

Week 1 – Introduction

Lecture 1: Introduction

INTRODUCTION

Conceptual Approaches

Different justice models give rise to different remedies:

- Corrective justice (e.g. compensation)
- Distributive justice (e.g. no fault schemes)
- Retributive justice (punishment)
- Restorative justice (transitional justice)
- Reparative justice (victim focused approach can combine all the above)

Distributive Justice vs Corrective Justice (Liability v Merit): Legal remedies aim to correct an injustices (compensation is a primary remedy) and is recognised as a right. Corrective justice is a legal finding of liability This is different from distributive justice which is based on sharing resources among people belonging to the same community, ie. Finding who deserves merit (for example, Medicare).

Judicial Remedies

Positivist View:

In determining what a legal remedy is, the legal positivist view (Austin) is that:

- There is a distinction between primary and secondary rights (Austin). If law recognises the breach of a duty (primary right), that gives rise to a remedy (secondary right).
- This is confronted by situations where the law is not so neat, or does not consider that a wrong has been committed. For example, a bank transferring money from one account into another account accidentally (no right has been infringed). The remedy in such case is restitution.

Social Institution

Another way of understanding remedies is by understanding it as a social institution which promotes social order. That is, remedies operate in a society. This explains remedies like restitution exist where no wrong has been committed. Other examples include compensation for loss, specific performance, injunctions, and exemplary damages.

Monist v Dualist Approach:

The monist view recognises a correlative between right and remedy, whereas the dualist view considers them to be separate wherein remedies can be tailored (there has been a rise in the dualist view as a result of statute).

While the monist view may be too constrained, the dualist view can be too liberal. In deciding which remedy to apply, judges must engage in social and moral issues and is this appropriate? Where's the limit to judicial discretion?

A good example illustrating the tension between the monist and dualist approaches is the Fusion Fallacy. The monist view when it comes to the fusion fallacy is that you cannot apply common law principles when determining a claim in equity.

Harris v Digital Pulse

Facts:

- Breach of fiduciary duty (equity) with employer seeking exemplary damages. At trial, the employer was awarded exemplary damages and this was taken to the High Court.

Held:

- 2:1 majority said you cannot award exemplary damages for a breach of fiduciary duty as they're separate streams – principles cannot be mixed.

Reading: Principles of Remedies, pp 3-11.

SCOPE OF THE LAW OF REMEDIES

Given the absence of any judicial definition of what actually constitutes the law of remedies, there are at least 4 distinctions which help understanding it.

Primary and Secondary Rights / Monist v Dualist

In terms of Austin's scheme, primary rights correspond with causes of action, and secondary rights correspond with remedies. Austin acknowledges that this at times can be illogical as 'a primary right is not itself a right without the secondary right by which it is sustained'.

Recently, academic discourse has been drawn to describe the law of remedies by reference to two schools of thought – monism and dualism.

Remedies and Procedure

The second basic distinction that of remedies and court procedure. This turns upon the difference between 'ends' and 'means' (*Adam P Brown Male Fashions v Philip Morris Inc*). Remedies are the ends and procedure is the means for achieving those ends. However, the law of remedies is very procedural in nature which poses difficulties to this distinction.

Civil and Criminal Law

This distinction draws of the different remedies available for criminal vs civil law, albeit they often cross over.

Self-Help Remedies

This is the distinction between self-help remedies and judicial remedies administered by the courts.

Self-help remedies include, abatement of nuisance, eviction of trespassers, and termination of contracts for breach.

Weeks 2 and 3 – Torts

Week 2 Readings – Textbook, chapter 2

DAMAGES IN TORT

Definition → Damages are an award of money by the court designed to compensate the plaintiff for injuries caused by the defendant's wrong. They are intended to place the defendant in the position they would be in had the tort not been committed (*Livingstong v Rawyards Coal*). The main common law exception to this is exemplary damages, where the principle is not one of compensation but one of punishment and deterrence.

There can be uncertainty as to what is an 'actionable injury'. Some injuries may not give rise to damages, such as:

- Loss of chance of a better outcome in medical negligence cases,
- Negligent infliction of pure psychiatric harm, and
- Pure economic loss

Cattanach v Melchior – wrongful birth

Facts:

- Mrs Kerry Anne Melchior had seen the obstetrician and gynaecologist Stephen Alfred Cattanach, and asked for a tubal ligation procedure to be performed on her, citing financial inability to support a third child. She recalled having one ovary removed when she was fifteen years of age and that her fallopian tube had at that time also been removed.
- While performing the operation Dr Cattanach could see no evidence of a second fallopian tube and so assumed that Mrs Melchior's recollection was accurate.
- Mrs Melchior gave birth

Issue:

- Whether the cost of raising a healthy but unplanned child conceived as a consequence of a doctor's negligence is actionable damage

Held:

- Bare majority held that it was
- It remains an actionable injury, but the amount awarded as compensation has been curtailed

Harriton v Stephens – wrongful life

Facts:

- Doctor failed to diagnose rubella in the mother during pregnancy and she therefore lost an opportunity to terminate her pregnancy
- Her daughter was born with severe lifelong disabilities including blindness, deafness, mental retardation and spasticity
- Harriton claimed special damages for past and future medical costs and damages for pain and suffering

Held:

- 6:1 High Court majority refused to recognise wrongful life as actionable injury
- Crennan J - 'A comparison between a life with disabilities and non-existence is impossible'
- Kirby J (dissent) – allowing this would give doctors an immunity resulting in a child being born into a life of suffering, this immunity should not be afforded.

COMPENSATORY DAMAGES – ELEMENTS

Definition → Compensatory damages are money awarded to a plaintiff to compensate for damages, injury, or another incurred loss.

For a plaintiff to receive compensatory damages, the court must find that:

1. The plaintiff has a tortious **cause of action** against the defendant,
2. The defendant's tort has in fact **caused** the plaintiff's loss,
3. The plaintiff's loss is not too **remote**, and
4. The plaintiff has not breached their duty to mitigate **unnecessary** loss.

Both at common law (*Todorovic v Walker*), and statute (**CLA s 5E**), the plaintiff bears the burden of proving the first 3 elements with 'reasonable certainty'. The defendant bears the burden of proving 4 as it is presumed the plaintiff took all necessary steps.

I. Cause of Action

Legitimate causes:

- Assault
- Abuse of process
- Battery
- Conspiracy
- Conversion
- Deceit
- Defamation
- Detinue
- Duress
- False imprisonment

Etc. (page 20/21).

Actual damage must be shown but it is ordinarily immaterial in proving the commission of the tort even if the damage is an element of the cause of action (E.g. passing off). This merely entitles the plaintiff to nominal damages. This is not the case in negligence, where the action will not accrue unless damage occurs (*Commonwealth v Cornwell*).

II. Causation

The plaintiff's damage must have been caused by the defendant.

The common law has split causation into two issues: (1) causation in fact, and (2) causation in law. Causation in fact is usually decided by the application of the 'but for' test. If the court finds causation as a matter of fact, it then decides whether there is causation in law. This questions whether the legal system *ought* to impose liability on the defendant.

The 'But For' Test – Causation in Fact

The defendant is considered to have caused the loss if, but for the wrong, the loss would not have occurred (*March v E & M Stramare*). The standard of proof of the balance of probabilities (*Malex v JC Hutton*).

Barnett v Chelsea

Facts:

- A night-watchman reporting to a hospital complaining he has been vomiting for a number of hours
- Doctor sent him home, suggesting he come back in the morning if he was not better
- It transpired that the watchman has somehow ingested arsenic and dies during the night

Held:

- Although hospital breached its duty of care, the evidence shows that there wouldn't have been a cure and he would have died even if the hospital had admitted him immediately.
- Thus no causation

Multiple Causes

March v E&MH Stramare

Facts:

- The plaintiff was injured when at about 1am the car he was driving hit the defendant's truck
- Truck was parked in the middle of the street with its parking and hazard lights on, but plaintiff was drunk at the time of collision
- Trial judge said that the way the truck was parked was a breach of duty of care owed to other road users
- However plaintiff was also negligent and trial judge attributed 70% fault to the plaintiff and apportioned damages accordingly
- The full court overturned this as given the truck drivers negligence was only 30% it couldn't be said on the balance of probabilities (that is more than 50%) that his negligence caused the loss
- Plaintiff appealed

Held:

- High Court found that defendant's negligence in parking the truck was also a cause of the accident and restored the finding of the trial judge
- The question was whether the defendant's conduct 'materially contributed' to the harm. Even though the defendant's conduct was less than 50% to blame, it was more

probable than not that this particular accident would not have occurred if the defendant didn't park where he did.

- Mason CJ – must 'establish that injuries are 'caused or materially contributed to' by the defendant's wrongful conduct.

Similarly, in *Fitzgerald v Penn*, the court articulated the test to be 'whether a particular act or omission can fairly and properly be considered a cause of the accident', which is 'ultimately a matter of common sense'.

When contemplating multiple causes, another phrase used by Mason CJ in *March* was 'caused or materially contributed to'. This is a useful approach as it focuses attention away from the role traditionally played in the 'but for' test (which allocates responsibility to a single cause) and contemplates multiple causes.

Factual Causation under the Civil Liability Acts

Normative considerations to causation are not part of the test under the Civil Liability Acts.

CLA NSW s 5D:

(1) A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

This requires that the factual issue of causation (i.e necessary condition) be treated separation from whether there ought to be liability. Policy and value judgements are only to be taken into account in the second question.

In recent cases, the necessary condition test has been seen as a statutory implementation of the common law 'but for' test – but without the need for any policy factors or value judgements to be taken into account.

Intervening Events

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 (*March*). Such an event is called a new intervening event, or novus actus interveniens. This must arise independently from the original wrong and must disturb the sequence of events that would have been anticipated. Events which are foreseeable will not break the chain (*Haber v Walker*).

Contributory Negligence

The key apportionment provision affecting contributory negligence is found in the **Law Reform (Miscellaneous Provisions) Act 1965 s 9(1)**: