

## 7. Foreseeability, Standard of Care, Causation and Remoteness of Damage

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### *Term of Reference*

1. ***Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:***
  - (a) ***the formulation of ... standards of care;***
  - (b) ***causation;***
  - (c) ***the foreseeability of harm;***
  - (d) ***the remoteness of risk.***

### General introduction

7.1 In approaching these aspects of the Terms of Reference, it is first necessary to give some consideration to the Panel's overarching recommendation (Recommendation 2) that all actions for personal injury and death resulting from negligence should be subject to a single legal regime regardless of whether they are brought in contract, tort, under a statute, or under any other cause of action.

7.2 This Term of Reference has been formulated around the elements of the tort of negligence, namely duty of care, breach of duty (that is, standard of care), causation and remoteness of damage. The elements of standard of care, causation and remoteness of damage are relevant to any claim for negligently-caused personal injury and death regardless of the cause of action in which it is brought. On the other hand, the concept of 'duty of care' is a feature of the tort of negligence, which is only one of the causes of action in which a claim for negligently-caused personal injury or death can be brought. If such a claim is brought in contract, the question will not be simply whether the defendant owed the plaintiff a duty of care, but rather whether the contract contained an express or implied term to the effect that the defendant would perform the contract with reasonable care. If the action is brought under a statute, the question will be whether the statute contains a provision that expressly or impliedly imposes a duty to take reasonable care.

7.3 The Panel will not make any recommendations in this Report about when contractual duties to take reasonable care should arise. Liability for breach of statutory duties is dealt with in Chapter 10 of this Report (paragraphs 10.40-10.41).

7.4 So far as concerns the duty of care in the tort of negligence, the basic principle is that a person owes a duty of care to another if the person can reasonably be expected to have foreseen that if they did not take care, the other would suffer personal injury or death. Foreseeability is also relevant to standard of care (that is, to the question of whether a duty of care has been breached) and to remoteness of damage. Remoteness of damage is often thought of as an aspect of causation, and we will consider it in that context. Standard of care is dealt with in paragraphs 7.5-7.24. Causation and remoteness of damage are dealt with in paragraphs 7.25-7.51.

## Standard of care

7.5 Certain aspects of this topic are dealt with in Chapter 3. In Recommendation 4 we proposed a legislative restatement of the current law to the effect that in cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to what could reasonably be expected of a person professing that skill, judged at the date of the alleged negligence. In Recommendation 3 we proposed a special rule about the standard of care that can reasonably be expected of medical practitioners in treating patients. And in Recommendations 6 and 7 we proposed a legislative statement of certain principles relating to medical practitioners' duties to take care in giving information to patients.

7.6 All of these recommendations concern particular applications of the general principles of standard of care. It is with these general principles that we are concerned in this Chapter. 'Negligence', in the sense in which it is used in this context and in our overarching recommendation, means failure to meet the standard of care to avoid harm that is laid down by the law. The standard of care is often couched in terms of the reasonable person: it is negligent to do what the reasonable person would not do, and not to do what the reasonable person would do.

7.7 Under current Australian law, the concept of negligence has two components: foreseeability of the risk of harm and the so-called 'negligence calculus'. Foreseeability of the risk of harm is relevant to answering the

question of whether the reasonable person would have taken any precautions at all against the risk and, hence, whether the defendant can reasonably be expected to have taken any precautions. It would not be fair to impose liability on a person for failure to take precautions against a risk of which they had neither knowledge nor means of knowledge. Foreseeability is a precondition of a finding of negligence: a person cannot be liable for failing to take precautions against an unforeseeable risk. But the fact that a person ought to have foreseen a risk does not, by itself, justify a conclusion that the person was negligent in failing to take precautions against it.

7.8 Once it has been determined that the risk in question was foreseeable, the negligence calculus provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm that has occurred and, hence, what precautions the defendant can reasonably be expected to have taken. The calculus has four components:

- (a) the probability that the harm would occur if care was not taken;
- (b) the likely seriousness of that harm;
- (c) the burden of taking precautions to avoid the harm; and
- (d) the social utility of the risk-creating activity<sup>1</sup>.

7.9 The calculus involves weighing (a) and (b) against (c) and (d). In most personal injury cases decided by courts, the various elements of the calculus are not considered individually. Rather, the court simply asks (in the light of these factors) what the reasonable person in the position of the defendant would have done or not done in order to avoid harm to the plaintiff.

7.10 Whereas probability is a scientific concept, foreseeability is a matter of knowledge and inference. For instance, no matter how likely it is that something will occur, it is foreseeable by a person only if that person knows or ought to know that it might occur. (Knowledge must be judged as at the date of the alleged negligence and not at a later date; that is, without the benefit of hindsight and ignoring subsequent increases in knowledge about the risk and

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1 Some activities are more worth taking risks for than others — a plaintiff may be required to submit to a risk for the sake of some greater good that they would not be expected to accept if some lesser interest were at stake. A common situation in which precautions that would normally be thought reasonable need not be taken is where an emergency vehicle is speeding an injured or sick person to hospital. As Denning LJ said in *Watt v Hertfordshire County Council* [1954] 2 All ER 368, 371 it is one thing to take risks when driving for some commercial purpose with no emergency, but quite another to take risks for life and limb.

its consequences.) On the other hand, an event that is of a very low probability may be foreseeable by a person if, for instance, the person knows or ought to know it has occurred in the past.<sup>2</sup> For the purposes of the law of negligence, whether a person ought to have foreseen a particular event is not a matter of what they knew, but of what the 'reasonable person' in their position would have known. Hence the law speaks of '*reasonable* foreseeability'.

7.11 The statement that a risk is 'reasonably foreseeable' is often used to convey the idea that the risk is not so improbable that the reasonable person would ignore it. This usage confuses the concepts of foreseeability, probability and reasonableness of precautions. A risk of very high probability will not be foreseeable unless it is known; and, conversely, a risk of very low probability will be foreseeable if it is known. The concept of reasonableness in the phrase 'reasonably foreseeable' is concerned with how much knowledge about risks it is reasonable to attribute to people. It does not follow from the fact that *someone* knows about a risk that it would be reasonable to expect everyone to know about the risk and be able to foresee it.

7.12 The fact that events of very low probability can be reasonably foreseeable creates a problem. While it seems acceptable to say that a person should not be liable for failure to take precautions against unforeseeable risks, it may not be reasonable to expect a person to take precautions against a risk of very low probability simply because it was foreseeable. In order to overcome this problem, the High Court in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 held, in effect, that a person cannot be held liable for failure to take precautions against a risk that could be described as 'far-fetched or fanciful', even if it was foreseeable. What this amounts to saying is that there are some risks that are of such low probability that the reasonable person would ignore them, regardless of the balance of the other considerations in the negligence calculus — that is, no matter how serious the harm was likely to be if the risk materialised, no matter how cheap or easy it would have been to take precautions that would have prevented the risk materialising, and no matter how socially worthless the risk-creating activity was.

7.13 It is extremely important to note, however, that the mere fact that a foreseeable risk was not far-fetched or fanciful says nothing about whether precautions to prevent the risk materialising ought reasonably to have been taken, and if so, what precautions. These issues are resolved by asking what precautions the reasonable person would have taken, and this question is

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<sup>2</sup> As Dixon J said in *Chapman v Hearse* (1961) 106 CLR 112, 115, 'I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.'

answered in terms of all four elements of the calculus. The probability of the risk — however low or high it might be — is only one element in the calculation.

7.14 It is clear to the Panel, as a result of its consultations and research, and the experience of its members, that the decision in *Shirt* is widely perceived to have created a situation in which lower courts may be in danger of ignoring this point. In other words, there is a danger that *Shirt* may be used to justify a conclusion — on the basis that a foreseeable risk was not far-fetched or fanciful — that it was negligent not to take precautions to prevent the risk materialising, and to do this without giving due weight to the other elements of the negligence calculus.<sup>3</sup> It is also widely believed that this approach has brought the law of negligence into disrepute, and that it may have contributed to current difficulties in the field of public liability insurance.

7.15 One suggestion that has been made for dealing with this problem is to modify the formula laid down in *Shirt* by replacing the phrase ‘not far-fetched or fanciful’ with some phrase indicating a risk that carries a higher degree of probability of harm. Various phrases have been suggested. The Panel favours the phrase ‘not insignificant’.<sup>4</sup> The effect of this change would be that a person could be held liable for failure to take precautions against a risk only if the risk was ‘not insignificant’. The phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far-fetched or fanciful’, but not so high as might be indicated by a phrase such as ‘a substantial risk’. The choice of a double negative is deliberate. We do not intend the phrase to be a synonym for ‘significant’.<sup>5</sup> ‘Significant’ is apt to indicate a higher degree of probability than we intend.

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3 This point was made by McHugh J in his discussion of foreseeability in *Tame v New South Wales* [2002] HCA 35, [96]-[108].

4 In *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* (1963) 63 SR (NSW), 948, 958-9 Walsh J used the phrase ‘a practical possibility’. This phrase was rejected by the Privy Council in favour of ‘a real risk’ in the sense of a risk that would not be brushed aside as ‘far-fetched’: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617, 643. We did consider using the term ‘realistic’ but rejected it on the basis that it was too close to ‘real’, which might be thought too closely associated with the *Shirt* formula. We decided not to adopt the term ‘practical’ because of the danger that it might be interpreted as describing, not a degree of probability, but rather the sort of risk against which the ‘practical’ or ‘reasonable’ person would take precautions. If it were interpreted in this latter way, it could not operate as we intend, namely as a precondition of the application of the negligence calculus (see paragraph 7.16).

5 Compare Barwick CJ’s discussion of ‘not unlikely’ in *Caterson v Commissioner of Railways* (1973) 128 CLR 99, 102.

7.16 In the opinion of the Panel, this proposal addresses part of the perceived problem we have identified. But by itself, it does not address the danger that a court will conclude that *because* a risk can be described as ‘not insignificant,’ it would be negligent not to take precautions against it. In other words, there remains a danger that a court might use a finding that a risk was ‘not insignificant’ as a substitute for applying the negligence calculus, rather than as merely imposing a (necessary but not sufficient) condition of liability for negligence, namely that there can be no liability for failing to take precautions against risks that cannot be described as ‘not insignificant’.

7.17 For this reason, the Panel is of the opinion that modifying the *Shirt* formula in the way suggested is not sufficient on its own. There should also be a statutory provision to the effect that whether failing to take precautions, against a not insignificant risk of personal injury or death to another, was negligent depends on whether, in the opinion of the court, the reasonable person would have taken precautions against the risk. We also think that it would be helpful to embody the negligence calculus in a statutory provision. This might encourage judges to address their minds more directly to the issue of whether it would be reasonable to require precautions to be taken against a particular risk.

7.18 There is, however, another danger, perceptible in some judicial pronouncements, that the concepts of foreseeability and probability may be conflated. The problem with this is that a court may jump from the proposition that a risk is foreseeable as a not insignificant possibility, to the conclusion that the reasonable person would have taken precautions against it. But as explained in 7.7, foreseeability is merely a precondition of liability for negligence. The fact that a risk is foreseeable (even as a not insignificant possibility) does not, *by itself*, justify the conclusion that the reasonable person would have taken precautions against it. For this reason, the Panel considers that there should be a statutory provision to the effect that a person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).

### **Recommendation 28**

**The Proposed Act should embody the following principles:**

- (a) A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).**

- (b) It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as ‘not insignificant’.**
- (c) A person is not negligent by reason of failing to take precautions against a risk that can be described as ‘not insignificant’ unless, under the circumstances, the reasonable person in that person’s position would have taken precautions against the risk.**
- (d) In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (amongst other things):**
  - (i) the probability that the harm would occur if care was not taken;**
  - (ii) the likely seriousness of that harm;**
  - (iii) the burden of taking precautions to avoid the harm; and**
  - (iv) the social utility of the risk-creating activity.**

7.19 Although the Proposed Act applies only to claims for negligently-caused personal injury and death, the principles in Recommendation 28 are relevant to any claim for negligently-caused harm, whatever sort of harm is in issue. The Panel’s considered opinion is that these principles are suitable to be applied to all claims for negligently-caused harm.

## Emergency services and the standard of care

7.20 In paragraph 3.84, the Panel identified three issues relevant to Term of Reference 3(d). One of these was ‘[T]he standard of care applicable in circumstances where a medical practitioner or other health-care professional voluntarily renders aid to injured persons in an emergency’.

7.21 The Panel understands that health-care professionals have long expressed a sense of anxiety about the possibility of legal liability for negligence arising from the giving of assistance in emergency situations. However, the Panel is not aware, from its researches or from submissions received by it, of any Australian case in which a good Samaritan (a person who gives assistance in an emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent. Nor are we aware of any insurance-related difficulties in this area.

7.22 Under current law, the fact that a person (including a health-care professional) was acting in an emergency situation is relevant to deciding whether the person acted negligently. It may be reasonable in an emergency situation to take a risk that it would not be reasonable to take if there was no emergency, provided that precautions appropriate to the circumstances are taken to prevent the risk materialising.

7.23 Also relevant to the issue of negligence is the skill that the good Samaritan professed to have. Suppose a passenger on an aircraft has a heart attack, and in response to a call for assistance by the cabin staff, a 60 year old specialist dermatologist goes to the passenger's aid. The standard of care expected of the doctor would be set not only taking account of the emergency nature of the situation, but also of the fact that a doctor who has practised as a dermatologist for many years could not be expected to be as well-qualified and able to provide emergency treatment for a heart-attack victim as a cardiac surgeon or even, perhaps, an active general practitioner.

7.24 The Panel's view is that because the emergency nature of the circumstances, and the skills of the good Samaritan, are currently taken into account in determining the issue of negligence, it is unnecessary and, indeed, undesirable to go further and to exempt good Samaritans entirely from the possibility of being sued for negligence. A complete exemption from liability for rendering assistance in an emergency would tip the scales of personal responsibility too heavily in favour of interveners and against the interests of those requiring assistance. In our view, there are no compelling arguments for such an exemption.

## Causation and remoteness of damage

7.25 A person cannot be liable for damages for failure to take care to prevent personal injury or death unless negligent conduct on his or her part (whether act or omission) caused the harm, and unless that harm was not too 'remote' from the negligent conduct. The current law in Australia (as laid down by the High Court) appears to be that whether negligent conduct caused the harm in question is to be answered by the application of 'commonsense'. A problem with this approach is that it gives courts and parties to negligence claims very little guidance about when negligent conduct will be considered to have caused harm.



## The two-pronged test of causation: factual causation

### The basic rule

7.26 Despite this appeal to commonsense, it is accepted that causation has two aspects. The first — the factual aspect — is concerned with whether the negligent conduct in question played a part in bringing about the harm that is the subject of the claim. The long-accepted basic test for answering this question is whether the conduct was a necessary condition of the harm, in the sense that the harm would not have occurred but for the conduct. In one case, for example, it was held that a hospital that had turned away a patient who had been poisoned was not liable for negligent failure to treat him because even if he had been treated, he would have died anyway. Although there are some cases with which the ‘but for’ test does not deal satisfactorily (involving ‘causal over-determination’ of harm — that is, harm that is attributable to more than one sufficient condition), the law has devised rules for resolving such cases in ways that are generally considered to be satisfactory and fair. We therefore make no recommendations on this aspect of the law.

### Evidentiary gaps

7.27 However, there are several issues that have arisen in this context that are currently the cause of considerable controversy. One is the problem of what have been called ‘evidentiary gaps’.<sup>6</sup> The cases identify two types of situation in which an evidentiary gap may exist.

7.28 One involves harm which is brought about by the *cumulative* operation of two or more factors, but which is indivisible in the sense that it is not possible to determine the relative contribution of the various factors to the total harm suffered. This was the situation in the English case of *Bonnington Casting v Wardlaw*,<sup>7</sup> which lays down the principle that any of the contributory factors can be treated as a cause of the total harm suffered, provided it made a ‘material contribution’ to the harm. The effect of this rule is that a defendant may be liable for *the total harm* suffered by a plaintiff even though it cannot be said that, but for the conduct of the defendant, the plaintiff would not have

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6 The Panel’s consideration of and recommendations about causation have been greatly assisted by the work of Jane Stapleton, especially ‘Causation and the Scope of Liability for Consequences’ (2003) 119 *LQR* (forthcoming).

7 [1956] AC 613.

suffered *the total harm*; and that it can only be said that but for the conduct of the defendant the plaintiff would not have suffered *some of that harm*.

7.29 It should be noted that the term 'material contribution to harm' is often used not in the sense in which it was used in *Bonnington Castings v Wardlaw*, but merely to express the idea that a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm. In this sense, both joint and concurrent tortfeasors materially contribute to the harm resulting from their respective conduct.

7.30 A recent illustration of the second type of case in which an evidentiary gap may exist is provided by the decision of the English House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89. The plaintiffs contracted mesothelioma as a result of successive periods of exposure to asbestos while working for different employers. The scientific evidence about the aetiology of mesothelioma did not justify a conclusion, in relation to any of the plaintiffs' employers, that but for the negligence of that employer, the plaintiffs would not have contracted the disease. The court held that in such a case, proof (on the balance of probabilities) that the defendant's negligent conduct 'materially increased the risk' that the plaintiffs would contract mesothelioma, would suffice to establish a causal connection between the conduct and the harm. The status of this principle in Australian law is unclear.<sup>8</sup> The High Court has not yet had a chance to consider it.

7.31 The 'material contribution to harm' and 'material contribution to risk' principles both allow negligent conduct to be treated as a factual cause of harm even though it cannot be proved on the balance of probabilities that there was in fact a causal link between the conduct and the harm. In other words, in certain circumstances, it may be appropriate to 'bridge the evidentiary gap' by allowing proof that negligent conduct materially contributed to harm or the risk of harm to satisfy the requirement of proof of factual causation.

7.32 The Panel's opinion is that, in certain types of cases, bridging the evidentiary gap in this way would be widely considered to be fair and reasonable. The decisions in *Bonnington Castings* and *Fairchild* support this conclusion, as does the practice of the New South Wales Dust Diseases Tribunal which, apparently, has felt itself able to deal with such cases by taking a 'robust and pragmatic' approach to factual causation in cases where

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<sup>8</sup> In *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307, Mason P seems to have rejected it, but Stein J apparently accepted it.

the scientific evidence about causation has not provided a solid basis for finding that the 'but for' test has been satisfied.<sup>9</sup>

7.33 The major difficulty with the 'material contribution to harm' and 'material contribution to risk' approaches is to define those cases in which the normal requirements of proof of causation should be relaxed. It is extremely important to note that this is a normative issue<sup>10</sup> that depends ultimately on a value judgment about how the costs of injuries and death should be allocated. The Panel believes that detailed criteria for determining this issue should be left for common law development. Nevertheless, we consider that it would be useful to make explicit the normative character of the issue by including in the Proposed Act a provision that, in deciding whether proof that conduct that materially contributed to, or materially increased the risk of, harm should suffice as proof of causal connection, it is relevant to consider whether (and why) responsibility for the harm should be imposed on the negligent party, and whether (and why) the harm should be left to lie where it fell (that is, on the plaintiff) (see paragraph (f) of Recommendation 29).

7.34 Another way in which it has sometimes been suggested that the problem of evidentiary gaps might be dealt with is by shifting the onus of proof on the issue of factual causation from the plaintiff to the defendant once the plaintiff has established that the defendant was under a duty to take reasonable care to avoid the risk in question and failed to take the required care. In the Panel's opinion, this approach is undesirable because it does not squarely address the issue of the evidentiary gap but rather hides it. This is because in practice, the onus of proof that is shifted to the defendant will be impossible to discharge precisely because there is an evidentiary gap. For this reason, the Panel believes that it would be valuable to state legislatively that the onus of proof of any fact relevant to causation always rests on the plaintiff.

7.35 The Panel believes that this recommendation has a wider significance. In *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, 420-421 Gaudron J said:

‘... generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect or that the injury would have occurred even if the duty had been

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9 See, e.g. the judgment of O’Meally J in *McDonald v State Rail Authority* (1998) 16 NSWCCR 695, esp 714-717.

10 It should be noted that this is a different normative issue from that discussed in paragraph 7.41. It should also be noted the normative issue being discussed here arises in the context of factual causation.

performed, it will be taken that the breach of the common law duty of care caused or materially contributed to the injury.’<sup>11</sup>

7.36 The effect of this approach is to cast the onus of proof on the issue of causation onto the defendant, once it has been established that the defendant owed the plaintiff a duty of care and breached that duty, and that the plaintiff has suffered a foreseeable injury. This principle, which has been referred to with approval by various courts in recent cases, represents a fundamental change in the traditional law about causation and proof of causation, and has the potential significantly to expand liability for negligence. The objection to the principle is that it applies regardless of whether there is an evidentiary gap, and without requiring consideration of whether there is any good reason (over and above the existence of duty, breach and damage) to relieve the plaintiff of the requirement to prove factual causation. A legislative restatement of the basic rule that the onus of proof of any fact relevant to causation always rests on the plaintiff may discourage courts from adopting this approach. This will promote the objectives of the Terms of Reference.

### Cases in which causal link depends on the plaintiff’s hypothetical reaction

7.37 A second issue<sup>12</sup> that needs to be considered in this context concerns situations in which the question, of whether the harm would have occurred but for the negligent conduct, cannot be answered without asking a further question about what the plaintiff would have done if the defendant had not been negligent.<sup>13</sup> Suppose, for example, that an employer unreasonably fails to provide its employee with a particular safety device that would have

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11 Cited with approval in *Rosenberg v Percival* (2001) 205 CLR 434, 461 per Gummow J; *Chappel v Hart* (1998) 195 CLR 232, 240 per Gaudron J, 257 per Gummow J, 273 per Kirby J; *Naxakis v Western General Hospital* (1999) 197 CLR 269, 279 per Gaudron J.

12 This was one of the three issues raised in paragraph 3.85. Another issue raised there was ‘the proper basis of assessment of damages in cases of breach of a duty to inform’ by a medical practitioner. Suppose that a surgeon negligently fails to warn a patient of a risk of harm inherent in an operation, that the patient would not have had the operation if the warning had been given, and that the risk materialises despite the exercise of all reasonable care by the surgeon in performing the operation. The possibility we had in mind was that damages in such a case might be assessed, not by reference to the physical harm suffered by the plaintiff, but rather by reference to the impairment of the plaintiff’s decision-making autonomy as a result of the negligent failure to warn. Having given this matter further consideration (concerning the Panel’s timetable of work see paragraphs 1.44-1.46), our view is that the proper basis for assessment of damages in such cases is the harm suffered. As this is the position under the current law, we make no recommendation on this topic.

13 The same issue arises where the question is what a third party would have done if the defendant had not been negligent.

prevented the harm suffered by the plaintiff if it had been used. Suppose further, however, that the employer alleges that even if it had been provided, the employee would not have used it. Or take as another example the leading Australian case of *Chappel v Hart* (1998) 195 CLR 232, in which it was held that a doctor had failed to fulfil the reactive duty to inform a patient of an inherent risk of a surgical operation which materialised, thus harming the patient. The plaintiff alleged that she would not have had the operation, at the hands of the defendant or at the time it was performed, and hence would almost certainly not have suffered harm, if she had been warned of the risk.

7.38 In both of these cases, the question of what the plaintiff would have done if the defendant had not behaved negligently could be decided either 'subjectively' or 'objectively'. The subjective approach depends on asking what the plaintiff would actually have done if the defendant had not been negligent, whereas the objective approach depends on asking what the reasonable person in the plaintiff's position would have done if the defendant had not been negligent. A serious problem that affects the subjective approach is that, once the harm has been suffered, it is unrealistic to expect the plaintiff to testify that he or she would have had the operation (or not used the safety device) even if he or she had been given the relevant information. The objective test overcomes this problem. But in the medical context, at least, it is open to several serious objections. First, it might be thought to put too little weight on the patient's interest in making decisions about his or her own health. Secondly, it threatens to undermine the reactive duty to inform. That duty requires the doctor to give the patient information that the doctor knows or ought to know the patient wants, regardless of whether the reasonable patient would want the information. If the doctor fails to give such information, it would seem inconsistent to answer the question, of how the patient would have acted if the information had been given, on the basis that the patient was a reasonable person. Rather, the question to be asked is what *that patient* would have done if the information had been given. Thirdly, the objective test provides an answer to the non-causal question, 'what should have happened', not the causal question, 'what would have happened', if the defendant had not been negligent.

7.39 Australian law currently adopts the subjective approach, whereas in medical negligence cases (but not in other cases), Canadian law adopts a version of the objective approach under which the question to be answered is not simply what a reasonable person would have done, but rather, what the reasonable person *in the plaintiff's position and with the plaintiff's beliefs and fears* would have done. A problem with this approach is that it may require an

answer to the nonsensical question of what a reasonable person with unreasonable views would have done.

7.40 Our view is that the arguments against the objective test are much stronger than those in its favour, and that Australian law is right to adopt the subjective test. On the other hand, the Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff's own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge's view of the plaintiff's credibility is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible.<sup>14</sup>

## The two-pronged test of causation: liability for consequences

7.41 As we have noted, the first aspect of the causation issue concerns the factual question of whether the allegedly negligent conduct played a part in bringing about the harm in question, in the sense that it was a necessary condition of the occurrence of the harm. Answering this question positively is not enough to justify the imposition of liability for negligence because every event has an infinite number of necessary conditions, and there is an important sense in which all necessary conditions are of equal salience in explaining how the harm came about. But the ultimate question to be answered in relation to a negligence claim is not the factual one of whether the allegedly negligent conduct played a part in bringing about the harm, but rather a normative one<sup>15</sup> about whether the defendant ought to be held liable to pay damages for that harm. In other words, the question is: should the defendant be held liable for any of the harmful consequences of the negligence and if so, for which? These questions can be said to concern the appropriate 'scope of liability' for the consequences of negligence.

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14 This recommendation could be extended to cover any case in which the issue of causation depends on what a person — whether the plaintiff or a third party — would have done if the defendant had not been negligent.

15 It should be noted that this is a different normative issue from that discussed in paragraph 7.33.

7.42 It is the Panel's considered opinion that at least some of the confusion and uncertainty in this area of the law is a result of failure to distinguish clearly between the factual question, of whether the negligence was a necessary condition of the harm, and the normative question about which consequences of the negligence the defendant should be held liable for. A danger here is that a finding that the negligent conduct was a necessary condition of the harm may, by itself, be thought to justify a conclusion that the defendant ought to be held liable for the consequences of the negligence. The point is not that imposition of liability may not be justified, but only that a finding that the negligence was a necessary condition of the harm is not, by itself, sufficient to support that conclusion, because there is an infinite number of necessary conditions of every event. For this reason, the Panel recommends a legislative statement to the effect that the issue of causation has two elements — factual causation and scope of liability — both of which need to be addressed.

7.43 It is in the context of the second element — namely scope of liability for consequences — that the statement that causation is a matter of commonsense is most often made. However, courts use various other terms and phrases to describe the sort of connection between negligent conduct and harm that can justify the imposition of legal liability to pay damages. These include 'real cause' and 'effective cause'. It is also said that if another necessary condition 'intervenes' between the defendant's conduct and the harm and 'breaks the chain of causation', the defendant will not be liable for the harm.

7.44 The concept of foreseeability is used in this context as well. A basic rule of negligence law is that a negligent person will not be held liable for unforeseeable consequences of their negligence (although there are important qualifications to this rule — such as the principle that the victim of negligently-caused harm must be 'taken as found' — that need not be discussed in detail here). A point that should be noted is that the rule laid down in the *Shirt* case (discussed in paragraph 7.12 above), that a person cannot be liable for failing to take precautions against a far-fetched or fanciful (albeit foreseeable) risk of harm, does not apply in this context. Once a person is held to have behaved negligently, they can, in theory at least, be held liable for foreseeable consequences of that negligence, even if they were of a very low probability.

7.45 None of these terms and phrases provides very much guidance as to the likely outcome of individual cases, and the question of 'the scope of liability for consequences' tends to be seen as one that has to be answered case-by-case rather than by the application of detailed rules or principles. This is not to say that there are no relevant guidelines in the law. For instance, it is

said that a person is not liable for 'coincidental' consequences of their negligence. Suppose that a driver negligently injures a pedestrian, who is further injured when the ambulance in which she is being taken to hospital is involved in a collision as a result of negligence on the part of the ambulance driver. The first driver would not be held liable for the injury resulting from the second accident, because the sequence of events would be considered a 'coincidence', even though the first driver's negligence was a necessary condition of the harm suffered in the second accident. On the basis of this example, it is easy to see the appeal of the 'coincidence principle' as an outworking of ideas about personal responsibility.

7.46 However, this principle of 'no liability for coincidences' is not of universal application. For instance, in *Chappel v Hart*, the failure of the defendant to warn the plaintiff was accepted to have been a necessary condition of the materialisation of the risk because the plaintiff would not have had the operation, at the defendant's hands or when it was performed, if she had been warned; and in that case she would almost certainly not have suffered the harm. But the fact that the risk materialised despite the exercise of reasonable care by the defendant could be called a coincidence. The best explanation of the difference between this case and the example discussed in paragraph 7.45 is not that the doctor caused the patient's harm whereas the first negligent driver did not cause the harm suffered in the second accident. Rather, the explanation would seem to lie in differing ideas about the responsibilities of doctors to their patients on the one hand, and the responsibilities of drivers to pedestrians on the other. In *Chappel v Hart*, several of the judges made this point by saying that the doctor should be liable because the risk that materialised was precisely the risk about which (in discharge of the reactive duty) he should have warned the patient.

7.47 For present purposes, the important point is that there appears to be a perception amongst various groups that courts are too willing to impose liability for consequences that are only 'remotely' connected with the defendant's conduct. In other words, there is a feeling that the net of responsibility for the consequences of negligence is being cast too widely. The question that confronts the Panel is whether there is anything that we can usefully propose by way of legislative statement that might reduce the element of uncertainty in the law and indicate to courts that issues of responsibility are directly relevant in this context.

7.48 A major difficulty here is to strike a balance between making legislative statements that are so abstract and general as to be more or less useless, and making detailed provision that denies courts the flexibility they need to deal with the infinitely various facts of individual cases. What is needed is a



provision that will suggest to courts a suitable framework in which to resolve individual cases. Terms and phrases such as 'effective cause', 'foreseeability' and 'commonsense causation' do not provide such a framework because they express a conclusion without explaining how that conclusion was reached. They discourage explicit consideration and articulation of reasons, for imposing or not imposing liability for the consequences of negligence, that are securely grounded in the circumstances of individual cases and address issues of personal responsibility.

7.49 The Panel believes that it is possible to give some helpful legislative guidance that holds out a reasonable prospect of furthering the objectives of the Terms of Reference. Such a provision would be to the effect that in determining liability for the harmful consequences of negligence (whether in such terms or in terms of 'legal cause', 'effective cause', 'commonsense causation', 'foreseeability', 'remoteness of damage' and so on), it is relevant to consider, (a) whether (and why) responsibility for the harm should be imposed on the negligent party, and (b) whether (and why) the harm should be left to lie where it fell.

#### **Recommendation 29**

**The Proposed Act should embody the following principles:**

##### ***Onus of proof***

- (a) **The plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.**

##### ***The two elements of causation***

- (b) **The question of whether negligence caused harm in the form of personal injury or death ('the harm') has two elements:**
- (i) **'factual causation', which concerns the factual issue of whether the negligence played a part in bringing about the harm; and**
  - (ii) **'scope of liability' which concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. 'Scope of liability' covers issues, other than factual causation, referred to in terms such as 'legal cause', 'real and effective cause', 'commonsense causation', 'foreseeability' and 'remoteness of damage'.**

***Factual causation***

- (c) The basic test of 'factual causation' (the 'but for' test) is whether the negligence was a necessary condition of the harm.
- (d) In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.
- (e) Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.
- (f) For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:
  - (i) whether (and why) responsibility for the harm should be imposed on the negligent party, and
  - (ii) whether (and why) the harm should be left to lie where it fell.
- (g)
  - (i) For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.
  - (ii) Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.

***Scope of liability***

- (h) For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:
  - (i) whether (and why) responsibility for the harm should be imposed on the negligent party; and
  - (ii) whether (and why) the harm should be left to lie where it fell.

7.50 It may be helpful to give an example of how paragraph (h) of this Recommendation (dealing with scope of liability) might be used. Consider the case of *Chappel v Hart* again. Because the plaintiff would not have had the operation, at the hands of the defendant and at the time it was performed, if she had been warned of the risk, the defendant's failure to warn played a part in bringing about the harm suffered by the plaintiff. But this conclusion does not settle the question of whether the doctor ought to have been held liable for that harm. In favour of denying liability, it could be argued that in the absence of negligence on the part of the defendant in performing the operation, the harm suffered by the plaintiff was a mere coincidence for which the defendant ought not to be liable. On the other hand, it could be argued that even though the occurrence of the harm was a coincidence, it was the very risk about which the plaintiff had inquired. For that reason, the imposition of liability would be justified in order to reinforce the doctor's reactive duty to inform and the patient's interest in freedom of choice. The provision in paragraph (h) of Recommendation 29 does not support either of these arguments against the other. Rather, it is intended to encourage courts to articulate such arguments and to discourage them from explaining decisions in terms of unhelpful phrases such as 'commonsense' or 'real and effective cause'. Articulation of principles of personal responsibility will further the objectives underlying the Terms of Reference.

7.51 As in the case of Recommendation 28, this Recommendation is of potential application not just to claims for negligently-caused personal injury and death, but to any claim in which causation is an issue. Consistently with our Terms of Reference, however, we do not propose its extension beyond personal injury law.

