

## Rules of Causation

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In the tort of negligence, causation is key as it links the defendant's carelessness (breach) to the harm suffered by the claimant without a need for a contract ('Donoghue v Stevenson' (1932)); Negligence is a fault-based principle that focuses on the quality of the defendant's conduct and it must be proven that the defendant acted below a reasonable standard of care.<sup>1</sup> So what is a standard of reasonable care? In the tort of negligence, the defendant's carelessness alone will not be punishable unless the claimant can prove that: He/She owes a duty of care to them; He/She has breached that duty of care and; the defendant's breach resulted into the harm suffered by the claimant which is not deemed to be too remote.<sup>2</sup> The standard of reasonable care is an objective test where the court compares the defendant's act or omission to what the imagined 'reasonable person' would have done or would have avoided in the same circumstances (Giliker and Beckwith, 2000). If a defendant falls below that particular standard of care, then he/she is said to be in breach and therefore liable of negligence (John, 2002). Importantly, the breach of duty must be the cause of the damages suffered by the claimant and this may seem like a straightforward approach but in law there is a different meaning to the word "cause" than the ordinary meaning (Horsey and Rackely, 2019). Moreover, Causation in tort requires two causes in order for the claimant to prove that the defendant is liable of negligence and these are factual and legal causation (Moore, 2019).

In any given negligence claim there must be a breach of duty from the defendant that caused the claimant to suffer damages (Moore, 2019), so the courts must decide if the defendant's carelessness was a necessary ingredient for the harm to occur (cause in fact), if so, then they must establish whether this is the 'real' cause of the harm (cause in law). Let's take for

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<sup>1</sup> Horsey, K. and Rackley, E. (2019) *Tort law*. New York: Oxford University Press.

<sup>2</sup> Ronquillo, Y. and Pesce, M (2020). *Tort*. [Online]. (Last updated 15 August 2020). Available at: <https://www.statpearls.com/articlelibrary/viewarticle/23586/>

example, a patient comes to a hospital desperately in need of a treatment and is then sent home by a doctor without a proper examination from which he subsequently died ('*Barnett v Chelsea and Kensington Hospital Management Committee*' (1969) )<sup>3</sup>, but it later emerged that he was suffering from arsenic poisoning and no proper treatment would have saved him as it was too late. Obviously, the doctor was negligent but in factual causation however, according to the 'but for' concept, the claimant in such cases must show that 'but for' the defendant's carelessness the claimant would not have suffered the injury (in this case the breach was not the cause because the patient was already in critical condition).<sup>4</sup> Occasionally, the 'but for' test can be controversial because it is inferring that individuals must place themselves at a time just before the breach took place and assess how things would have turned out if the defendant obeyed their duty (Hammer, 2014). In *Nyang v G4S*<sup>5</sup>, the detention and medical staff were indeed in breach of duty but it was established again (Similar to **Barnett**) that 'but for' the defendants' breaches the claimant would not have escaped harm. In other areas of the 'but for' test where issues may arise is where there are multiple potential causes of harm *Wilshire v Essex Area Health Authority*<sup>6</sup> and the defendant must deal with the 'burden of proof' to identify that the defendant's breach was more than 50 per cent likely the cause of the harm.<sup>7</sup> Consequently, this is where policy considerations sometimes come into play to bypass issues with the 'but for' test such as: Possibility of solving the probability of damages occurring if there was an absence of negligence and on the other hand rejecting the results (if probability can be solved) if they seem to be too unjust like for instance in

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<sup>3</sup> '*Barnett v Chelsea and Kensington Hospital Management*' (1968) 2 WLR 422

<sup>4</sup> Hammer, D. (2014) 'Factual causation' and 'scope of liability': What's the difference?', *JSTOR*, 77 (2), pp. 155-188. Available at:

[https://www-jstor-org.ezproxy.uwtsd.ac.uk/stable/24029774?seq=6#metadata\\_info\\_tab\\_contents](https://www-jstor-org.ezproxy.uwtsd.ac.uk/stable/24029774?seq=6#metadata_info_tab_contents)

[Accessed: 24 October 2020].

<sup>5</sup> '*Nyang v G4S Care & Justice Services Ltd and others*' (2013) EWHC 3946 (QB).

<sup>6</sup> '*Wilsher v Essex Area Health Authority*' (1988) AC 1074

<sup>7</sup> Stapleton, J. (2010) Factual Causation, *Federal Law Review*, 38 (3), pp. 467-484. Available at: <https://journals-sagepub-com.ezproxy.uwtsd.ac.uk/doi/pdf/10.22145/flr.38.3.9>

the case of *Fairchild v Glenhaven*<sup>8</sup> where the law lords felt uncomfortable with the results (produced by the ‘but for’ test) which would have had the defendants escape liability despite negligence being the cause of the claimant’s injury (Horsey and Rackley, 2019). Apart from this, situations where the ‘but for’ test may also be unattainable are where the cause can not be scientifically proven hence this is why the courts have ruled that it is enough to show that the defendant’s negligence made a ‘material contribution’ to the injury (*Bonnington Castings LTD v Wardlaw*<sup>9</sup>) and that the defendant’s carelessness ‘materially increased’ the risk of the claimant’s condition like in *McGhee v National Coal Board [1973]*<sup>10</sup> (David and McCague, 2005) where the defendant’s condition (dermatitis) increased after working in a brick house owned by his employer who negligently failed to provide a washing facility (as a result the dust stayed on the D longer than usual) for his employees after their task. It is important to note that in negligence claims, the defendant will not be automatically liable when the claimant proves that they did in fact cause the injury because the courts must still judge whether the cause in fact should amount to legal consequences.<sup>11</sup>

The defendants’ liabilities are entitled to be limited to an extent which is why one may consider legal causation as an introduction point for policy considerations because it is assessing after the defendant’s negligence has been found, whether it will be morally right to penalize them for their actions or in more legal terms whether their actions were too remote (no connection to the outcome).<sup>12</sup> In order to do so, the courts have taken on different tests to analyse the moral

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<sup>8</sup> ‘Fairchild v Glenhaven Funeral Services’ (2002) UKHL 22

<sup>9</sup> ‘Bonnington v Castings Ltd v Wardlaw’ (1956) AC 613

<sup>10</sup> ‘McGhee v National Coal Board’ (1973) 1 WLR 1

<sup>11</sup> Weinrib, E. (1975) A step forward in factual causation, *The Modern Law Review*, 38 (5), pp. 518-534.

Available at:

[https://www-jstor-org.ezproxy.uwtsd.ac.uk/stable/1093830?sid=primo&seq=2#metadata\\_info\\_tab\\_contents](https://www-jstor-org.ezproxy.uwtsd.ac.uk/stable/1093830?sid=primo&seq=2#metadata_info_tab_contents) [Accessed: 26 October 2020].

<sup>12</sup> Broadbent, A. (2009). ‘Fact and Law in the Causal Inquiry’, *Legal Theory*, 15 (8), pp.1-32. Available at: <https://philpapers.org/archive/BROFAL.pdf> [Accessed: 27 October 2020].

aspect of decisions about liability which is firstly the remoteness of damage and secondly whether any subsequent later events may have broken the chain of causation separating from the defendant's carelessness and overall these two areas are commonly conflictiving (Stauch, 2001). The doctrine of remoteness of damage is where issues have continuously been raised about the limitation of legal policy in order to decide whether or not the defendant is indeed liable for all the consequences of their careless conduct (Broadbent, 2009). In addition to this, *The Wagon Mound (No.1)*<sup>13</sup> is the leading case in this area where a thin film of oil slipped from the defendant's ship spreading towards a neighbouring ship (owned by the claimant), which later ignited into flames causing damages to the ships as a result and The Privy Council decision introduced a new way for remoteness to be analyzed in respect of foreseeable risk of harm (Stauch, 2001) as they agreed that a reasonable person would not have foreseen the fire damage as a consequence of the defendant's negligence. This decision influenced the destruction of the 'direct consequences' rule formerly known as the *Re Polemis* test observed in '*Re Polemis and Furness*' (1921)<sup>14</sup> where a defendant would be liable for all damages occurring after their negligence no matter how unforeseeable they are but the courts ruled after the decision in *Wagon Mound* that this test was worthless for the law as it was too cruel for the defendant (policy matter) and to establish a more reasonable test for the defendant like foreseeable risk of harm and not the extent (Horsey and Rackley, 2019). Furthermore, in these particular circumstances claimants who are already suffering from a weakness will be vulnerable to 'extreme' damages and the courts recognise this which is why they have created a rule that protects these 'fragile' claimants and it is called the 'egg shell skull' rule and this rule is specifying that a 'defendant must take the claimant as he finds him' (Cote, 2015). In practice, the classic case which this

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<sup>13</sup> '*Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co (The Wagon Mound) No 1*' (1961) PC 2

<sup>14</sup> '*Re Polemis and Furness, Withy and Co Ltd*' (1921) 3 KB 560

principle was applied is in '*Smith v Leech Brain & Co Ltd*' (1962)<sup>15</sup> where a defendant was liable for the full consequences of his negligence plus the extent because the claimant was already suffering from a precancerous skin condition.

On issues of causations there may be a later intervening act resulting in a break in the chain of causation which may perhaps have an effect on the defendant's negligence for the harm caused and this is known in law as *novus actus interveniens*; When assessing this concept the courts must take in account reasonableness, policy and fairness to establish whether the initial wrongdoer (who wants to convince that their liability is limited) should be liable for the later intervening event or whether the chain has been broken (Llovells, 2017). So in what circumstances will a defendant be able to implore this concept as means to escape liability for the subsequent injuries? (Casson, 1970, p. 450) Well this depends on the nature of the event because *novus actus interveniens* may take one of four forms. However, before any new intervening act is considered *novus actus interveniens*, it must be first established that the act was not foreseeable after the defendant's negligence meaning that it will not break the chain of causation if it was more likely to have occurred after as stated by Lord Reid in '*Home Office v Dorset Yacht Co Ltd*' (1970) (McIvor, 2006, p.2). Firstly, the act of a third party (deliberate or non-deliberate) might potentially break the chain of causation between the defendant's liability and the subsequent injuries suffered like for example in the case of '*Philco Radio, Ltd v J. Spurling, Ltd*' (1949), the claimant's typist tried to open a box filled with inflammable products (delivered by the Defendant without a warning sign) while unintentionally holding a cigarette which caused an explosion, but the Court of Appeal stated that the typist act was not deliberate and the defendant was held liable perhaps because he owed a duty not to deliver such product without warning

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<sup>15</sup> '*Smith v Leech Brain & Co Ltd*' (1962) 2 QB 405

(acted unreasonably) and so the typist act did not break the chain of causation.<sup>16</sup> Moreover, the circumstances of the deliberate act of a third party can be a big factor when distinguishing the liability of the original defender and the later harm suffered but it could be dependent on the facts of a case like for instance where the other party can not be found (therefore avoiding legal consequences) after causing further injuries to the leg of a claimant who was already suffering damages (pain and stiffness) in the same leg due to a previous accident from the negligence of the original defender which led the court to hold that since no one would be liable for the ongoing effects of the original accident, in light of fairness, the original defender had to be fully liable on the facts that his negligence continued to operate despite the additional injury caused.<sup>17</sup> Similarly, the chain of causation will not be broken by a deliberate act of the third party if a defendant's duty was to guard the claimant or their property against damages and the case of '*Stansbie v Troman*' (1948)<sup>18</sup> demonstrates this where a decorator failure to take reasonable care to lock the premises before leaving (as imposed by a contractual relationship) breached this duty and it was foreseeable that thieves would walk in and steal jewelry from the claimant so as a result the third party's act did not break the chain of causation leaving the defendant fully liable for the damages. Sometimes, the defendant's negligence can force third parties to intervene (as rescuers) and in these circumstances if the third party's conduct (if negligent) causes further damages, the chain of causation will be broken if the later harm was not foreseeable (like in **Stanbie**) after the original defendant carelessness and you can see this in '*Knightley v Johns*'

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<sup>16</sup> J.G.F. (1950) 'Tort-Negligence-Dangerous Substances'-Novus Actus Interveniens'- Contributory Negligence', *The Cambridge Law Journal*, 10(3), pp. 470-471. Available at <https://www-cambridge-org.ezproxy.uwtsd.ac.uk> [Accessed: November 3 2020].

<sup>17</sup> 'Baker v Willoughby' (1970) House of Lords, case 467. *Westlaw Edge UK* [Online] Available at: <https://uk.westlaw.com/Document/I6DE91420E42711DA8FC2A0F0355337E9/View/FullText.html> [Accessed at: 3 November 2020].

<sup>18</sup> 'Stansbie v Troman (1948) Court of Appeal, case 48. *Westlaw Edge UK* [Online] Available at: <https://uk.westlaw.com/Document/IBE3B19E0E42811DA8FC2A0F0355337E9/View/FullText.html> [Accessed at: 3 November 2020].

(1982)<sup>19</sup>, where it was held that the inspector's negligent order in sending a fellow policeman against the flow of traffic to shut down a tunnel (policeman suffered injuries by vehicle) after the defendant's negligent road accident constituted as a new intervening act because it was not foreseeable that the initial accident would cause the inspector to make such an unreasonable order and so the defendant was free of the later damages.<sup>20</sup>

In different circumstances, natural occurring events such as diseases for example may arise as an intervening event plus policy consideration for these particular matters are whether such an event would have occurred despite the initial breach ('vicissitudes of life') or whether the negligent act itself caused the situation to happen for instance a storm causing further damages to a party after it had been damaged by a negligent person may constitute as an *actus interveniens*.<sup>21</sup> In the 'Jobling v Associated Dairies Ltd' (1982) questions were raised (Like in **Baker**) as to whether the claimant should be compensated for the original back injury due to the negligence of his employer together with the economic loss he suffered past the point where an unrelated back disease led him completely unable to work and on appeal it was held that the back disease would have occurred (contrary to **Baker**) despite the employer's negligence and so compensation were only given to Mr. Jobling up until the point the disease sufficed because anything else given later would have been irrelevant (Horsey and Rackely, 2019, p.277). In addition to this, the courts are hesitant to show that a natural event supersedes the original injury because the claimant would have nobody else to blame for the further damages they suffer which affects the defendant's liability.<sup>22</sup> There are occasions where the act of the claimant himself can

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<sup>19</sup> 'Knightley v Johns' (1982) Court of Appeal, case 349. *Westlaw Edge UK* [Online] Available at: <https://uk.westlaw.com/Document/ID4ECD800E42711DA8FC2A0F0355337E9/View/FullText.html>

<sup>20</sup> Cleaver, M. (2017) *Tort law - Remoteness* [video]. Available at: <https://www.youtube.com/watch?v=XaiWMx7c7UQ&t=2s> (Accessed: 5 November 2020).

<sup>21</sup> Hogan Lovells Publications (2017) *Novus actus interveniens*. Available at: <https://www.hoganlovells.com/en/publications/novus-actus-interveniens> (Accessed: 6 November 2020).

<sup>22</sup> Williams, G. (1946) 'The law reform (Contributory Negligence) Act', *The modern law review*, 9(2), pp.105-136. Available at:

intervene to break the chain of causation and although this is a rare occurrence, it can be used as a partial defence or a complete defence (due to Contributory Negligence Act) depending on the reasonableness of the claimant meaning if the victim did something really foolish then their actions will break the chain of causation.<sup>23</sup> For instance, in ‘*Wieland v Cyril Lord Carpets*’ (1969) the claimant had to wear a neck brace due to the negligence of her employer and consequently this impaired her ability to move with her bifocal glasses properly so she fell as an attempt to use a staircase (causing further injuries) and in the trial, because the first negligent act impaired her normal ability to use bifocals, the defendant was fully responsible as the claimant tried her best to maneuver properly (Casson, 1970). In contrast, you can look at this same issue but instead the claimant’s action is unreasonable by attempting to descend a steep staircase with no rail and support days after his legs were stiff due to a negligent employer.<sup>24</sup> The key factor in *Mckew* decision process was the reasonableness of the claimant as opposed to *Baker* because choosing to descend the stairs in his condition was unreasonable and therefore broke the chain of causation and to add onto to this his decision to jump afterwards to save himself was not relevant at that particular point (Casson, 1970). Now, if the claimant’s decision to descend a staircase was unreasonable, questions have been raised on what happens when a claimant commits suicide as a result of depression from an earlier accident and it could be examined by asking whether the defendant owed a duty of care for the claimant not to commit suicide or whether the claimant act had broken the chain of causation, furthermore, in ‘*Corr v IBC Vehicles Ltd*’ (2008) the defendant suffered personal injury plus psychiatric harm because of his employer’s negligence

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<https://onlinelibrary-wiley-com.ezproxy.uwtsd.ac.uk/doi/10.1111/j.1468-2230.1946.tb01003.x> (Accessed: 6 November 2020).

<sup>23</sup> Bank, T.L. (2013) *Causation--Intervening Acts* [video]. Available at:

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<sup>24</sup> ‘*Mckew v Holland and Hannen and Cubitts (Scotland)*’ (1969) House of Lords, Case 20. *Westlaw Edge UK* [Online] Available at

[:https://uk.westlaw.com/Document/IF64A4190E42711DA8FC2A0F0355337E9/View/FullText.html](https://uk.westlaw.com/Document/IF64A4190E42711DA8FC2A0F0355337E9/View/FullText.html) (Accessed: 6 November 2020).

and decided to commit suicide.<sup>25</sup> The House of Lords decided that the chain of causation was not broken and the policy which influence their decision was that this was a result of the employer's negligence and the claimant would not have voluntarily committed suicide 'but for' the defendant's negligence (Horsey and Rackley, 2019, pp. 285).

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<sup>25</sup> 'Corr v IBC Vehicles Ltd' (2008) House of Lords, Case 884. *Westlaw Edge UK* [Online] Available at: <https://uk.westlaw.com/Document/IB99145B0A7CE11DD9B91815A707927AB/View/FullText.html>

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Sekou Guilavogui