheasant which glanced off a tree and hit plaintiff in the eye, causing blindness + other injuries
= COURT HELD: It was an accident, and cannot be a trespass as there was no negligence or lack of caution.

Williams v Milotin (1957)
= P was struck by D while riding his bike – with D claiming that P couldn't sue for trespass as it was outside statute of limitations
= COURT HELD:

McHale v Watson
= COURT HELD: "Is it for the defendant who threw it to prove an absence of intent and negligence on his part?" →YES

- In determining negligence, reasonable person test applies.

Directness/Interferes with the plaintiff

- The interference in trespass must be direct, not merely a consequence of it: *Reynolds v Clark + Scott v Shepherd*
- *Hutchins v Maughan [1947]*: a trespass will lie when the injury "follows so immediately upon the act"

- "Did the impact follow so closely on the D's act that it might be considered part of that act": *Sir John Salmond (1945)*
- Directness does not require physical contact between the plaintiff and the defendant: *Scott v Shepherd (1773)*

Scott v Shepherd (1773)
= Firework thrown in crowded marketplace, fell on Yate's tall and Will picked it up and threw it on, landing on Ryal's stall, who threw it on, later exploding and injuring plaintiff
= COURT HELD: Intermediate acts of Willis and Yates do not purge original tort in the defendant – they were acting in the agony of the moment in self-preservation, as if part of an unbroken chain
= DISSENT: Blackstone J dissented saying that trespass was only committed against Yates/

Hutchins v Maughan [1947] <u>Lack of intervening act:</u>
= Defendant laid on unfenced land where D grazed his horses, with P's dogs coming along and eating the bait, dying → this was after D had told P about the bait
= QUESTION TO BE ANSWERED: Injury to dogs was immediate or consequential – direct occasioned by D's actions, or merely consequential upon that act.
= COURT HELD: No trespass as the act of laying the baits by itself did not intervene with P's property → "the injury suffered cannot be said to have follow so immediately in point of causation upon the act of the defendant as to be termed part of that act."

Is actionable per se

- No requirement to show damages, just need to establish trespass.
- May be awarded where there is injury or damage to bodily integrity or person's dignity, rather than physical injury.
- Damages may be awarded by the way of punishment (exemplary damages) OR for injured feelings (aggravated damages)
- Exemplrary damages may be mitigated by plaintiff's conduct (eg, provocative: *Fontin v Katapodis (1962)*)

Trespass to the person

Forms of Trespass to the person include:

- Battery
- Assault
- False Imprisonment

Battery

- The direct and intention act by a person which causes contact with body of another.

Elements of Battery:

1. An intention voluntary act by a person
2. Which directly
3. Causes contact with the body of another

Direct and intentional act

- Must be willed/voluntary act

Contact with the body

- Positive, affirmative contact that is outside accepted usages/accidental contacts of daily life – spitting in someone's face, unwelcome kiss, taking something from P's hand, throwing boiling water at plaintiff
- "Any touching of another person, however slight might amount to battery": *Collins v Wilcock [1984]*
- Concept historically was referred to as "touching in anger": *Cole v Turner (1704)*. It is unsure what "in anger" means,

= Hostility means unwanted contact: *Collins v Wilcock [1984]* where the police officer gave more contact than was generally accepted in getting someone's attention.

Rixon v Star City [2001]

= Rixon was approached at casino by security guard, who grabbed him on the shoulder, turned him around and asked him if he was Brian Rixon

= COURT HELD: No battery as the contact was for the purposes of engaging Mr Rixon and not in excess of what is accepted in everyday life.

- Mere omission cannot amount to battery, as it must be a positive act. However, an omission can turn into a positive act, as seen in *Fagan v Metropolitan Police Commander*

Assault

- Any direct threat by a person which intentionally or negligently creates in another an apprehension of imminent, harmful or offensive contact.

Elements of Assault

1. An intentional voluntary act or threat by the defendant
2. Which directly creates in another person (the plaintiff)
3. A reasonable apprehension of imminent contact with that person's body

Intention

- The threat must be intentional

Cranston v Consolidated Meat Group Pty Ltd [2008]

= Incident arose amongst two employees working at the meat factory, where D told P to go away, gesturing with his hand that also carried a knife. P sued for assault, saying she was apprehended imminent contact

= COURT HELD: Use of knife was unconscious, resulting solely from the fact that D used the knife in his course of work and was by no means intended to create fear in the mind of P.

Act or threat

- Can be threatening acts, words or both.

NSW v Ibbett (2006)

= Police followed D's son into garage at night, causing a commotion that D heard and went into investigate, lifting up the garage finding a police officer pointing a gun at her sun, and then at D herself, demanding that D let in "his mate."

= COURT HELD: Confrontation was more than enough to satisfy requirements of assault.

Do words alone constitute a threat?

- No clear authority but words alone may constitute assault if the oral threat causes apprehension of imminent bodily contact

Barton v Armstrong [1969]

= COURT HELD: "It is a matter of the circumstances" as to whether words alone will constitute assault BUT the telephoning of somebody during the middle of the night, in a threatening tone to instil fear in one's mind, is more than just mere words → mere words becoming conduct?

- Silence on the phone may constitute assault: *R v Burstow; R v Ireland [1998]*

Apprehension

- It is necessary to establish an intention to cause apprehension in the plaintiff that a battery is about to occur.
- OBJECTIVE TEST: Would a reasonable person in the plaintiff's position have been apprehensive of imminent contact → not the individual themselves
- Exception to this rule where D knows P to be timid and plays on that fact: *MacPherson v Beath (1975)*

Apprehension must be of imminent harmful contact

- The apprehension must be of imminent harmful contact, but does not necessarily related to immediacy in terms of time.

Zanker v Vartzokas (1988)

= Woman got into man's van for a lift, he started to ask for sexual favours, she wanted to get out what he accelerated and said that the was taking her to his mate's house, who would "fix her up". She jumped out of the car, suffering some bodily injuries.

= COURT HELD: Still imminent violence, as it was future violence that was going to come to fruition as soon as she left the car.
= "A present fear of relatively immediate, imminent violence was instilled in her mind …and that fear was kept alive … by continuing progress with her a prisoner."
MacPherson v Brown (1975)
= Professor Gibbs was surrounded by a group of 20 students, who were demanding answers. Gibbs said he feared for his safety if he tried to get away and that his progress to get away would
= ZELLING J (minority): The defendant kept the crowd surrounding Gibbs to make him feel as if he couldn't/scared to attempt to leave.

Conditional Threats
= If the conditional threat instils a reasonable apprehension in the mind of the plaintiff, it is assault.
Tuberville v Savage (1669)
= D said to another "if it weren't' assize time, I would not take such language from you" while putting his hand on his sword
= COURT HELD: Not assault – D was saying he would not fight P because the judges were in town.
Rozsa v Samuels [1969]
= Passenger threatened to punch taxi driver, whereon taxi driver raised a knife saying, "I will cut you to bits if you try it." And moved out of the taxi
= COURT HELD: Assault, defendant had other options to respond to the threat → it was inproportionate to the initial threat

- Reasonable means of self defence: A went beyond the this test, as his means of self defence were not reasonable and in proportionate to the original threat.
- It can still be assault in conditional threats if the individual complies: *Police v Greaves*

Police v Greaves [1964]
= Robber told police officer that if he moved any forward, he would put a knife through his guts – police officer withdrew
= COURT HELD: Still assault as though the threat was conditional, "the menacing attitude of the respondent caused the police officers to retire."

False Imprisonment

- A tort for an individual who has been unlawfully restrained/detained

Elements of False Imprisonment

1. A positive voluntary act of the defendant
2. Directly causing
3. The *total deprivation* of the liberty of the plaintiff
4. Without lawful justification

Directness and intention

- No authority for negligently committed false imprisonment
- D must have an intention to imprison – no malicious intent is required.

Ruddock v Taylor (2005)

= Taylor says he was falsely imprisoned after he was detained following the cancellation of his VISA
= COURT HELD: High Court was lawful imprisonment as the cancellation of the VISA was lawful, as was the subsequent imprisonment because it was based on 'reasonable suspicion' that he was an unlawful non-citizen because of the minister's cancellation of the VISA
= Spiegelman CJ in NSW Court of Appeal applied *Scott v Shepherd* to the fact

- *Cowell v Correct Services Commission (1988)*

= A case of a failure to release a prisoner on the correct date at the conclusion of his sentence, because of mis-calculation of remissions.

- Must prove that D had directly participated in the false imprisonment: *Watson v Marshall*

Coles Myer Ltd v Webster (2009)
= Two P's were accused of using false credit cards, with D saying that this was the case – two cops found Ps in part of mall, prevailing on two Ps to go with them to part of mall where manager in D's company, identified them – Ps were questioned and strip searched. Ps then sued for false imprisonment, but it was found that the police were acting independently. The case was heard on appeal.
= COURT HELD: Ps were successful in suing for false imprisonment – as D(manager) had deliberately and falsely invented accusations to cops, which led to false arrest → for a person to be liable for false imprisonment as a result of another party arresting/imprisoning, D must have 'actively sought' + 'manifested an intention that there be an imprisonment'

- Refers to *Scott v Shepherd* 'mischievous element'

<u>Total deprivation of Liberty</u>

- There must be a total deprivation of liberty – does not have to be a prison: can be a car, a room, even a circle of people surrounding another individual.
- *Bird v Jones (1845)*: "by that boundary the party imprisoned must be prevented from passing … imprisonment includes the notion of restraint within some limits defined by a will or power exterior to our own."
- A reasonable means of escape is dependent on the risk attached to it – eg: you cannot lock someone in a room with a window 4 floors up and expect them to jump to escape: *Burtown v Davis and General Accident*

R v Macquarie and Budge (1875)
= M owed money to bank, and when the bank tried tried to board the vessel to repossess a boat, both M and B were uncooperative. They left the bank attendant moored on the boat and turned the engines to full speed, with the vessel moving off.
= COURT HELD: False imprisonment was found as the victim was in a situation with some means of escape, but that means involved hazard
McFadzean v Construction, Forestry, Mining and Energy Union (2007)
= Anti-loggers group were protesting, another group (logging group) said they would not leave while the picket from the anti-loggers was in place. Police were called, who the loggers said could facilitate the anti-loggers' departure + there was a 1.5km route through the forest to leave

= COURT HELD: Not false imprisonment as the defendant's had a reasonable means of escape via another route through bushland

- <u>Test for reasonable escape:</u> threat or danger to self; threat or danger to property; distance and time; legality.

- Reasonable means of escape may depend on the amount of knowledge available to plaintiff

Balmain New Ferry Co Ltd v Robertson (1906)

= P went onto a wharf knowing that you were charged a penny whether you travelled or not – he changed his mind about going to Balmain and wanted to leave, but was restricted until he paid a penny.

= COURT HELD: Not false imprisonment as P knew the conditions of entry – the employees of D were merely enforcing the conditions of entry, that anyone who had passed through the turnstile were required to pay 1 penny.

- Privvy Council also held that the defendant could have also followed through with the journey that P had paid for.

Bird v Jones

= P was prevented from climbing over part of a fence to access a walkway – claimed it was false imprisonment.

= COURT HELD: Not false imprisonment, as it was partial obstruction that was causing inconvenience.

Herd v Weardale Steel Coke and Coal Co [1915]

= P was a miner who was taken down into the mines, and upon seeing what work was required of him, refused to do it. P requested to be taken up, which was refused as it was being used to carry coal to the surface – and were only allowed to go up at 1.30pm – P (under oral contract/statute posted at top of mine), P was not entitled to be raised to the top of the mine until the end of his shift

= COURT HELD: Not false imprisonment as P had agreed to the conditions of his employer + statute when he went down into the mine – the employer was not obliged to bring him back up

- <u>Volenti non fit injuria</u>: "to a willing person, injury is not done"

<u>Duration of false imprisonment</u>

- Any form of deprivation of liberty is sufficient, even for a short time – but the time may also be a factor in determining whether an initially lawful detention become unlawful.

Nasr v NSW [2007]

= Two men (Nasrs) were taken to Burwood cop shop after being arrested by police and held there for six hours

= COURTHELD: No false imprisonment as it was not an unreasonable amount of time given the circumstances (night-time + police processing the arrest)

<u>Knowledge of the deprivation</u>

- P does not have to know it is false imprisonment – this is the view of Australian courts

Meering v Grahame-White Aviation

= P went to employers to answer questions about thefts and did not know there were detectives outside preventing him leaving
= COURTHELD: Was held to be false imprisonment

Myer Store Ltd v Soo [1991]
= Two cops visiting security office of a department store were told that they had photographed someone stealing, whereupon they confronted an innocent customer and accused him of fitting the thief's description – was taken away and interviewed for an hour and allowed him to leave. A week later they obtained a search warrant and found nothing. The police asked him again to come to the station, was interviewed, then exonerated
= COURT HELD:

- From moment of escort to room + 1hr interview: false imprisonment as they had total restraint which was unlawful.
- Search was trespass to land as they continued to search after sunset

<u>Acts: what actions or inactions may constitute false imprisonment</u>

- In the absence of any physical restriction on movement, a person can wholly submit to the authority /control of another – it will still amount to imprisonment

Watson v Marshall and Cade (1971)
= P was asked by cop to go to psychiatric hospital – P believed he would be forced to go if he didn't go so went along
= COURT HELD: Apprehension of imprisonment was justified, and court held this enough to satisfy an imprisonment
Symes v Mahon [1922]
= P accompanied cop on train after being told about warrant for arrest – P paid own fare and sat in separate compartment
= COURT HELD: Still imprisonment, but where there is no physical contact, evidence must be provided of complete submission by P to the other party.

- False imprisonment as a result of psychological means – must be detained by 'coercive consequence' and D's actions must have overbourne the P's will

- Mere omission can amount to false in imprisonment: *Cowell v Corrective Services Commission of NSW (1988)*

Trevorrow v South Australia (No 5) (2010)
= Trevorrow (T) was a Aboriginal boy taken to hospital, then placed into long-term foster care without the knowing of his parents. There was no reason for T to be taken away from his parents
= Initially court said there was false imprisonment but on appeal, this was overturned
= COURT HELD: The requirement of restrain was not satisfied, as Mrs Davies nurtured T- a policy decision was made by the court to not allow restrain to go this far as it would extend to untouched areas + with unpredictable consequences.

- Is it necessary that the plaintiff know of the imprisonment at the time it occurs? No, P does not have to know they are being restrained

- Was T subjected to total restraint while in foster care? The care that Mrs Davies gave, acting under a duty to care for T, could not fit into the general meaning of restraint, the court said,

R v Cubillo

= Cubillo taken into custody as a child, and could not establish that she was in the care of an Aboriginal person whose consent to her removal was not obtained → couldn't prove she was taken away

= COURT HELD: Long delay in commencing proceedings - Commonwealth couldn't find evidence (witnesses had died/ill health) so his honour declined to give an extension of time.

Damages

- Nominal
- Compensatory
- Aggravated
- Exemplary

Malice Prosecution

Following elements must be proved:

1. Defendant instigated proceedings

= "The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgement are vicariously responsible for the proceedings.": *Commonwealth Life Assurance Society Ltd v Brain (1935)*

2. Proceedings terminated in favour of plaintiff

= D must prove innocence, not just that the case was terminated: *Davis v Gell (1924)*

3. Proceedings lacked reasonable and probable cause

= Whether prosecutor did not honestly believe there was a proper case for prosecutor OR that they formed that view on insufficient basis: *A v NSW*

4. Defendant acted with malice

= "illegitimate or oblique motive": *A v NSW*

5. Plaintiff suffered damage to reputation, person, free or property

Konneh v State of NSW – Davids and Goliath

= CASE DEALS WITH: Individuals mistakenly arrested by police, who can now claim compensation under a class action – but they cannot be found.

= BACKGROUND:

- Konneh (K) arrested at Sydney home by police, who suspected him of breaching bail → he was not on bail. K then launched a class action against police for false imprisonment.
- State relied on *Bail Act* s 50 (1)(a) clause that permits police to arrest on reasonable belief held on reasonable grounds.

= DECISION:

- *Bail Act* clause could only apply if someone was on bail
- Konneh (and others arrested when not on bail) won – damages were awarded.

= ISSUE:

- Solicitors' duty to contact potential candidates for class action – but difficult to tell these people: difficult to identify, difficult to contact because of their low-socio-economic background +age
- Lawyers who have had clients arrested in these sorts of circumstances may be negligent if they don't inform them of their rights to compensation.

Negligence: Proof of Breach & Causation

CAUSATION

- It must be proven that D's actions caused P's injury.
- Ipp Report proposed 'Two Stage' Causation test → 1. But for D's action, would P have been injured? AND 2. Whether D should bear legal responsibility for P's loss.

S5D – General Principles [of Causation] – Civil Liability Act

(1) A determination that negligence caused particular harm comprises the following elements:
(a) that the negligence was a necessary condition of the occurrence of theharm ("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.

1(a) – HC has established that this is a statutory equivalent of 'but for' test → Factual causation
1(b) – Deals with whether D should be liable/responsible for P's loss – scope of liability

Factual Causation - The 'BUT FOR' Test

- The question is whether "BUT FOR" D's actions, would P have suffered loss – if the answer is no, then D is liable

Barnett v Chelsea & Kensignton Hospital Management Committee [1969]

= P's husband was nightwatchmen and became seriously ill after drinking tea. When attending the hospital, the on duty doctor refused to see P's husband - stating that if he felt unwell the next day to seek medical advice. P's husband died from poisoning
= COURT HELD: NO causation – as the expert medical advice said even if D's hospital had properly diagnosed, P's husband would have died anyway.

March v Stramare (1991)
= D's were fruit/vege merchants – parked their truck on mutli-lane road (centre) with hazards on. P was drink and speeding, rammed into the back of the truck – suffering severe injury
= COURT HELD: 'But For' Test did not help establish that both the actions of both D and P were causally related to the damage.

Adeels Palace v Moubarak
= Ps were shot at a venue and alleged, that but for the venue's negligence (not having enough security), the shooting would not have happened
= COURT HELD: No causation – but for couldn't be established.

- **BUT FOR must always be established, except for events categorised in S5D(2) → but these go undefined at this point**

"A necessary condition is a condition that must be present for the occurrence of the harm."

AUTHORITY → *Strong v Woolworths Ltd/Big W*
= P, who walked with the aid of crutches because one leg had been amputated, slipped on chip when approaching entrance to D's store. P sustained serious injury. The area where P slipped was near a food court, but under the controi of D. D said that they owed a duty of care/breached that duty of care by not having an adequate system for the detection and removal of slipper substances that might be dropped in the area.
= COURT HELD: Woolworths had caused the injury, after breaching DoC.

Principles espoused in *Strong v Woolworths*

- S5D (1)(a) is a statutory statement of BUT FOR test → *"a defendant's negligent act … which is necessary to complete a set of conditions that are jointly sufficient to … (cause) the harm meets the test of factual causation within s 5D(1)(a)."*

Scientific uncertainty → *Amaca v Ellis*
= Cotton died of lung cancer, and had been negligently exposed to asbestos fibres in the course of his employment by two different employers. He also smoked 15-20 cigarettes a day for 26 years. The type of cancer he had was not usually associated with asbestos exposure. His two dependants brought action against the employers.
= COURT HELD: Appeal allowed and no causation → couldn't establish that the asbestos was a material cause of the cancer

Limitations on the BUT FOR test:

- Where the risk that eventuates is not the risk in respect of the duty or breach that have been established;
- Where subsequence coincidental events or human intervention, intervenes between the D's breach and injury
- Two or more sufficient causes operating concurrently
- Exceptional cases where the P cannot prove causation but 'material increase in risk' is enough

Material Cause

- There may be many necessary conditions of a loss, but the courts have attached causation to the D's actions/conduct where it is a material cause of the loss, even where it is not the sole cause
- A material cause has been held to be: not negligible → *Adeels Palace*

MATERIAL CAUSE @ COMMON LAW

Bonnington Castings v Wardlaw [1956]

= P suffered from lung disease – which was caused by exposure to silica dust, which accumulated in his lungs. Some of this exposure was due to his negligent employer, who did not properly maintain a dust extraction unit. BUT, he also was exposed to silica dust outside the workplace

= COURT HELD: Material cause

- LORD REID on what is a material cause: "A contribution which comes within de minimus nun curat lex [trivial] is not material, but I think that any contribution to which does not fall within that exception must be material."

"As long as a breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage": Henville v Walker

Saying that an exposure to something ***MAY*** have been a cause of a P's loss, is not enough to attribute legal responsibility: *Amaca v Ellis* (couldn't be shown definitively that P's cancer was due to employer's negligence)

MATERIAL CAUSE – TORT REFORM LEGSILATION

- There is much uncertainty as to the extent which s 5B(1) embodies the common law principles of causation in *March v Stramare* → particularly with respect to the sufficiency of a material contribution to harm as a necessary condition.
- A material cause MA
- Y still satisfy the 'But For' causation under S5D(1)

INCREASE IN RISK

- In some cases, all the P can do is prove that the P's negligence increased the risk of the P suffering loss

- A material increase in risk is NOT THE SAME as a material contribution to injury: *Wilsher v Essex*

McGhee v National Coal Board [1972]
= P worked in D's brick factory and was exposed to brick dust throughout the working day – the exposure was not held to be negligent, but the failure to provide showers at the end of the day was.
= ISSUE: Could the negligent failure have avoided the dermatitis?
= COURT HELD: Found for the P – the most that could be said was the negligent failure increased the risk of contracting demratities

- An inferential approach has been adopted in Australia.
- The court might infer causation where a D materially increased the risk of injury: *Wallaby Grip v Macleay*

Fairchild v Glenhaven Funeral Services [2003] **– Increase in risk of causing disease equates to material contrition**
= The P's were employees suffering asbestos related cancer – had been exposed to asbestos from many different employers. P was unable to prove on BoP which exposure by which empoyer had caused their illnesses or whether all were contributing causes.
= COURT HELD: Inferred causation – House of Lords held that for policy reasons, rules of proof of causation should be modified in these cases where medical science is unable to establish precise cause of injury

The Tort Law Reform with Material Risk

- S5D(2) allows the court in exceptional cases, in accordance with established principles to determine that negligence can be accepted as establishing factual causation even though 'But For' test is not met
- However, exceptional cases are not defined → in *Jovanoski v Billbergia*, employee could not identify who put grease at the back of his truck (causing him to injure himself) and could not prove that the D's breaches could have prevented/minimised the injury; court said it was not an exceptional cases
- Established Principles → common law

Lost Chances at Common Law

- Lost chances are generally not maintainable at common law in Australia.
- *Tabet v Gett (2010)*: Doctor was sued for causing a loss of a chance to get better → court overruled trial decision; cannot sue for loss of chance in Australia.

Scope of Liability – The Common Sense Approach

- The court has recognised that in some instances where there is more than one possible cause of P's injury, COMMON SENSE should be applied.

Two Stage Inquiry as to Causation (Tambree)

1. *Where the D's conduct is historically involved in the P's loss (BUT FOR TEST)*
2. *Ought the D be held liable for the harm sustained? (SCOPE OF LIABILITY)*

Bennett v Minister of Community Welfare
= D had negligently failed to properly advise P when he was a 16y/o war of the state, of his right to independent legal advice as to recovery of damages for injury suffered while in care of D. Sought bad legal advice later and eventually his claim became barred by statute.
= COURT HELD: D's actions were cause of P's loss – it couldn't be established that later advice was sole cause.

Medlin v SGIC
= P was uni professor who had injured in car accident by negligence of D"s insured – couldn't continue to teach so took early retirement. D contended that early retirement was cause of loss of earning capacity, not the accident
= ISSUE: Was the casual link broken by the P's voluntary decision to retire?
= COURT HELD: Early retirement was caused by D – that is, the causal link was not broken

"The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the D's wrongful act or omission is, as between P and D and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage."

Chappel v Hart
= P had suffered damage to her laryngeal nerve (voice damage). P operated and warned D of well-known complication but failed to warn of the possible unlikely/random complication of infection. P contended D's failure to warn her of this caused her loss.
= COURT HELD: P succeeded against D but minority were concerned that the risk of that injury would have been present regardless of who operated → majority applied but for.

Wallace v Kam → Scope of liability for breach of duty should relflect the underlying policy that it is a medical practitioner's duty to warn of risks and that "it was to protect the patient from the occurrence of physical injury the risk of which is unacceptable to the patient."

Things to consider that might make up normative considerations under S5D(1)(b) (Zanner v Zanner):
- More than one sufficient condition of the injury
- Intervening causes
- Cumulative operating of two or more factors to cause indivisible harm/material contribution
- The place of increase in risk
- Foreseeability
- The state of the P to be taken as found
- The place of sheer coincidence
- The importance of the relevant rule of responsibility

Hunter Area Health Service v Presland (2005)

= R argued that it was negligent of A, responsible for the operations of two hospitals to which R had been admitted. They did not detain him, and as a result, R contended that by detaining hi, he would not have killed his brother's fiancee and would have avoided the subsequent incarceration
= COURT HELD: Majority held it would be unjust to hold A liable on the normative Q of causation.

Criticism of Common Sense – 'THE PURPOSE APPROACH'

- This emphasises that a finding of causation should be made regarding specifically to the purpose and scope of the cause of action concerned

Travel Compensation Fund v Tambree (2005)
= D's were auditors who provided false/misleading statements about the financial position of the travel company. P suffered great loss – but travel agent had continue to trade after becoming insolvent, illegally → P's losses also covered that period
= Q: Was it D's misleading report OR the illegally trading that was clearly the cause of loss
= COURT HELD: D's actions caused loss → where P's reliance on the D involved the taking of a risk and where the 'very risk' against which protection was sought materialised, then the D's conduct must be a cause of the loss suffered as a result of the materialisation

Novus Actus Interveniens – Intervening Causation

- This is where, on a BALANCE OF PROBABILITIES, the D argues that there was an intervening act that severed the chain of causation

- If the second event occurs within or due to the condition created by the negligent act, causation is not broken.

"The intervention of an act or decision of the plaintiff does not necessarily negate causation especially "in cases where the negligent act …was itself a direct or indirect contributing cause of the intervening act or decision.": Medlin v SGIC

VOLUNTARY ACTS

- Voluntary acts by the P or a third party (that is a voluntary/independent intervention) should be regarded as novus act interveniens

= To establish a voluntary act as an intervening occurrence, it must be shown (*Haber v Walker)*:

1. The human action that is properly regard as voluntary; or
2. A causally independent event the conjunction of which with the storngful act or omission is by ordinary standards to extremely unlikely as to be termed a coincidence

= The causal link is negatived by subsequent conduct of another person when that conduct is *"free, deliberate and informed act or omission of a human being, intended to exploit the situation created by the D."* → *State Authority of NSW v Chu*

- Criminal acts by a third are usually enough to sever the chain of causation → *State Rail Authority of NSW v Chu* (news reporter slipped and fell, was later sexually assaulted weeks on, suffered psychiatric/physical injuries → chain of causation was severed)

THE 'VERY RISK' CREATED BY D

- Where the risk was created by D (and therefore has a duty of care to protect the P), the courts will find that the D's act is causally related to the P's loss in spite of the subsequent act
- In *Chomentowski v Red Garter Restaurant,* waitress was robbed by man on their way to the safe → court held that it was D who created the risk/had duty of care to protect P – thus there was a causal link
- Where D has created the risk, the P's negligence will not sever the causal link: *March v Stramere*
- Where the subsequent even is <u>the very kind of thing likely to happen in the circumstances, it cannot be a novus actus interveneniens</u>

Bennett v Minister of Community Welfare
= B claimed that the Minister's failure to obtain advice n his behalf in 1973, was the cause of his loss → Minister argued that the cause of the loss was the negligent advice in 1976.
= COURT HELD: Causal link established → Bennett was only forced to obtain the 1976 advice because the Minister had breached his duty.

March v Stramare Approach → Look at D's negligent act, and the ask, was the second negligent act the 'very risk' likely to materialise 'in the ordinary course of things?'

<u>Subsequent negligent medical treatment:</u> *Mahony v Kruschich*

- Could subsequent negligent medical treatment, which exacerbated P's injuries, sever the casual link between the D's earlier act of negligence?
- COURT HELD: Provided P acts reasonably in seeking or accepting treatment, D cannot escape liability UNLESS the treatment is 'inexcusably bad'

COINCIDENCE

- A coincidence WILL be a novus actus → i.e. lightning that strikes subsequent to D's negligent act
- Tortfeasor will not be liable where injury is caused by a coincidence → even where the tortfeasor's actions might have resulted in the P being the place at the time when the coincidence occurs, <u>SO LONG AS the risk to the P has not been increased by the actions of the tortfeasor</u>: *March*

Canterbury Bankstown RLFC Ltd v Rogers (1993)
= P injured by D in League game – went to England for recovery, where he injured his leg. He alleged that he would not have been in England, had it not been for D punching him
= COURT HELD: No causal link – subsequent injury was a coincidence

VICISSITUDES OF LIFE

- *JOBLING PRINCIPLE* → P suffered injury, by the time it came to trial, he was totally incapacitated by an illness which would have incapacitated him anything (without D's negligence – the illness had not manifested at the time of negligence → COURT HELD: The myelopathy (illness) was outside D's scope of liability

S5D(3,4) → SUBJECTIVE TEST; Failure To Warn Cases

- What P has to prove is that: P would have acted to avoid the risk if he or she had been adequately warned by the D: *Rosenberg v Percival*

- TEST under S 5D(3) *CLA*:

= What the P would have done is to be determined subjectively in light of all the circumstances
= Any statement made by P after the event as to what they would have done is inadmissible (unless it is against their interests)

= Circumstances that are used in subjective test of s5D(3) may include (*Neal v Ambulances Service of NSW*):

- Conduct of P at relevant time;
- Evidence of the P as to how they might have felt about particular mattesr
- Evidence of others in a position to asses the conduct of the P and their apparent feelings or motivations
- Other matters which might have influenced the P

- Where there is no direct evidence as to what the patient would have done, the judge may infer from the objective facts that the patient would not have undergone the procedure: *Rosenberg v Percival*

Wallace v Kam (2013)
= Wallace suffered from a spinal condition and Dr Kam performed surgery on him. There were two risks from the surgery that Wallace focused on in the action – one significant, one less so. Kam did not mention any of these. Surgery did not go well – and Wallace suffered form lesser of two risks.
= ISSUE: Wallace sued Kam for failing to warn him about two risks of surgery and that the failure to disclose caused his injury → had he know, he would not have agreed to the surgery.
= COURT HELD: No causation, as P would have agreed anyway → Doctors will not be liable where they do mention a risk that should perhaps be mentioned UNLESS that risk materialises and there is evidence to persuade the court that the patient would not have agreed to the treatment if warned of that particular risk

Multiple Sufficient Causes

This is where there are two separate and independent acts that contribute to P's loss – they may be both tortious or one tortious and one not.

- **ACCELERATION OF INJURY OR DEATH** → D can be liable for accelerating someone's death where they have a terminal illness
- **SUBSEQUENT INJURIES** → D will only be liable for the damages for the injury they caused: *Baker v Willoughby* (The vicissitudes principle)
- **ADDITIONAL CAUSES** → Where there additional causes to an injury/damage, if the subsequent injury does not really worsen the situation as a whole, the D2 cannot be liable for the damage already caused by D1: *Performance Cars v Abraham*

PROOF OF BREACH

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

INFERENCES

- An inference of negligence or causation can only be drawn from proved facts which make it more likely than not → i.e. more probable than not that the D was negligent or that D's negligence caused P's loss.

"Circumstances raising a more probable inference in favour of what is alleged." → *T.N.T. v Brooks*

Holloway v McFeeters
= P's husband was found dead in a street, there were doubts as to whether an unidentified vehicle was driving negligently
= COURT HELD: Evidence/circumstances showed that it was more probable than not that the driver was driving in a negligent manner.

RES IPSA LOQUITUR – "THE THING SPEAKS FOR ITSELF"

It is not a legal principle but "a general index to those cases in which mere proof of an occurrence … constitutes prima facie evidence of negligence": *Mummery v Irvings*

To rely on res ipsa louqitur, P must show (*Schellenberg v Tunnel Holdings (200) 200 CLR 121)*:

1. **Absence of explanation of cause of accident (i.e. immediate cause of injury must be an unknown factor)**

2. **Event does not usually happen without negligence**

= The courts must be able to deduce this without expert evidence; common knowledge and experience must be enough

= In *Piening v Wanless* – the courts could not use res ipsa loquitur in a case where P was injured when the steering system of a car failed; steering mechanics was not common knowledge.

3. **The event must be in the control of D**

= The D must be in sole control of the situation – if there is more than one P, then the act cannot show who has been negligent.

Schellenberg v Tunnel Holdings

= P was employed in a factory and was injured when operating a hand grinder, which was powered by compressed air. Hose pumping the air, became uncoupled and struck him in the face → P twisted and injured his back, sued his employer

= COURT HELD:

Effect of Res Ipsa Loquitur

- In Australia there is NO SHIFT IN ONUS OF PROOF → But the D bears the evidentiary onus to adduce evidence to explain the cause of the accident

Negligence: Remoteness of Damage

- A question about the ***extent of damage*** for which D is liable
- Common law test for REMOTENESS = *Reasonable foreseeability of the damage: Wagon Moun NO 1 [1961]*

Civil Liablity Act – s5D(4)

(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.

This enables the court to take policy considerations into account when determining whether D should be liable for the damage

Reasonable Foreseeability of the Damage

- The reasonable foreseeability of damage overruled the direct consequences test in *Wagon Mound (no 1)*

- For D to be liable for damage →
- It must not be too remote
- The damage must be reasonable foreseeable, so that it could occur in the mind of the reasonable person in D's position (not far fetched)

Wagon Mound (No 1)
= Owners of wharf brought case against charterers of a ship, who negligently spilled fuel oil into the water, which ignited and caused severe damage to the wharf. In evidence, it was found that the employee's of D could not have reasonably known that the oil would have caught fire+ activity on P's wharf must have caused the fire. At trial, the court found D liable through direct consequences test. Case went on appeal.
= COURT HELD: Not liable – as the consequences of D's negligence were not reasonably foreseeable, therefore D was not liable

What does 'reasonably foreseeable' mean? *The Wagon Mount (No 2)*

The risk of injury was reasonably foreseeable if … *"it was a real risk . Which would occur in the mind of the reasonable man [in D's position] ... and which he would no brush to the side as far-fetched"*

What is a reasonable person? *The Wagon Mound (no 2)*: "Men of their class and calling endowed with a reasonable amount of relevant knowledge and experience ... Only a reasonable amount of knowledge and experience, but also a normal or average make-up, lying between the extremes of over-confidence or rashness and extreme cautiousness"

- The damage can be reasonable foreseeable if each of the specific events leading up to the damage was reasonably foreseeable: *Versic v Connors* (car acco, with P's husband drowning – the events leading up to the injury/damage, the drowning, were reasonably foreseeanle)

The kind of damage

- P only needs to show that the *kind* of damage was foreseeable, and not the precise type of damage OR full extent/seriousness of it was foreseeable: *Hughes v Lord Advocate [1963]*
- The kind of damage = physical injury, economic loss, psychiatric injuyry etc.

Relevant things to consider:
1. **Kind of damage**
2. **Manner of damage: *Doughty v Turner Manufacturing***

Hughes v Lord Advocate [1963]
= Scottish Post Office employees left manhole on street when they ceased work, leaving canvas tent over manhole with several kerosene lamps. The P and his friend tied lamp to rope and climbed down manhole to explore, with P tripping over the lamp and knocking it over – there was an explosion and fire and P was severely burned
= COURT HELD: Damage to P was not too remote as the kind of injury was reasonably foreseeable, even if the extent was not.

"But a D is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as different in kind from what was foreseeable … This accident was caused by a known source of danger, but caused in a way which could not have been foreseen."

- **The *manner* of injury is relevant** – in the case below, the first manner of splashing causing injury was foreseeable, the second manner (the one that actually occurred) was not foreseeable.

Doughty v Turner Manufacturing [1964]
= P was standing nearby when asbestos cover was knocked into bath of hot molten – nothing happened initially, but after some minutes alter, there was an eruption and P was severely burnt. Covers were thought to be chemically inert but expert evidence showed that it was the cover that had reacted with the chemical in the bath to cause the reaction
= COURT HELD: The injury suffered by P was too remote, an injury caused by a splash was foreseeable but injury resulting from eruption as a result of chemical reaction was not foreseeable.

- In Australia, "harm of a like kind" must be foreseeable: *Mt Isa Mines v Pusey*

Mount Isa Mines v Pusey (1970)
= P was employed by D, with P going to the aid of two employees of D who were injured by switchboard explosion as a result of D's negligence. P developed schizophrenia as a result of shock from the event, claiming damages for nervous shock.
= COURT HELD: Some type of mental disturbance was reasonably foreseeable and the P's mental illness was not a different kind of damage
- ONLY HARM OF A 'LIKE KIND' IS REQUIRED

Mount Isa Mines was distinguished in *Rowe v McCartney*, where P was in car accident with D, who became quadriplegic – she claimed mental illness because she felt guilty for the situation that her friend (D) was now in → COURT HELD: Damage was unforeseeable as it was different from the kind of damage which might follow from an accident, and was a result of P's antecedent conduct.

Nader v UTA of NSW
= P was 10-year-old boy who received minor head laceration/bruising when he fell as he was alighting from a bus that still moving. P developed rare psychiatric illness where medical

evidence concluded it was probably a result of P's parents' reaction to the accident – their failure to obtain timely/appropriate treatment.
= ISSUE: The court held that D's action was material cause, but was the injury too remote to be compensable by D?
= COURT HELD: Not too remote – it was a foreseeable consequence of the action.

Kavanagh v Akhtar
= P suffered permanent injury to her shoulder/arm after some boxes fell onto her in D's shop, as a result of D's employees negligence. P's injury meant she couldn't groom herself and had to cut her hair – because of cultural/religious reasons, this had a profound effect on her husband, who later left her. This caused her to have severe depression.
= D argued that the marriage breakdown and subsequent depression were not foreseeable
= COURT HELD: D was liable – it was foreseeable that the injury would put strain on the marriage, which might lead to psychiatric illness

- Court said it was irrelevant that P's husband's extreme reaction to the hair cutting was unforeseeable – it was only relevant that a psychiatric injury was foreseeable as a consequence of the physical injury inflicted on P.

Economic Loss Case – *Metrolink Victoria Pty ltd v Inglis [2009]*
= D had caused a collision between his car and a tram owned by P, and because of the disruption to tram services, P was obliged to pay penalties pursuant to his franchise agreement. D argued that this kind of loss was not foreseeable.
= COURT OF APPEAL: The damage was foreseeable - "In the ordinary case a broad categorisation of the kind or genus of the loss will be appropriate"

The Extent of the Damage; 'Egg-Shell Skull' Rule

- D has to take the victim as they find them – D is responsible for the damage he caused, even if P was extraordinary fragile and thus suffered greater or unforeseeable damage
  → all that must be foreseeable is whether the original kind of damage was foreseeable: *Hughes v Lord Advocate*

- Egg-shell skull does not apply to alcoholism: *McCoy v Watson*
- Rule only comes into play once a wrong has been committed: *Chester v Waverely Copr*

It is no answer to a claim that the victim "would have suffered less injury or no injury at all if he had not had an unusually thin skull or an unusually weak heart"*: Dulieu v White & Sons*

Smith v Leech Brains & Co [1962]
= P's lip was burned at work, and medical evidence show his lip tissue cells were in a pre-malignant state at the time of the burn which triggered the cancer from which P died from.
= COURT HELD: D was liable – not too remote as D was liable because the original injury was foreseeable and thus D was liable for the extreme consequences.

Robinson v Post Office [1974]
= COURT HELD: P's brain damage was caused by a severe allergic reaction to anti-tetanus serum, which was required following a laceration to the leg → this was compensable as *so long as the initial injury and necessity for medical injury was foreseeable, then all the damage which resulted was recoverable*

- **Egg-shell skull rules applies to psychiatric injuries – where P a who is particularly susceptible to psychological injury**

Shorey v PT Ltd (2003)
= P was injured in fall at shopping centre. While her physical injuries were solved, she suffered from what medical evidence called 'conversion disorder' – psychiatric condition resulting in severe disability
= COURT HELD: D was liable – as Kirby J remarked: P was "peculiarly susceptible to developing bizarre symptoms" … but the "apparent disproportion between cause and effect is not an exculpation for the negligent party. It does not render the damage unforeseeable…

- D may be liable for further later injury which is brought about because of the initial injury causes a susceptibility in P: *Pyne v Wilkenfeld* → D caused P's car accident where P injured his neck. D was later liable for further injury sustained by P in later fall, which occurred because the neck injury necessitated wearing a brace that restricted P's vision.

- Egg-shell skull makes D liable for damage of an unforeseeable extent, but not for unforeseeable damage of a different

Commonwealth v McLean
= P developed throat cancer as a result of excessive tobacco/alcohol use precipitated by his psychological injury by D's negligence
= COURT HELD: The cancer was not the same kind of injury as that which was foreseeable and was too remote to come under egg-shell skull rule.

Limitations of Actions

- The P's cause of action dates from the suffering of the damage.

Brisbane South Regional Health Authority v Taylor
= P presented herself at D's hospital, suffering menstrual pains. Was given hysterectomy. Later found out, through her own research, that that action was too drastic. Attempted to sue the hospital 15 years on.
= COURT HELD: No extension allowed→ "When an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case required that extension"