Joint/several tortfeasors – joint can be vicarious liability

Common Law: each tortfeasor potentially liable for whole loss (onus on D to join other tortfeasors in claim, if P claims against one D then all claims against other D’s barred)

No right of contribution (D can’t claim from other tortfeasors)

PRINCIPLE: if held: (catch) from Fairchild v Glenhaven Funerals

Where can’t determine

4) EVIDENTIAL GAP PROBLEM

Subsequent torts taken as "vicissitudes of life" (1st tortfeasor gets away with liability and all on subsequent tortfeasor)

Where 2nd event adds to injury already created

Does this 2nd event overtake 1st tortfeasors liability?

Baker v Willochly W had to share in liability for amputated leg (W negligent in 1964 in car accident, leg amputated in 1967 after shot in robbery) to extent of his share. H of L held: concurrent cause, W must pay share

Faulkner v Keffalinos 2 successive car accidents, 1st partial disability, 2nd total

Jobling v Associated Dairies back injury at work (partial disability) followed by total disability from disease

PRINCIPLE: Baker rule not followed in Australia/UK, 2nd tortfeasor wholly responsible. Subsequent torts taken as "vicissitudes of life" (1st tortfeasor gets away with liability and all on subsequent tortfeasor)

2) Might have been one or more than one cause (once injury triggered other causes make no difference to severity of loss) → SA v Ellis situation (E exposed to asbestos, evidence can’t determine whether contracted disease from single or multiple exposures)

3) Successive causes proven but cannot prove separate consequences (divisible loss but can’t apportion damage, e.g. hearing loss from exposure to loud noises over several e/ers)

5) PROVING PROBABILITIES

Effect of apply B of P approach to future/probable events?

Failure to diagnose/Loss of chance cases:

Barton v East Berkshire AHA H fractured hip, taken to hospital (D), hospital took 5 days to diagnose, H suffered deformity. Even without late diagnosis 75% chance of deformity. H sued for loss of chance (25%). Held: “All or nothing approach” – to prove causation element must be >50%, as only 25% hospital not liable

R v Health R suffered spinal microfractures after treatment.

PRINCIPLE: Change the question – if conduct causes loss of chance of better outcome then liable (quantum affected by loss of chance)

Sitt v Tabet CT scan 1 day earlier could have revealed brain tumour before seizure. TJ Held: delay in treatment 25% responsible for loss, chance of better outcome = 40%. CA Held: Rufo wrong, if less than 50% chance causation not satisfied

CIVIL LIABILITY ACT

s11 General Principles of Causation

s11(1) Causation comprises 2 elements:

(a) necessary condition test (factual causation)

(b) scope of liability (normative considerations replaces remoteness/causation in law)

s11(2) if can’t satisfy s11(1) court should consider why responsibility for a harm should be imposed on a D

Comparison with Common Law

Scope of duty determined by s4 and a schedule of duties

“Harm” vs. “damage”

“necessary condition” vs. “but for”

“Exceptional cases” accounted for (s11(2)) – codifies Fairchild approach

Adeels Pajaro after fight in Sydney club on NYE patron returned with gun and shot 2 people (1 innocent bystander, 1 involved in fight). HCA Held: duty owed and breached but didn’t cause loss, absence of security not a necessary condition of harm and not exceptional

s28-33 proportionate liability for concurrent wrongdoers (but only for claims of economic loss/profit loss)

s31(1)(a) claim can be apportioned according to whatever is “just and equitable” reflecting D’s responsibility for the loss

CAUSATION IN LAW

Policy based, overtaken by Remoteness

Balance P’s expectation/need for compensation with burden of disproportional liability

Also a tool to limit liability

Direct Test

Original test of causation in law, didn’t differ substantially from causation in fact

Polemis blank fall as result of tortious act, caused spark leading to explosion.

PRINCIPLE: Liability for damages flowing directly from tortious act. Rely on novus actus interveniens to limit liability

Development of Remoteness

1) Donaghue v Stevenson neighbour principle – neighbour is closely and directly affected by act (ought to be in contemplation)

2) Wagon Mound (No 1) charterer negligently spilled oil at Morts Dock, Balmain. Oil floated on surface and set alight when welding sparks ignited cotton waste on surface. Wharf and ships destroyed in fire. PC Held: Applying Polemis D liable for all damage, applied reasonable foreseeability (not RF so no recovery)

3) Wagon Mound (No 2) no recovery at trial level (not RF). PC Held: RF test applies to negligence, some risk of fire would have been present in mind of reasonable engineer

PRINCIPLE: reasonably foreseeable when not “far fetched or fanciful”. Reasonable person ought to do what is reasonable to prevent damage/accident (balance the likelihood of accident vs. burden of prevention).

Application of Remoteness Test

Applies to kind of damage, not extent:

Hughes v Lord Advocate PRINCIPLE: only need to foresee general type of damage, extent is immaterial (if damage RF then liable for all → Egg Shell skull rule, “take victim as they find them” Tavarnoph)

Pure psychiatric harm

Originally no damages for “nervous shock” (Coutts v Victorian Railway) miscarriage from nervous shock too remote

Statute (all Aus jurisdictions) replaced CL and said can recover if RF and recognised disorder

Other significant tests:

Person of “normal fortitude”

Sudden shock

Directly perceived

Polemis held police negligently attributed accident to T’s drink driving, predisposition to mental illness led to depression. Held: not RF

PRINCIPLE: RF that person of normal fortitude harmed?

Ametta v Australian Stations pre-existing relationship between mother of 18yo jackeroo and D: Held: successful claim for damages (existing relationship outweighed injury not being sudden or directly perceived)

Pure Economic Loss

Traditionally no recovery for pure economic loss (e.g. loss of income, profits, interest etc)
5) UNCONSCIONABILITY
Where special disability evident to make it unfair to accept assent

(Commercial Bank of Australia v Amadio)

**Elements:**
1) One party under special disability
2) Disability sufficiently evident to stronger to make it unfair to accept assent

**Rebuttal:** Stronger can show transaction “fair, just and reasonable” (Commercial Bank)

Rescission available in equity even where adequate consideration

**ELECTION TO RESCIND**

- Bound by any decision that party makes
- Election of a voidable K is irrevocable (Ergent v ASL Developments)
  1) effective until rescinded by innocent party, rescission negates right to enforce K
  2) Election to affirm voidable K extinguishes right to rescind

Election not required immediately as long as does nothing to affirm K

(Tropical Traders v Goonan)

Self help remedy: No court order/direction required to rescind
Can rescind by performance/actions or by words

**RESTITUPTION IN INTRESSUM**

- Purpose = put parties in position before K
- Discretionary remedy
- Concurrent jurisdiction of CL and equity (equity prevails)
- Discretionary remedy

Must do what is “practically just” for all parties (Bridgewater v Leahy)

5 BARS TO RESSION UNDER PRINCIPLE (must know that have right to rescind first)
1) Affirming contract (words or conduct)
2) Lapse of time (Leaf v International Galleries - constable painting, 5 years) – too hard to put back to pre-contract position (from knowledge of right to rescind and election to rescind)
3) Restitution no longer possible (can’t go back to pre-contract position) – note substantial restitution in equity
4) Innocent 3rd party involved (acquired interest for value)
5) Limited bar – K fully executed on both sides (Seddon v North East Salt) – where public knowledge of performance e.g. property, shares (public should have knowledge of shareholders behind company).

Held: restitution refused as K fully performed Rule applied in cases of INNOCENT misrepresentation

**ACCOUNTS OF PROFITS**

1) Evidence of breach of confidence
2) Breach of trust/fiduciary duty

**ACCOUNT OF PROFITS**

- Trustee/Fiduciary must account for profits made "by reason" of breach of trust/fiduciary duty
- Warman International v Dwyer

Injunction required – GO THROUGH ELEMENTS IN EQUITY – need injunction

**INJUNCTION**

- Auxiliary jurisdiction for accounts of profits in infringement of:
  - Patents (Smith v London & South Western Railway)
  - Copyright (Daily v Taylor)
  - Trade marks (Edelesten v Edelesten)

attended in Aust in 2002 (CAN POTENTIALLY DISTINGUISH FOR CASE OF FRAUDULENT MISREPRESENTATION)

**SUBSTANTIAL RESTITUTION**

- Only put back parties substantially to pre-contract position where party acted fraudulently

Alati v Kruger

A bought fruit shop from K, K misrepresented turnover. A unable to reach turnover, A wanted to rescind (legal action). Shop fell into disrepair, K said can’t rescind as can’t return to original position. Held: when first chose to rescind substantial restitution possible, sufficient in equity for rescission.

**PRINCIPLE:** restitution occurs from time when innocent party elects to rescind contract (quantum/assessment: make deduction arrangements for any lost value)

Restitution on terms

If can’t give back what received (e.g. services) then no restitution

Yadav v Pioneer Concrete

- stood guarantor on understanding for future debts only, actually for past and future debts. Tried to rescind K when called on past debt. Held: can grant restitution by only holding to future debts

**PRINCIPLE:** can amend K to meet certain terms (when thought these were actually the case).

**ACCOUNT OF PROFITS**

- Developing area of law
- Order to pay, under supervision of the court, any profit/moneys unfairly made (acquired by wrong committed against P)
- Purpose: not to punish but to prevent unjust enrichment (Daily Industries v Decor Corp), disgorge any profits made
- Different from damages

Restitutionary rather than compensatory (no K exists)

P need not have suffered a loss (Consul Development v DPC Estates)

Colbeam Palmer v Stock Affiliates

Suing for what D earned rather than compensation for P’s loss

Could also sue in tort (choose between damages/account of profit)

**ELEMENTS**

Ground for awarding account of profit

**GROUNDS FOR AWARDING**

1) Breach of trust/fiduciary duty

Exclusive jurisdiction in equity

Trustee/Fiduciary must account for profits made “by reason” of breach of trust/fiduciary duty

(Harris v Digital Pulse)

Warman International v Dwyer

- Account of profit remedy where benefit obtained by: 1) conflict/possible conflict between FD and personal interest, or 2) by reason of FD and/or taking advantage of knowledge derived from FD

Outcome: constructive trust created (Chan v Zachary) which P has interest in

**ASSESSMENT**

Account for entire profit made by reason of breach of trust/FD

(Consul Development v DPC Estates)

1) Account of profits not a penalty
2) Remuneration for “work and skill” where hasn’t acted dishonestly

(Boordman v Phipps)

- a. But cant encourage trustees to breach in any way

Guinness v Saunders

3) Trustee makes profit by misapplication of trust money then beneficiary entitled to entire profit

(Scott v Scott)

4) Trustee makes profit by misapplication of trust mixed with other, beneficiary entitled to proportionate share

(Scott v Scott)

5) Property purchased with trust money, no account for profit until sells property

(Scott v Scott)

6) Where business acquired in breach of FD, court makes judgment as to what proportion of profit due to fiduciary’s skill, efforts, property and resources

(Warman International v Dwyer)

2) Breach of confidence

Breach of confidence in exclusive equity jurisdiction where obligation in equity (AS v Guardian Newspapers)

- ELEMENTS from ABC v Lehnah Game Meats
- Information confidential
- Information imparted in circumstances importing confidence
- Actual or threatened use of information
- To detriment of party communicating information

**Contract:** not entitled to account of profit for breach of K

**Innocent breach of confidence**

(Treasurer v Copyles) not a knowing breach therefore no account of profits (also no injunction)

3) Infringement of intellectual property rights

- Auxiliary jurisdiction of equity
- Disincentive for parties to acquire profit

**ELEMENTS**

1) Normally only given in case of injunction (ancillary relief)
2) Account of profits for a knowing infringement (see differences in statute)
3) Discretionary remedy (subject to equitable defences)

**BUT SEE STATUTE:** Trade Marks Act 1995, Patents Act 1990 etc. (all Cth)

**NOTE:** now statute led

Account of profits an ancillary remedy to injunction to stop IP rights from being further infringed (Smith v London)

Daily v Taylor court has no jurisdiction for account of profits unless grants injunction

**PER STATUTE** – don’t necessarily need injunction

Jurisdiction to award account of profits from: Trade Marks Act 1995, Patents Act 1990, Copyright Act 1968, Designs Act 2003 (all Cth statutes)