Chapman v Hearse - [1961] HCA 46

HIGH COURT OF AUSTRALIA

Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ. (THE HONOURABLE MR. JUSTICE MENZIES did not deliver a judgment in this appeal.)

CHAPMAN v. HEARSE
(1961) 106 CLR 112
8 August 1961

Negligence

Negligence—Duty of care—Injury reasonably foreseeable—Not necessary for precise sequence of events to be foreseeable—Novus actus interveniens—Successive negligent acts by different persons—Whether first negligent actor exonerated by intervening negligent act—Remoteness of damage—Apportionment of liability—Wrongs Act, 1936-1956 (S.A.), ss. 25 (c), 27a (3).

Decision

August 8.
THE COURT delivered the following written judgment:-
In September 1958 a collision occurred near Adelaide between two vehicles one of which was driven by the appellant Chapman and the other by one Emery, who is not a party to these proceedings. The collision occurred at a point where Balcombe Avenue joins Tapley's Hill Road on the eastern side. Both vehicles were travelling along Tapley's Hill Road towards the north and that

which Emery was driving was the leading car. Approaching the Balcombe Avenue junction Emery slowed down and indicated by a signal that he was about to turn to the right. As he was turning Chapman's car struck the near-side rear corner of Emery's car with the result that it overturned in the mouth of Balcombe Avenue. Apparently the door of Chapman's car swung open and he was deposited on the road whilst the car itself veered off to the left and came to rest on an adjacent golf course after breaking through a fence. After being thrown from his car Chapman remained unconscious on the roadway lying lengthwise along the road and about three feet to the west of the centre line. At the time of or almost immediately after the accident Dr. Cherry drove his car from the near-by golf course entrance. He stopped his vehicle and went to Chapman's assistance. At about the same time two other vehicles arrived at the scene of the accident from the north. The drivers of these cars, Simmons and Nolte, each saw Chapman lying on the road and stopped their cars a little further on. They both commenced to go to Chapman's assistance but they observed that another person, Dr. Cherry, had reached him first and then, hearing cries from the overturned car, they went to it and helped to extricate some of the occupants. Within a few minutes of the time when Dr. Cherry reached Chapman another car came along the road from the south and the driver of this vehicle, the respondent Hearse, failed to see either Dr. Cherry or the injured man until it was too late to avoid them. In the result his vehicle struck Dr. Cherry and caused him injuries as the result of which he died. It was dark and it was raining at the time and there seems little doubt that visibility was poor. (at p118)

2. It was in these circumstances that the respondent company, as the sole executor of Dr. Cherry, instituted proceedings against Hearse pursuant to the Wrongs Act, 1936-1956 (S.A.) claiming damages for the benefit of Dr. Cherry's widow and children. By his statement of defence Hearse denied that he had been negligent and alleged contributory negligence on the part of Dr. Cherry. Then by a third party notice and statement of claim he claimed that, in the event of liability attaching to him, he was entitled to contribution from Chapman to such extent as to the Court should seem just and equitable. It should, perhaps, be mentioned that Dr. Cherry's widow was joined as a plaintiff in the original proceedings and that she sought to recover a solatium but no question is outstanding in respect of this matter and she is not a party to this appeal. (at p118)

3. In the proceedings with which we are now concerned the learned Chief Justice, who presided at the trial, found that Hearse was negligent in the control and management of his vehicle and ordered that judgment should be entered for the respondent company against him in the sum of 16,584 pounds 11s. 0d. But he also found that the third party, Chapman, was liable to make a contribution to Hearse of one-fourth of that sum. A subsequent appeal by Chapman to the Full Court of the Supreme Court was, by majority, dismissed and this appeal is brought from the order of dismissal. (at p118)

Following paragraph cited by:

Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

4. It is contended primarily on behalf of Chapman that no order for contribution should have been made and, alternatively, that the amount in which he was held liable to contribute should be reduced. But by a cross-appeal the respondent Hearse seeks an increase in the amount of Chapman's contribution and, further, asks us to reverse a finding by the learned Chief Justice that Dr. Cherry was not, himself, guilty of contributory negligence. No fault is, however, found with the original

finding that Hearse was negligent in running Dr. Cherry down nor with the finding that Chapman was guilty of a prior act of negligence which had brought about the situation to which reference has already been made. The finding of negligence on Hearse's part was based upon the fact that the circumstances then prevailing required a high degree of caution on the part of a driver using the road and that, although he was not driving at a high speed, his speed was excessive in the prevailing conditions and that he had not kept a sufficiently careful look out. It is difficult to see why, upon the evidence, we should entertain the view that Dr. Cherry was guilty of contributory negligence. Even more difficult is it to discern any reason why we should interfere with an existing finding to the contrary but the submission was not pressed too far and it is convenient to dispose of it at once. This we may do by asking ourselves whether, in the unusual circumstances of the case, Dr. Cherry's conduct involved any departure from the standard which reasonable care for his own safety demanded. To our minds this question can be answered only in one way. He had, naturally enough, come to Chapman's assistance; in the course of attending to Chapman his attention must inevitably have been diverted from the road and if, by reason of this fact, he failed to see the oncoming car until it was too late to get out of its way it would be quite wrong to hold that he was guilty of contributory negligence. However, we do not know whether he did, in fact, fail to see Hearse's car for it is possible that, having seen it, he made some attempt, unseen by Hearse, to attract the latter's attention, in order to protect Chapman. However this may be we are of the opinion that no grounds exist for disturbing the finding of the learned Chief Justice on this point. That being so the principal question for examination is whether, having suffered judgment at the hands of Dr. Cherry's executor, Hearse became entitled to recover a contribution from Chapman. (at p119)

5. The answer to this question depends upon whether Chapman would have been liable for the "same damage" at the suit of Dr. Cherry's executor (Wrongs Act, s. 25(c)). This enquiry, the appellant somewhat emphatically asserts, must be answered in the negative. First of all, it is said, Chapman owed no duty of care to Dr. Cherry. Alternatively, it is asserted that, even if he did, Dr. Cherry's death was caused solely by the negligent driving of Hearse and not at all by any breach of duty on Chapman's part and, finally, the contention is raised that, on any view of the matter, the death of Dr. Cherry, considered as a consequence of Chapman's negligence, was too remote to fix him with responsibility. (at p119)

Following paragraph cited by:

Du Plessis v Morton Berg Pty Ltd (25 September 2025) (Hindman J)
Paul Steven Atkins v Brett Ainsley Hughes, Trudi Ann Hughes (15 May 2025) (Burnett J)
Saadat v Commonwealth (09 May 2025) (Stanley J)
Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) (11 April 2024) (Burnett J)
WKBF and Minister for Immigration, Citizenship and Multicultural Affairs (Migration) (13 November 2023) (The Hon Kyrou, J)
Blue Op Partner Pty Ltd v De Roma (12 July 2023) (Meagher, Mitchelmore and Kirk JJA)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Prestage v Barrett (02 July 2021) (Estcourt J)
Prestage v Barrett (02 July 2021) (Estcourt J)
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (27 May 2021) (Bromberg J)

Hamcor Pty Ltd v State of Qld (01 October 2014) (Dalton J)
Langmaid v Dobsons Vegetable Machinery Pty Ltd (04 July 2014) (Blow CJ, Porter and Pearce JJ)
Charalambous v Yeung (RLD) (27 September 2013) (M Chesterman, Deputy P, P Molony, Judicial Member, J Butlin, Non-judicial Member)
Pham v Parissis Pty Ltd (t/as Bells Real Estate) (05 July 2012) (His Honour Judge Saccardo)
Gunnersen v Henwood (07 September 2011) (Dixon J)

310. There must, at least, be a reasonable connection between risk and reaction. It is not the relationship between the negligent conduct and the extent of the plaintiff' s mitigatory expenditure that forms the connection. As the High Court said in *Ch apman v Hearse* : [110]

> As far as we can see the test has never been authoritatively stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of. The test as we have stated it has been assumed in a multitude of cases both here and in England and is generally in accordance with the view entertained in the United States of America.

Rather, I consider for the expense of a mitigatory response to negligent conduct to be reasonably foreseeable, there must be a reasonable connection between the class of mitigatory response and the type of negligent conduct. Thus, returning to my example, if the negligent cyclist has crashed into a petrol bowser and the owner, foreseeing a risk that such an accident could cause a fire which might destroy his service station, constructs an engineered solution sufficient to restrain a fully laden semi-trailer from demolishing his service station, when a guard around the bowser would suffice, there is no sufficient connection between the conduct — negligent management of a bicycle — and the response of the service station owner. That response is not reasonably foreseeable by a cyclist. The analogy is not an exact one. In these circumstances, could the defendant have reasonably foreseen, generally, an expenditure in mitigation of a risk of future loss might follow on negligent conduct in and about the escarpment in connection with vegetation and water management issues.?

via

[110] (1961) 106 CLR 112 , 121.

Metrolink Victoria Pty Ltd v Inglis (02 October 2009) (Neave and Redlich JJA and Williams AJA)

63. A defendant can only escape liability if the loss or damage sustained can be regarded as 'differing in kind' from what was foreseeable. [49] The loss which actually materialises may not be identical to that foreseen as responsibility does not depend upon the capacity of 'the reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events

leading to the damage complained of.' [50] Thus in *Richards* it was found that even though the grave injuries sustained were radically different to the minor injuries that might reasonably have been anticipated, it was open to the jury to conclude that they were of the same class or kind as was foreseeable. In reaching that conclusion the court recognised that the injury could be viewed as of much greater gravity than any injury reasonably foreseeable or that the precise chain of events causing injury was not foreseeable. [51]

via

[50] *Chapman v Hearse* (1961) 106 CLR 112, 121.

Metrolink Victoria Pty Ltd v Inglis (02 October 2009) (Neave and Redlich JJA and Williams AJA)
Symonds v Vass (10 July 2009) (Beazley JA at 1; Giles JA at 10; Ipp JA at 47)
Calvert v Mayne Nickless Ltd (13 December 2004) (Wilson J)

54. Unless the plaintiff has proved that "the actual and direct event' giving rise to her injury was actually foreseen or "reasonably readily foreseeable" by the defendant, the Court must dismiss her claim: para (b) of subsec (1) and subsec (3) of s 312 . At common law, in a claim in negligence, it is not necessary for a plaintiff to prove that the defendant should have envisaged the precise circumstances in which injury occurred (*Chapman v Hearse* (1961) 106 CLR 112 at 121), but under this legislation there is greater focus on the precise circumstances of the injury - "the actual and direct event giving rise to the injury". Further, at common law it is enough that the chance of a risk manifesting itself in an actual occurrence was not far fetched or fanciful (*Wyong Shire Council v Shirt* (1979-80) 146 CLR 40 at 47), but under this legislation a greater degree of probability is required - that it was "reasonably readily foreseeable". See generally the discussion by Davies JA in *Plumb v State of Queensland* [2000] QCA 258 at [17] - [18] .

Calvert v Mayne Nickless Ltd (13 December 2004) (Wilson J)
Southern Area Health Service v Brown (18 December 2003)
Postnet Pty Ltd v Wood (08 November 2002)
Tame v New South Wales (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)
The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian (24 September 2001) (Mason P, Giles JA and Ipp AJA)
The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian (24 September 2001) (Mason P, Giles JA and Ipp AJA)
Plumb v State of Queensland (04 July 2000) (McMurdo P, Davies JA and Moynihan J,)
Perre v Apand Pty Ltd (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

186. It also should be remembered that it was not until comparatively recently that this Court determined that responsibility does not depend upon "the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of" [

219] and the Privy Council classified as sufficient a "real risk" which would not be brushed aside as far-fetched [220] . The incautious application of criteria which stipulate "foreseeability" may, in economic loss cases, have the undesirable consequences to which Breyer J has pointed. In *Barber Lines A/S v M/V Donau Maru*, his Honour said [221] :

> "To use the notion of 'foreseeability' that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases (unless it leads courts, unwarrantedly, to narrow the scope of 'foreseeability' as applied to persons suffering physical harm)."

However, it needs to be kept in mind, particularly for the present appeal, that the criterion is "*reasonable* foreseeability". Liability is to be imposed for consequences which Apand, judged by the standard of the reasonable man, ought to have foreseen [222] . Such a proposition was identified by Professor Stone as presenting a category of indeterminate reference[223]. This, it should be accepted, allows in a given case, particularly one where the damage alleged was inflicted upon the economic interests of the plaintiff, for interaction between facts and values.

via

[219] *Chapman v Hearse* (1961) 106 CLR 112 at 121.

Alexander v Cambridge Credit Corporation Ltd (25 June 1987) (Glass, Mahoney and McHugh JJA)

> The use of terms such as ‘reason’, ‘opportunity’ and ‘occasion’ is, of course, one of convenience only. They do not conclude the question whether what the defendant did was the cause of the relevant loss. There are cases in which the wrong may be the reason of or may have offered the opportunity for that to which it led, and yet may not be the cause of it. The authors of Causation in the Law did not, I think, suggest otherwise: cf Mackie (at 120-126). What these terms do is to draw attention to the things the presence or absence of which in such relationships have been seen by the courts to be relevant in deciding the causal relationship of them. There are, for example, cases in which the defendant in doing what constitutes the wrong did not intend the second actor to do what he did but has been held to have caused what the second actor’s action led to. Thus, where the subsequent act is the kind of thing apt to be done if the defendant commits the wrong in question, it may be appropriate to hold the wrong to be the cause of what flows from the subsequent act: cf Chapman v Hearse (at 121). If the defendant had a duty to do or not to do that which constitutes the wrong, in order that the subsequent act should not, or should, be done, it may be appropriate to find his act or omission to be the cause of the subsequent act and what it led to: the servant who leaves open his employer’s front door may, on this basis, be held to have caused the loss resulting from the robbery on the premises. And an omission by the defendant may be the cause of what the subsequent act led to where that omission created the situation and danger upon which the subsequent act operated: thus, a defendant’s failure to repair

the brakes of a truck may be the cause of the injury to the plaintiff which flows from the driving of it by a third person. I do not mean, by these examples, to exhaust the factors which have been seen relevant in determining whether the particular relation- ship should be held to be causal. But it is relevant to refer to such examples and to the others referred to in Hart & Honore and the other discussions of this problem, in order to decide whether, in the facts of the present case, there is something which warrants the defendant being held to have caused the onset of the Ganser Syndrome."

Nader v Urban Transit Authority of New South Wales (25 July 1985) (Samuels, Mahoney and McHugh JJA)
Jaensch v Coffey (20 August 1984) (Gibbs C.j., Murphy, Brennan, Deane and Dawson JJ)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)

(1961) 106 C.L.R. 112 , at p. 121.

Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Mount Isa Mines Ltd v Pusey (23 December 1970) (Barwick C.j., McTiernan, Menzies, Windeyer and Walsh JJ)
Richards v State Of Victoria (14 June 1968) (WINNEKE CJ, ADAM and LITTLE , JJ)

6. In the unusual circumstances of the case the point which calls first for attention is the position which Dr. Cherry occupied vis-a-vis Chapman. At the time when Dr. Cherry was run down he was standing - or stooping - near the centre of the road. It was dark and wet and there seems no doubt that visibility was poor. As a consequence the task of attending to the injured man, with no one present to warn oncoming traffic, involved Dr. Cherry in a situation of some danger. But, says the appellant, this was quite fortuitous and not a situation reasonably foreseeable by Chapman at the time when, as the result of his negligence, his vehicle collided with that of Emery. Then to emphasize the contention that Chapman owed no duty of care to Dr. Cherry the appellant enlarged upon the sequence of events which led to the final result. None of these events, it was said, was reasonably foreseeable. It was not reasonably foreseeable that Chapman would be precipitated on to the roadway, that Dr. Cherry should at that moment be in the immediate vicinity, that he, as a doctor, should be first on the scene and proceed to render aid to Chapman with no other person present to warn oncoming traffic or, finally, that within a few minutes Dr. Cherry should be run down by a negligent driver. But this argument assumes as the test of the existence of a duty of care with respect to Dr. Cherry the reasonable foreseeability of the precise sequence of events which led to his death and it was rejected, and rightly rejected, by the Full Court. It is, we think, sufficient in the circumstances of this case to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway. In pursuing this enquiry it is without significance that Dr. Cherry was a medical practitioner or that Chapman was deposited on the roadway. What is important to consider is whether a reasonable man might forsee, as the consequence of such a collision, the attendance on the roadway, at some risk to themselves, of persons fulfilling a moral and social duty to render aid to those incapacitated or otherwise injured. As Greer L.J. said in Haynes v. Harwood (1935) 1 KB 146 : "It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act" (1935) 1 KB, at p 156 .

(See also Hyett v. Great Western Railway Co. (1948) 1 KB 345 and Carmarthenshire County Council v. Lewis (1955) AC 549). Whether characterization after the event of its consequences as "reasonable and probable" precisely marks the full range of consequences which, before the event, were "reasonably foreseeable" may be, and no doubt will continue to be, the subject of much debate. But one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence. As far as we can see the test has never been authoritatively stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of. The test as we have stated it has been assumed in a multitude of cases both here and in England and is generally in accordance with the view entertained in the United States of America (cf. Marshall v. Nugent (1955) 58 Am LR 2d 251; 222 Fed 2d 604 and Boyd v. Terminal Railroad Association of St. Louis (1956) 58 Am LR 2d 1222). (at p121)

Following paragraph cited by:

Pabai v Commonwealth of Australia (No 2) (15 July 2025) (Wigney J)
Saadat v Commonwealth (09 May 2025) (Stanley J)
State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs (20 May 2024) (Perry J)

> 186. ***Thirdly*** , in some circumstances, an intervening event may be regarded as the true cause or proper cause of any harm. In those circumstances, the relevant causal chain will be broken, and the defendant will not be responsible for the ensuing consequences: *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522 at 528 ; *Chapman* at 122. Whether the causal chain has been broken is a question of fact and degree, to be decided on the facts of each case.

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Bottos v CityLink Melbourne Ltd (16 September 2021) (Gorton J)
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (27 May 2021) (Bromberg J)

> 251. It should be reiterated that the risk of injury flowing from the Extension Project n eed only be a real risk. A foreseeable risk may be a remote risk: *Shirt* at 46 (Mason J). As the High Court said in *Chapman v Hearse* at 122 , reasonable foreseeability is not, in itself, a test of causation. The foreseeability of the risk of injury and the likelihood of the risk are “two different things”: *Shirt* at 47 (Mason J). When courts “speak of a risk of injury as being ‘foreseeable’ [they]

are not making any statement as to the probability or improbability of its occurrence, save that [they] are implicitly asserting that the risk is not one that is far-fetched or fanciful": *Shirt* at 47 (Mason J).

East Metropolitan Health Service v Jane Elizabeth Popovic as executrix of the will of Emil Popovic (31 January 2019) (Murphy JA, Beech JA, Allanson J)
Martin v Comcare (30 November 2015) (Siopis, Flick & Murphy JJ)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Clayton Utz (a Firm) v Dale (23 July 2015) (Ashley, Tate and Ferguson JJA)
Alvarez Cabrera v PIV'S Engineering Pty Ltd (27 April 2012) (Commissioner Gething)
Strong Wise Limited v Esso Australia Resources Pty Ltd (18 March 2010) (Rares J)
Lahoud v Lahoud (03 July 2009) (Ward J)
Lyle v Soc (12 January 2009) (Steytler P; Buss JA; Miller JA)
Royal v Smurthwaite (04 April 2007) (Santow JA ; Tobias JA; Basten JA)
Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi (14 December 2006) (Handley JA; Ipp JA; Bryson JA)
Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding (19 June 2006) (Neilson DCJ)
Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
Hirst v Nominal Defendant (18 March 2005) (Jerrard and Keane JJA and Douglas J,)
Tambree v Travel Compensation Fund (26 February 2004) (Mason P, Sheller and Ipp JJA)
Cattanach v Melchior (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)
Postnet Pty Ltd v Wood (08 November 2002)
Ruffles v Chilman (07 June 2002) (Wallwork, Anderson and Steytler JJ)

99. Counsel for the appellant acknowledged, in the course of his submissions, that the appellant had misled his doctors, including Dr Judelman, as regards his presentation. He also acknowledged that Dr Judelman was, as he put it, "reckless" in overprescribing drugs. There is consequently no real contest as regards the Commissioner's finding (par 317 of his reasons) "that the … [appellant's] manipulative behaviour

and the doctor's compliance were key factors in the establishment and maintenance of the … [appellant's] addiction". The Commissioner found (par 325 of his reasons), in effect, that this confluence of factors led to the consequences complained of by the appellant and that these were not caused by the negligence of the respondents. Whether that was, or was not, so was "very much a matter of fact and degree": (see ***Mahony v J Kruschich (Demolitions) Pty Ltd*** (1985) 156 CLR 522 at 528, per Gibbs CJ and Mason, Wilson, Brennan and Dawson JJ and ***Chapman v Hearse*** (1961) 106 CLR 112 at 122). As each of Wallwork J and Anderson J has said, it was, on the evidence, entirely open to the Commissioner to reach the conclusion at which he arrived.

Australian Securities and Investments Commission v Adler (14 March 2002) (Santow J)
National Australia Bank Ltd v Nemur Varity Pty Ltd (01 March 2002) (Phillips, Callaway and Batt, Jj.A)

43. With regard to the test for remoteness [23] , the Privy Council in *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [24] laid it down - and it has been accepted in Australia ever since - that the essential factor in determining liability for the consequences of a tortious act of negligence [25] is whether the damage is of such a kind or genus [26] as the reasonable person should have foreseen and not whether the damage was the direct or natural consequence of the tortious act. The Privy Council elaborated this test as regards the degree of foreseeability required in the subsequent case of *Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty.* [27] , holding[28] that it was sufficient if there was "a real risk", that is, "one which would occur to the mind of a reasonable man in the position of the [defendant]". Foreseeability is not required of the precise manner in which the particular injury came about [29] or of its extent: see generally Fleming, *The Law of Torts* [30] . In *Kenny & Good Pty. Ltd. v. MGICA (1992) Ltd.* [31] , an appeal concerning a claim in negligence by a mortgage insurer against a valuer engaged by a lending institution, McHugh, J. made the following observations, which, provided allowance is made for the special nature of a valuation[32], are helpful here:

"54. Furthermore, I do not think that the fact that the aggrieved party would not have entered into the loss-making transaction but for the negligent valuation is a sufficient ground for holding the valuer liable for the difference between the true value and sale price. The issue is not one of causation but whether the loss caused by the breach is too remote to be recoverable. In principle, the valuer is only liable for losses of a kind that were sufficiently likely to result from the breach of duty to make it proper to hold that the loss flowed naturally from the breach or that are of a kind that should have been within his or her reasonable contemplation. The valuer is not liable for every loss that flows from his or her breach of duty. Although it is true in one sense that losses from general market declines are within the reasonable contemplation of the parties to a valuation contract or arrangement, I do not think that the notion of reasonable contemplation of loss extends to such generalisations concerning the course of future events.

55. Many kinds of losses or damage that are reasonably foreseeable in a general way are outside the area of recoverability in the law of torts and the law of contract …"

via

[23] *Chapman v. Hearse* (1961) 106 C.L.R. 112 at 122.

Stockwell v State of Victoria (17 December 2001) (Gillard J)
AMP v RTA & Anor (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)

155 In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 510 Mason CJ (with whom Toohey J and Gaudron J agreed) said that the test of reasonable foreseeability was not a test of causation, but of remoteness. That is, a breach of duty may be said to have caused damage, but recovery might nonetheless be prevented by

reason of remoteness, and remoteness turns on reasonable foreseeability. As Windeyer J said in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 397 :

> "we have the blessed, and sometimes overworked, word 'foreseeability' as a single test for both the existence of liability and negligence and the extent of recoverable damage."

In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 510, Mason CJ said:

> "However, in *Chapman v Hearse* [(1961) 106 CLR 112 at 122], this Court said, 'the term 'reasonably foreseeable' is not, in itself, a test of 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act'. More recently, in *Mahony v J Kruschich (Demolitions) Pty Ltd* [(1985) 156 CLR 522 at 528], the Court said:
>
> > 'A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens: *M'Kew v Holland & Hannen & Cubitts* [1970 SC (HL) 20]. But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see *Chapman v Hearse* [(1961) 106 CLR 112 at 124-125]. Whether such a line can and should be drawn is very much a matter of fact and degree [(1961) 106 CLR 112 at 122].'
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> Just as *Chapman v Hearse* rejected reasonable foresight as a test of causation, so *M'Kew* and *Mahoney* rejected it as an exclusive criterion of responsibility."

AMP v RTA & Anor (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)
AMP v RTA & Anor (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)
Schneider v Hoechst Schering Agrevo Pty Ltd (21 February 2001) (Spender, Hill & Hely JJ)
Lisle v Brice and MMI (04 August 2000) (Judge Forde)

25. The conceptual distinction between reasonable foreseeability as a test for both remoteness of damage and causation has to be recognised: *Chapman v. Hearse* (1961) 106 CLR 112 at 122 :

"…in effect, the argument of the respondent proceeded upon the basis that if the ultimate damage was 'reasonably foreseeable' that circumstance would conclude

this aspect of the matter against the appellant. But what this argument overlooks is that when the question is whether damage ought to be attributed to one of several ‘causes’ there is no occasion to consider reasonable foreseeability on the part of the particular wrongdoer unless and until it appears that negligent act or omission alleged has, in fact, caused the damage complained of. As we understand the term ‘reasonably foreseeable’ is not, in itself, a test if ‘causation’; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act.”

Beale v Meehan (11 April 2000) (Adams J)
Kenny & Good Pty Ltd v MGICA (1992) Ltd (17 June 1999) (Gaudron, McHugh, Gummow, Kirby and Callinan JJ)
Kenny & Good Pty Ltd v MGICA (1992) Ltd (17 June 1999) (Gaudron, McHugh, Gummow, Kirby and Callinan JJ)
Emanuele v Hedley (19 June 1998)
Kenny & Good Pty Ltd v MGICA (1992) Ltd (08 August 1997) (Wilcox, Branson, Sackville JJ)
Kenny & Good Pty Ltd v MGICA (1992) Ltd (08 August 1997) (Wilcox, Branson, Sackville JJ)
Nominal Defendant v Gardikiotis (24 April 1996) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

5 Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) (1961) AC 388 at 423, 425 ; Chapman v Hearse (1961) 106 CLR 112 at 122.
6 Livingstone v Rawyards Coal Company

Cash Resources Aust Pty Ltd v Brett (08 March 1996)
Chief Commissioner of Police v Hallenstein (26 October 1995) (Hedigan J)
State Rail Authority of New South Wales v Wiegold (24 December 1991) (Kirby P, Samuels and Handley JJA)
Commonwealth v Amann Aviation Pty Ltd (12 December 1991) (Search AustLII)
Gala v Preston (28 May 1991) (Mason C.j., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
March v E & MH Stramare Pty Ltd (24 April 1991) (Mason C.j., Deane, Toohey, Gaudron and McHugh JJ)
Alexander v Cambridge Credit Corporation Ltd (25 June 1987) (Glass, Mahoney and McHugh JJA)
Nader v Urban Transit Authority of New South Wales (25 July 1985) (Samuels, Mahoney and McHugh JJA)
Jaensch v Coffey (20 August 1984) (Gibbs C.j., Murphy, Brennan, Deane and Dawson JJ)

4. A plaintiff must prove that a psychiatric illness for which damages are claimed has been caused by the defendant's act or omission: Chapman v. Hearse (1961) 106 CLR 112 , at p 122. Reasonable foreseeability of the damage is insufficient if the chain of causation is interrupted. A defendant is not liable if a novus actus intervenes between the defendant's conduct and the damage complained of: McKew v. Holland &Hannen &Cubitts (1969) 3 All ER 1621, at p 1623.

J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER (21 June 1984) (Moffitt P, Glass and Priestley JJA)

> The second reason clearly appears at the end of the passage. The first employer cannot be held liable for the second injury because it was not a foreseeable consequence of the first tort and was therefore too remote from it to be a recoverable head of damage, the doctrine of remoteness marking the limits beyond which a tortfeasor is not liable for damage in fact caused by him: Chapman v Hearse (1961) 106 CLR 112 at 122. The first reason why the first tortfeasor is not liable for the second injury cannot be so readily identified. However, in the sentence emphasized I understand Barwick CJ to be saying that the second injury and the further damage to the plaintiff's back resulting from it could not be causally related to the first employer's tortious conduct.

J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER (21 June 1984) (Moffitt P, Glass and Priestley JJA)
J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER (21 June 1984) (Moffitt P, Glass and Priestley JJA)
Mitsui OSK Lines Ltd v The Ship Mineral Transporter (18 October 1983) (Yeldham J)
Havenaar v Havenaar (29 June 1982) (Reynolds, Hutley and Glass JJA)
Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (10 February 1981) (Aickin J. Barwick C.j., Stephen, Mason, Murphy, Wilson Jj. Barwick C.j., Gibbs, Stephen and Mason JJ)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
McNab v Auburn Soccer Sports Club Ltd (02 July 1975) (Sheppard J)
McNab v Auburn Soccer Sports Club Ltd (02 July 1975) (Sheppard J)
McNab v Auburn Soccer Sports Club Ltd (02 July 1975) (Sheppard J)
Caterson v Commissioner for Railways (10 May 1973) (. Barwick C.j., McTiernan, Menzies, Gibbs and Stephen JJ)
Richards v State Of Victoria (14 June 1968) (WINNEKE CJ, ADAM and LITTLE , JJ)
Andrews v WILLIAMS (09 May 1967) (WINNEKE CJ, LITTLE and LUSH , JJ)
Hayward v Georges Ltd (06 August 1965) (MCINERNEY, AJ)
Haber v Walker (10 October 1962) (GOWANS , J)
Haber v Walker (10 October 1962) (GOWANS , J)

7. These considerations make it clear to us that the appellant's first contention must fail. Applying the test as we have stated it there is, we think, no warrant for saying that, vis-a-vis Dr. Cherry, Chapman was not under a duty to exercise reasonable care in the management of his vehicle or for denying damages to the executor of Dr. Cherry if, in fact, Chapman's negligence can properly be said to have caused, or to have been a cause of, his death. As the learned Chief Justice observed it is, of course, manifest that the likelihood of such a happening as that which in fact occurred "will vary according to all the circumstances of the particular case" but when account is taken of the circumstances as they existed on the night in question there can be little doubt that it was reasonably foreseeable that subsequent injury by passing traffic to those rendering aid after a collision on the highway would be by no means unlikely. The prevailing conditions were notoriously such as to create danger to road users and it is impossible to regard the ultimate event as of an altogether exceptional character (cf. Bolton v. Stone (1951) AC 850). On the contrary some such event was by no means improbable and was, in our view, "reasonably foreseeable". We note that in not dissimilar circumstances American courts have, whilst confining liability to the foreseeable consequences of a negligent act, regarded the negligence of a person in control of a motor vehicle as the "proximate"

cause of a plaintiff's injuries notwithstanding the later intervention of an act of a third person which has more immediately caused the injuries of which the plaintiff complains. Such intervening acts may, of course, be culpable or not and since reasonable foreseeability is the test the fact that a later act is culpable does not necessarily preclude the conclusion that the earlier act was a "proximate" or "legal" cause (see Marshall v. Nugent (1955) 58 Am LR 2d 251; 222 Fed2d 604). (at p122)

8. These observations do not, of course, conclude the question whether, as the learned Chief Justice decided, Chapman's negligence was in the proved circumstances of the case a cause of Dr. Cherry's death and this must now be considered. At the outset, however, it should be said that the approach to this question in the course of argument was, with some resulting confusion, overlaid by a discussion of the decision of the Judicial Committee in Overseas Tankship (U.K.) Ltd. v. Morts Dock &Engineering Co. Ltd. (The Wagon Mound) (1961) AC 388 . In effect, the argument of the respondent proceeded upon the basis that if the ultimate damage was "reasonably foreseeable" that circumstance would conclude this aspect of the matter against the appellant. But what this argument overlooks is that when the question is whether damage ought to be attributed to one of several "causes" there is no occasion to consider reasonable foreseeability on the part of the particular wrongdoer unless and until it appears that the negligent act or omission alleged has, in fact, caused the damage complained of. As we understand the term "reasonably foreseeable" is not, in itself, a test of "causation"; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act. This distinction is of some importance in cases such as the present where there have been successive acts of negligence and where it is sought to establish, notwithstanding the fact that the ultimate consequence might have been reasonably foreseeable at the time of the earlier act of negligence, that the later negligent act was the sole cause of the damage complained of. This, of course, is what Chapman seeks to do in the present case. Dealing with this aspect as an independent matter he concedes the foreseeability of some event such as that which actually happened, but asserts that as a matter of practical fact, Dr. Cherry's death was caused solely by Hearse's negligent driving. It was, it is said, a case of novus actus interveniens, or that, otherwise, Hearse's negligent driving operated to break the chain of causation between the original negligent act and Dr. Cherry's death. Whether this was so or not must, we think, be very much a matter of circumstance and degree. (at p122)

9. In support of the appellant's contention it was initially argued that it was sufficient to enable him to escape liability if, as was held to be the case, Hearse's intervening act was negligent. Some support for this proposition, it was said, was to be found in a consideration of the so called "last opportunity" rule and by way of illustration it was pointed out that if Chapman had also been injured by Hearse's driving he would have been in a position to recover his damages in full against Hearse. That being so it would be anomalous if, having recovered his own damages in full, he should then be held liable to make a contribution to Hearse in respect of his liability to Dr. Cherry's executor. The whole of the damage, it was said, would have resulted from the same cause and it would be curious indeed if, in the final result, one part of it should be borne by Hearse alone and another part by Hearse and Chapman jointly. But, even assuming that the circumstances were, in general, appropriate to invoke the last opportunity rule, the argument is superficially attractive only. It assumes that notwithstanding the provision for apportionment of liability made by s. 27a(3) of the Wrongs Act that rule retains full force and effect in South Australia. In terms, what that section requires is an apportionment of damages where a person has suffered damage as the result partly of his own fault and partly of the fault of any other person or persons. The appellant's argument must, therefore, be taken to assume that the last opportunity rule was devised as a test of causation so that whenever it was successfully called in aid by a plaintiff its effect was to brand the defendant's negligence as the sole cause of the plaintiff's injuries. The so-called rule as "authoritatively" stated

in Tuff v. Warman (1858) 5 CB (NS) 573 (141 ER231) and as accepted by this Court in Alford v. Magee (1952) 85 CLR 437 was that a plaintiff's negligence would not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the negligence or carelessness of the plaintiff". It was, of course, pointed out that the qualification so stated was applicable only in appropriate cases. The statement, however, can have reference only to negligence on the part of a plaintiff which, apart from the so-called rule, would disentitle him to recover, that is to say, negligence which was, in fact, a cause of the damage. This view seems to flow naturally from the history of the development of the rule to which reference is made in Alford v. Magee (1952) 85 CLR 437 and which is fully traced by Professor Glanville Williams in his work on Joint Torts and Contributory Negligence (1951) p. 260 et. seq. We think that the observations in Alford v. Magee (1952) 85 CLR 437 are conclusive against the appellant on this point. That case regarded as preferable the view that contributory negligence means "negligence on the part of the plaintiff which has been a cause of damage in the same sense in which it is necessary for the plaintiff himself to prove that negligence of the defendant was a cause of the damage" (1952) 85 CLR, at p 451 and it then asserted that "it seems more natural and appropriate to use the term as meaning negligence of the plaintiff which has been a cause of the damage in the above sense and then (apropos of the last opportunity rule) to consider what circumstances will preclude such negligence from affording a good defence" (1952) 85 CLR, at p 452 . No doubt, in many cases, the rule has been treated as if it had assumed the role of a test of causation but not, as far as we can see, on any occasion when it was of importance to distinguish between its real and what may, perhaps, be called its apparent character. (at p124)

Following paragraph cited by:

Strong Wise Limited v Esso Australia Resources Pty Ltd (18 March 2010) (Rares J)

74. In *Chapman* 106 CLR at 122 Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ said that:

> "… the term 'reasonably foreseeable' is not, in itself, a test of 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act."

They concluded that the criterion of reasonable foreseeability embraced all foreseeable intervening conduct whether it be wrongful or otherwise: *Chapman* 106 CLR at 125 . And, the common law test for causation, in general, and in Australian law, in particular, is in many cases a question of fact: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ, 523 per Deane J, 524 per Toohey J and 525 per Gaudron J.

Alexander v Cambridge Credit Corporation Ltd (25 June 1987) (Glass, Mahoney and McHugh JJA)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Rowe v McCartney (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)
Kornjaca v Steel Mains Pty Ltd (10 May 1974) (Reynolds, Bowen and Glass Jj.A)

10. Notwithstanding this answer to the argument of the appellant on this point, he insists that the fact that Hearse's later act was wrongful operated to break the chain of causation between his negligence and Dr. Cherry's death. Why this should be so, however, does not clearly emerge but as far as we can see the submission rests solely upon the general proposition that there should not be imputed to a wrongdoer, as a reasonable man, foreseeability of subsequent intervening conduct which is, itself, wrongful. One illustration will suffice to show that as a proposition of law this is erroneous. Let it be assumed that X is a passenger in a vehicle driven by A and that he is injured when that vehicle comes into collision with a vehicle driven by B. It is established that A and B were successively negligent but, B, not otherwise negligent, could have avoided the consequence of A's negligence if he had used reasonable care. It would be no answer to a claim by X against A merely to assert that B's conduct which had intervened between the negligence of A and the injuries sustained by X was wrongful. A, of course, could not escape liability unless he established that B's negligence was the sole cause of X's injuries and in seeking to do this the last opportunity rule could be of no assistance to him. Nor, indeed, has it ever been suggested in such a case that because B's subsequent conduct was wrongful A's negligence should be excluded as a cause of X's injuries. From this it will be seen that, on principle, it is impossible to exclude from the realm of reasonable foresight subsequent intervening acts merely on the ground that those acts, when examined, are found to be wrongful. Indeed, that view is necessarily implicit in a multitude of street accident cases where passengers or pedestrians have sought damages. Of course, "where a clear line can be drawn the subsequent negligence is the only one to look to" (The Volute (1922) 1 AC, at p 144) but in the general run of cases of the type with which we are dealing no such clear line can be drawn. Marvin Sigurdson v. British Columbia Electric Railway Co. Ltd. (1953) AC 291 however, furnishes a recent example of circumstances in which it was thought permissible to draw the line though, it will be noticed, the line was drawn in a case which involved only the wrongdoers themselves. It is, we think, beyond doubt that once it be established that reasonable foreseeability is the criterion for measuring the extent of liability for damage the test must take into account all foreseeable intervening conduct whether it be wrongful or otherwise. Perhaps, much the same thing was said in Ferroggiaro v. Bowline (1957) 64 Am LR, 2d 1355 when it was observed that "the fact that the intervening act of a third person is a negligent one will not make it a superseding cause of harm to another for an injury which the original actor helped to bring about if the original actor at the time of his negligent conduct should have realized that a third person might so act". (at p125)

11. When these objections of the appellant are disposed of there remains little upon which it may be urged that his negligence was not a cause of Dr. Cherry's death. There can, we think, be no doubt that Dr. Cherry's presence in the roadway was, immediately, the result of Chapman's negligent driving and if any support for this conclusion should be thought to be necessary ample can be found in the analogous so-called "rescue cases". The degree of risk which his presence in the roadway entailed depended, of course, on the circumstances as they in fact existed and the circumstances were, in fact, such that the risk of injury from passing traffic was real and substantial and not, as would have been the case if the accident had happened in broad daylight, remote and fanciful. Perhaps, some confirmation for the proposition that the risk was substantial may be found in the fact that within a minute or two, or even less, Dr. Cherry was run down by a driver whose vision of the roadway must have been impeded to a great extent by the prevailing conditions. In these circumstances, we have no doubt that Chapman's negligence must be regarded as a cause of Dr. Cherry's death and since, for the reasons which we have given, some casualty of that character was within the realm of reasonable foreseeability the judgment against Chapman should stand. (at p125)

12. In making an apportionment pursuant to the provisions of the Wrongs Act the learned Chief Justice thought it just and equitable to require the appellant to make a contribution of one-fourth of

the amount awarded. It seemed to him "that it was the defendant who was directly and principally responsible for the fatality" and it was on this basis that he made his order for contribution. Upon the hearing of the appeal it was pressed upon us by counsel for Chapman that the amount of contribution was too large whilst, on the other hand, counsel for the respondent urged that the amount was too small. Upon consideration of the circumstances in which the accident happened we find ourselves in agreement with the view of the learned Chief Justice that it was the respondent who was "principally responsible" for the fatality and we can see no reason why we should interfere with the order which his Honour made. (at p126)

13. In the result we are of the opinion that the appeal should be dismissed. (at p126)

Orders

Appeal and cross-appeal dismissed with costs.

Cited by:

Du Plessis v Morton Berg Pty Ltd [2025] QSC 245 -
Du Plessis v Morton Berg Pty Ltd [2025] QSC 245 -
Du Plessis v Morton Berg Pty Ltd [2025] QSC 245 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)

160. In *Shoalhaven City Council v Pender* [2013] NSWCA 210, after referring to the decision in *Shirt* a t 639-640, McColl JA (with whom Barrett JA agreed) continued at [59]-[61] :

> 59 ... Thus, the foreseeability inquiry at the duty and breach stages raises different issues which progressively decline from the general to the particular: *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268 (at 295) ("*San Sebastian*") per Glass JA; see also *Vairy v Wyong Shire Council* (at [70] -[73]) per Gummow J.
>
> 60 Glass JA explained in *San Sebastian* (at 295-296) how the different issues are analysed as follows:
>
> The proximity upon which a *Donoghue* type duty rests depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of *any* kind on the part of the former may result in damage of some kind to the person or property of the latter: *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, at 120 , 121. The breach question requires proof that it was reasonably foreseeable as a possibility that *the kind* of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd; The Wagon Mound (No 2)* [1966] UKPC 1; [1967] AC 617, at 642, 643, *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 54 ALJR 283, at 285, 286 ... Of course, it must additionally be proved that a means of obviating that possibility was available and would have been adopted by a reasonable defendant, ibid. The remoteness test is only passed if the plaintiff proves that *the kind* of damage suffered by him was foreseeable as a possible outcome of *the kind* of carelessness charged against the defendant: *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383, at 390.

(Emphasis in original)

61 Despite the demise of proximity as an informing principle on the question whether a duty of care is owed (*Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 (at [59]) per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) reasonable foreseeability of harm of the kind suffered remains a necessary, although not sufficient, condition of the existence of a legal duty of care: *Tame v State of New South Wales* [2002] HCA 35; (2002) 211 CLR 317 (at [12]) per Gleeson CJ; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 (at [9]) per Gleeson CJ. Glass JA's explanation of the declining continuum of particularity of the foreseeability inquiry remains germane.

Pabai v Commonwealth of Australia (No 2) [2025] FCA 1575 -
Paul Steven Atkins v Brett Ainsley Hughes, Trudi Ann Hughes [2025] SADC 51 -
Paul Steven Atkins v Brett Ainsley Hughes, Trudi Ann Hughes [2025] SADC 51 -
Paul Steven Atkins v Brett Ainsley Hughes, Trudi Ann Hughes [2025] SADC 51 -
Paul Steven Atkins v Brett Ainsley Hughes, Trudi Ann Hughes [2025] SADC 51 -
Saadat v Commonwealth [2025] SASC 59 (09 May 2025) (Stanley J)

Abdulla v Birmingham City Council (2013) 1 All ER 649; *Al-Kateb v Godwin* (2004) 219 CLR 562; *AMP v Road Traffic Authority & Anor* [2001] NSWCA 186; *Armes v Nottinghamshire County Council* [2018] AC 355; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; *Bae v The Queen* (2020) 135 SASR 522; *Bersee v State of Victoria (Department of Education and Training)* (2022) 70 VR 260; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *Brookfield Multiplex Ltd v Owners - Strata Plan No. 61288* (2014) 54 CLR 185 ; *Bropho v Western Australia* (1990) 171 CLR 1; *Bus v Sydney County Council* (1989) 167 CLR 78; *Cekan v Haines* (1990) 21 NSWLR 296; *Chapman v Hearse* (1961) 106 CLR 112 ; *Coco v The Queen* (1994) 179 CLR 427; *Commonwealth v Introvigne* (1982) 150 CLR 258; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500; *Dietrich v The Queen* (1992) 177 CLR 292; *Donoghue v Stevenson* [1932] AC 562; *Electricity Generation Corporation v Woodside Energy Ltd* (20 14) 251 CLR 640; *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* (2008) 72 NSWLR 1; *Findlay v State of Victoria* [2009] VSCA 294; *Fried v National Australia Bank Ltd* (2001) 111 FCR 322; *Gifford v Strang Patrick* (2003) 214 CLR 269; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Harriton v Stephens* (2006) 226 CLR 52; *Hewitt v Bernhardt* (1979) 21 SASR 510; *Hillier v Lucas* (2000) 81 SASR 451; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; *Imbree v McNeilly* (2008) 236 CLR 510; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Koowarta v Bjelke Petersen* (1982) 153 CLR 168; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Mannone v Chaplin* [1991] 54 A Crim R 163; *March v Stramare* (1991) 171 CLR 506; *McDonald v State of South Australia; McDonald v Minister for Education and Child Development* [2017] SASCFC 146; *McLean Bros & Rigg Ltd v Grice* (19 06) 4 CLR 835; *McLean v Tedman* (1984) 155 CLR 306; *Minister for State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *MZYYR v Secretary, Department of Immigration and Citizenship & The Commonwealth of Australia* (2012) 292 ALR 659; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Nevin v B & R Enclosures* [20 04] NSWCA 339; *New South Wales v Bujdoso* (2005) 227 CLR 1; *Northern Sandblasting v Harris* (1997) 188 CLR 313; *Northern Territory v Mengel* (1995) 185 CLR 307; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; *Okwume v Commonwealth* [2016] FCA 1252; *Owens v Liverpool Corporation* [1939] 1 KB 394; *Paris v Stepney Borough Council* [1951] AC 367; *Petrovic v Victorian WorkCover Authority* [2018] VSCA 243; *Potter v Minahan* (1908) 7 CLR 277; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *R v Nguyen* (2013) 117 SASR 432; *Ramsay v Watson* (1961) 108 CLR 642; *Roads and Traffic Authority v Dederer* (2007) 234 CLR 330; *Romeo v Conservation Commission of Northern Territory* (1998) 192 CLR 431; *Roo Roofing Pty Ltd v Commonwealth of Australia* [2019] VSC 331; *Rosenberg v Percival* (2001) 205 CLR 434; *Rowe v Transport Accident Commission* (2017) MVR 195; *Sargood Bros v The Commonwealth* (1910) 11 CLR 258; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Shaaban Bin Hussein v Chong Fook Kam* (1970) AC 942; *Storm v Geeves* [1965] Tas SR 252 at 255 ; *Sullivan v Moody* (2001) 207 CLR 562; *Swinton v The China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553; *Taylor v Smith* (1926) 38 CLR 48; *The Queen v Fowler* (1985) 39 SASR 440; *Triaca v Summaries Pty Ltd* [1971] VR 347; *Trustees of Roman Catholic Church for Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Virk Pty Ltd (In Liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190; *VLAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1554; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Westina Corporation Pty Ltd v BGC* (2009) 41 WAR 263; *Wo donga Regional Health Service v Hopgood* (2010) 37 VR 284; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, considered.

Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 (20 May 2024) (Perry J)

186. ***Thirdly*** , in some circumstances, an intervening event may be regarded as the true cause or proper cause of any harm. In those circumstances, the relevant causal chain will be broken,

and the defendant will not be responsible for the ensuing consequences: *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522 at 528 ; *Chapman* at 122. Wheth er the causal chain has been broken is a question of fact and degree, to be decided on the facts of each case.

Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 -
Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 -
Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37 (11 April 2024) (Burnett J)

357. In *Clare & Gilbert Valleys Council v Kruse* ,[78] the Full Court held:

> Section 32 of the Act codifies what is known as the "Shirt calculus" as set out by Mason J in Wyong Shire Council v Shirt. While the sections of the Act mentioned generally reflect the common law, there are some clarifications or differences. Foreseeability of risk has a specific definition, namely, what a person knew or ought to have known. The not "farfetched or fanciful" test, as proposed in Shirt has been replaced by a test that a risk be "not insignificant". In Shaw v Thomas, Macfarlan JA with whom Beazley and Tobias JJA agree, when dealing with the identical provision in the Civil Liability Act (NSW) observed:
>
> Under the general law relating to the tort of negligence it is well established that it is unnecessary "for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable" (See Chapman v Hearse [1961] HCA 46 ; (1961) 106 CLR 12 at 12-121 ;(1961) 106 CLR 112 at 120-121 ; Rosenberg v Percival [2001] HCA 18; (2001) 205 CLR 434 at [64] . Nothing in the Act dictates any different approach when considering the requirement of s 5B(1)(b) that the risk be "not insignificant" (compare Doubleday v Kelly [2005] NSWCA 151 at [11] ; Waverley Council v Ferreira [2005] NSWCA 418 ; (2005) Aust Tort Reports 81-818 at[42]- [43]).
>
> In Wyong Shire Council v Shirt, Mason J referred to a risk "which is not far-fetched or fanciful" as being "real and therefore foreseeable" (at 48). The requirement in s 5B910(b) that the risk be "not insignificant" imposes a more demanding standard but in my view not by very much.
>
> We accept that the statutory test is marginally more demanding.

Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37 -
Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37 -
Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37 -
Warren BY His Litigation Guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37 -
Alleman v Gunnedah Shire Council [2024] NSWPIC 70 (20 February 2024)

247. The applicant submitted that the first respondent had failed to grapple with the relevant authorities on novus actus interveniens including *Chapman v Hearse* and *Mahoney*. There was no break in the chain of causation from the Canberra conference until the deceased worker's death.

Alleman v Gunnedah Shire Council [2024] NSWPIC 70 -
Alleman v Gunnedah Shire Council [2024] NSWPIC 70 -
WKBF and Minister for Immigration, Citizenship and Multicultural Affairs (Migration) [2023] AATA 3728 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Firth v AAPC Properties Pty Ltd [2023] VCC 546 -
Firth v AAPC Properties Pty Ltd [2023] VCC 546 -
Elisha v Vision Australia Ltd [2022] VSC 754 -
Ly v Australian Pharmaceutical Industries Limited [2022] VCC 1772 (28 November 2022) (Her Honour Judge Clayton)

212 Thus, in *Chapman v Hearse* , [140] the High Court stated the principle as follows:

"... one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence. As far as we can see the test has never been authoritatively stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of. ... ."[141]

Ly v Australian Pharmaceutical Industries Limited [2022] VCC 1772 -
Ly v Australian Pharmaceutical Industries Limited [2022] VCC 1772 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

Chapman v Hearse (1961) 106 CLR 112; [1961] HCA 46 ; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42, referred to.

Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Pietrobelli v Jewell Family Nominees Pty Ltd [2022] NSWSC 660 -
Pietrobelli v Jewell Family Nominees Pty Ltd [2022] NSWSC 660 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

108. Section 5C(a) of the *Civil Liability Act* reflects, and is consistent with, the common law. The effect of this provision is that a defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. As this Court said in *Chapman v Hearse* [129] , "one thing is certain" and that is that in identifying a risk to which a defendant was required to respond, "it is not necessary for the plaintiff to show that the precise manner in which [their] injuries were sustained was reasonably foreseeable". The Court continued:

> "it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [their] capacity to foresee the precise events leading to the damage complained of".

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -

Ramanayake v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 5 -
Ramanayake v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 5 -
Ramanayake v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 5 -
Colefax v Hojaij [2021] QDC 324 -
Biggs v O'Connor [2021] VSC 826 -
Biggs v O'Connor [2021] VSC 826 -
Ferla v Piazzanova Piazza Pty Limited [2021] VCC 1951 (07 December 2021) (His Honour Judge Parrish)

> 185 The Court of Appeal also referred to the High Court decision of *Chapman v Hearse* [166] and the earlier Victorian Court of Appeal decision of *Erickson v Bagley* ,[167] in which Kyrou and Kaye JJA stated:
>
> "... It is well established that, in order that a defendant be held to be negligent, it is not necessary that that defendant should have reasonably foreseen that the particular circumstances, in which the plaintiff was injured, might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred."[168]
>
> (Footnote omitted.)

Ferla v Piazzanova Piazza Pty Limited [2021] VCC 1951 -
Ferla v Piazzanova Piazza Pty Limited [2021] VCC 1951 -
Stone v Kennedy Plumbing Services (Vic) Pty Ltd [2021] VCC 1872 -
Stone v Kennedy Plumbing Services (Vic) Pty Ltd [2021] VCC 1872 -
Stone v Kennedy Plumbing Services (Vic) Pty Ltd [2021] VCC 1872 -
Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon [2021] NSWSC 1492 (19 November 2021) (Walton J)

252. The relevant authority on causation was summarised in *Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [85]-[94] , which I adopt and extract below:

> 85 The traditional approach to the question of causation requires a determination of a question of fact, namely what was the cause of a particular occurrence: *Fitzgerald v Penn* (1954) 91 CLR 268; *Stapley v Gypsum Mines Ltd* [1953] AC 663; [1953] 2 All ER 478 (at 681). This factual determination is generally described as the "but for" test or "*causa sine qua non*".
>
> 86 The common law approach to the issue of causation has since developed by reference to two distinct considerations, succinctly set out by Mason CJ in *March v E & MH Stramare Pty Ltd* (1991) 99 ALR 423; [1991] HCA 12 ("*March v Stramare*") (at 430) and summarised as follows:
>
> > (1) The application of the "but for" test (as well as the further question of whether a defendant is contributory negligent for damage if his or her negligence has played some part in producing); and
> >
> > (2) The applicability of value judgments and considerations of policy.
>
> 87 In *March v Stramare* , the High Court ruled that the "but for" test should not be treated as the definitive test of causation where negligence is alleged. Rather, in certain circumstances, causation is to be determined by policy and/or a value judgment involving ordinary notions of language and common sense.
>
> 88 This development addressed the oft-cited difficulty in application of the "but for" test in circumstances where there were two or more acts or events which would each

be sufficient to bring about the plaintiff's injury. The limitations of the test, particularly where there are two or more acts or events, each of which would be sufficient to bring about the plaintiff's injury, or where a defendant seeks to rely upon a "supervening cause" or "*novus actus interveniens*", are well established: *March v Stramare* at 430 ; *Chapman v Hearse* (1961) 106 CLR 112; [1961] HCA 46 ("*Chapman v Hearse*") at 124-125 . This difficulty was summarised by Mason CJ (*March v Stramare* at 431-432) and extracted below:

> ... the "but for" test does not provide a satisfactory answer in those cases in which a superseding cause, described as a *novus actus interveniens*, is said to break the chain of causation which would otherwise have resulted from an earlier wrongful act. Many examples may be given of a negligent act by A which sets the scene for a deliberate wrongful act by B who, fortuitously and on the spur of the moment, irresponsibly does something which transforms the outcome of A's conduct into something of far greater consequence, a consequence not readily foreseeable by A. In such a situation, A's act is not a cause of that consequence, though it was an essential condition of it. No doubt the explanation is that the voluntary intervention of B is, in the ultimate analysis, the true cause, A's act being no more than an antecedent condition not amounting to a cause. But this explanation is not a vindication of the adequacy of the "but for" test.
>
> The facts of, and the decision in, *M'Kew* illustrate the same deficiency in the test. The plaintiff would not have sustained his ultimate injury but for the defendant's negligence causing the earlier injury to his left leg. His subsequent action in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance resulted in a severe fracture of his ankle. This action was adjudged to be unreasonable and to sever the chain of causation. The decision may be explained by reference to a value judgment that it would be unjust to hold the defendant legally responsible for an injury which, though it could be traced back to the defendant's wrongful conduct, was the immediate result of unreasonable action on the part of the plaintiff. But in truth the decision proceeded from a conclusion that the plaintiff's injury was the consequence of his independent and unreasonable action.
>
> The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. In some situations a defendant may come under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk: see *Chomentowski v Red Garter Restaurant Ltd* (1970) 92 WN (NSW) 1070. To deny recovery in these situations because the intervening action is deliberate or voluntary would be to deprive the duty of any content.
>
> ...
>
> As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or *novus actus interveniens* when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the "but for" test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it.

89 Deane J also relevantly observed (*March v Stramare* at 435–436):

> ... the mere fact that something constitutes an essential condition (in the "but for" sense) of an occurrence does not mean that, for the purposes of ascribing responsibility or fault, it is properly to be seen as a "cause" of that occurrence as a matter of either ordinary language or common sense. Thus, it could not, as a matter of ordinary language, be said that the fact that a person had a head was a "cause" of his being decapitated by a negligently wielded sword notwithstanding that possession of a head is an essential precondition of decapitation. Again, the mere fact that a person makes a gift of money to another is not, in any real sense, a "cause" of the damage sustained by that other person when his agent negligently loses the money notwithstanding that the loss would not have occurred "but for" the original gift. As Lord Reid pointed out in *Stapley* (at 681):
>
> The question [of 'what caused an accident from the point of view of legal liability'] must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.

90 Further relevant developments by the High Court, cited in *March v Stramere*, included the following:

> (1) In *Chapman v Hearse,* the High Court rejected reasonable foresight as a test of causation (at 124-5). Rather, "it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act" (at 122).
>
> (2) In *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 1 59 ALR 722; [1985] HCA 37, the High Court observed (at 725):
>
> > A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a *novus actus interveniens*: *M'Kew v Holland & Hannen & Cubitts* [1970] SC(HL) 20 at 25. But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see *Chapman v Hearse* (1961) 106 CLR 112 [at 124–5]. Whether such a line can and should be drawn is very much a matter of fact and degree (ibid, at p 122).

91 The two-fold common law approach in *March v Stramare* , set out above, is now reflected in s 5D of the *Civil Liability Act* . A determination that the defendant's negligence caused particular harm requires satisfaction of the following:

> (1) whether the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
>
> (2) whether it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

92 Causation will be established if the evidence justifies, in light of the statutory test, a finding or inference of "probable causal connection between the breach of duty and the harm suffered": C Sappideen and P Vines (eds), *Fleming's The Law on Torts* (10th ed, 2011, Thomson Reuters) at 226-227. If the probable causal connection is established, the law treats as certain that to which there may be no conclusive answer: *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111; [2010] HCA 5 at [70].

93 Causation in tort is not established because a tortious act or omission increases the risk of injury, even though the relationship between risk and causation must be assessed. The mere existence of an association between one occurrence and another does not, of itself, establish factual causation for the purposes of s 5D(1)(a).

94 In *Carangelo v State of New South Wales* [2016] NSWCA 126 ("*Carangelo*") at [71], Emmett AJA (with whom Macfarlan and Gleeson JJA agreed) stated, in this respect:

> 71 Causation in tort is not established merely because the allegedly tortious act or omission increased a risk of injury. The risk of an occurrence and its cause are quite different things. However, the relationship between risk and causation must be considered. Ordinarily, risk refers to a challenge or danger, or the chance or hazard of loss. The existence of an association or a positive statistical correlation between the occurrence of one event, and the subsequent occurrence of another, may be expressed as a possibility which may be no greater than a real chance that, if the first event occurs, the second event will also occur. The mere existence of such an association or correlation does not justify a statement relevant to factual causation in law, that the first event creates or gives rise to or increases the probability that the second event will occur. Such a statement contains an assumption that, if the second event occurs, it will have some causal connection to the first. However, if the association between the two events is shown to have a causal explanation, then the conclusion may be open, if the second event should occur, that the first event has been at least a contributing cause. An inference of causal connection may be reached on the balance of probabilities after the event, notwithstanding that the statistical correlation between the first event and the second event indicated, prospectively, no more than a mere possibility or a real chance that the second event would occur, given the first event. (*Amaca Pty Limited v Booth* [2011] HCA 53; 246 CLR 36 at [41]-[43]).

Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon [2021] NSWSC 1492 -
Doyle v Webb [2021] NSWDC 581 -
Mourkakos v Cleandomain [2021] VCC 1648 (27 October 2021) (His Honour Judge Dyer)

> 184 The alternative case advanced by Mr Richards QC was broadly described as being akin to a *Chapman v Hearse [145]* scenario where multiple failings by the defendant should have been foreseeable as a cause of injury to the plaintiff. Mr Mourkakos' evidence identified a failure to act upon his report, a failure to properly supervise or instruct him in the use of the T16 machine, a failure to make provision for onsite training such as toolbox meetings, and a failure by the employer to ensure that the equipment, including the T16 machine, was properly maintained and serviced.

via

[145] [1961] HCA 46; (1961) 106 CLR 112

Mourkakos v Cleandomain [2021] VCC 1648 -
Mourkakos v Cleandomain [2021] VCC 1648 -
Mourkakos v Cleandomain [2021] VCC 1648 -
Mourkakos v Cleandomain [2021] VCC 1648 -
Bottos v CityLink Melbourne Ltd [2021] VSC 585 -

McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Richard Gillam v Cumberland Council [2021] NSWDC 538 -
Collins v Insurance Australia Ltd [2021] NSWDC 371 -
Prestage v Barrett [2021] TASSC 27 -
Prestage v Barrett [2021] TASSC 27 -
Prestage v Barrett [2021] TASSC 27 -
Nathaniel Corbett by his Next Friend Debra Todd v Town of Port Hedland [2021] WADC 55 (14 June 2021) (Gething DCJ)

92. Counsel for the defendant suggested a somewhat narrow definition of the risk, in essence being a risk of a crush injury arising from the hinge point where the Gate meets the fence. However, as the majority observed in ***Allied Pumps*** : [68]

> In assessing whether a risk of injury is foreseeable, it is sufficient if the *kind* of injury is foreseen as a possible consequence of particular conduct. It is not necessary to be able to foresee the particular injury. Nor is it necessary that the precise sequence of events leading to injury be foreseen. In short, it is not necessary that an injury of any particular severity, or the particular mechanism of any such injury, be foreseeable.

via

[68] ***Allied Pumps*** [8]. See also: ***Rosenberg v Percival*** [2001] HCA 18; (2001) 205 CLR 434 [64] (Gummow J); ***Chapman v Hearse*** [1961] HCA 46; (1961) 106 CLR 112, 120 - 121 (judgment of the court); ***Shaw v Thomas*** [2010] NSWCA 169 [43] (Macfarlan JA, with whom Beazley & Tobias JJA agreed) (***Shaw***).

Nathaniel Corbett by his Next Friend Debra Todd v Town of Port Hedland [2021] WADC 55 (14 June 2021) (Gething DCJ)

Chapman v Hearse [1961] HCA 46 ; (1961) 106 CLR 112

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

251. It should be reiterated that the risk of injury flowing from the Extension Project need only be a real risk. A foreseeable risk may be a remote risk: *Shirt* at 46 (Mason J). As the High Court said in *Chapman v Hearse* at 122 , reasonable foreseeability is not, in itself, a test of causation. The foreseeability of the risk of injury and the likelihood of the risk are "two different things": *Shirt* at 47 (Mason J). When courts "speak of a risk of injury as being 'foreseeable' [they] are not making any statement as to the probability or improbability of its occurrence, save that [they] are implicitly asserting that the risk is not one that is far-fetched or fanciful": *Shirt* at 47 (Mason J).

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

192. Before embarking upon the analysis required, there are further observations made in *Chapman v Hearse* which are of relevance to the present case. As the Court said at 120 , the test for the existence of a duty of care does not depend upon "the precise sequence of events" which lead to the injury being reasonably foreseeable. Nor is it necessary that the precise damage that may be caused be reasonably foreseeable. That is because "...it would be quite artificial to

make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [that person's] capacity to foresee the precise events leading to the damage complained of" (at 121). Further, their Honours characterised reasonable foreseeability as "not, in itself, a test of 'causation'" (at 122).

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 -
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 -
Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7) [2021] FCA 237 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Cross v Trespa Holdings Pty Ltd (ACN 006 612 782) [2020] VCC 1965 -
Cross v Trespa Holdings Pty Ltd (ACN 006 612 782) [2020] VCC 1965 -
Dann v Port Sorell Bowls Club Inc [2020] TASSC 47 -
Bowman v Nambucca Shire Council [2020] NSWSC 1121 -
Bowman v Nambucca Shire Council [2020] NSWSC 1121 -
Zivanovic v Kanina Banner Pty Ltd (ACN 082 617 187) [2020] VCC 1126 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Michel v Broadlex Services Pty Ltd [2020] ACTSC 57 -
Michel v Broadlex Services Pty Ltd [2020] ACTSC 57 -
Michel v Broadlex Services Pty Ltd [2020] ACTSC 57 -
Gill v Ethicon Sàrl (No 5) [2019] FCA 1905 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc and Anor (No.2) [2019] NSWDC 433 -
Dempsey v Am Controls Pty Ltd; Am Controls Pty Ltd v Atlas Metal Processors Pty Ltd; Atlas Metal Processors Pty Ltd v Am Controls Pty Ltd [2019] NSWSC 698 -
Owners Corporation No 1 of BS613436T v LU Simon Builders Pty Ltd [2019] VCAT 286 -
Ryan v Bunnings Group Limited [2020] ACTSC 353 -
Ryan v Bunnings Group Limited [2020] ACTSC 353 -
Ford v Elmore Haulage; VWA v Snowy Monaro [2019] VSC 58 -
East Metropolitan Health Service v Jane Elizabeth Popovic as executrix of the will of Emil Popovic [2019] WASCA 18 -
East Metropolitan Health Service v Jane Elizabeth Popovic as executrix of the will of Emil Popovic [2019] WASCA 18 -
Bryant v Competitive Foods Australia Pty Ltd [2018] QDC 258 -
Quilligan v Copyshift Group [2018] VSC 784 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
Leslie Corbett v South 32 Limited (No 2) [2018] NSWDC 232 -
Leslie Corbett v South 32 Limited (No 2) [2018] NSWDC 232 -
Ms Kirsty McLaren (in her capacity as executrix of the estate of Mr William George McLaren) v Hugo White Pty Ltd trading as Sautelle White Lawyers [2018] NSWDC 226 -
Weber v Greater Hume Shire Council [2018] NSWSC 667 -
Weber v Greater Hume Shire Council [2018] NSWSC 667 -
Bucknell v Parker [2018] QDC 36 -
Warn v Best Bar Pty Ltd [2018] WADC 17 (02 February 2018) (Braddock DCJ)

116. It is undisputed that what he was doing injured Mr Warn's back. Reasonable foreseeability of a risk of injury marks the extent of liability in tort where causation is established: ***Wyong Shire Council v Shirt*** (47 48). I find that it was reasonably foreseeable that a back injury could result from this kind of lifting and twisting. It is not necessary to foresee the precise

mechanism of injury: *Chapman v Hearse* (1961) 106 CLR 112 ; *Mount Isa Mines v Pusey* (1970) 125 CLR 383. This was a severe injury. Another worker might have suffered a milder back strain. The fact that he might have been more vulnerable to injury in this physical work does not relieve his employer of the duty to take reasonable care, nor in these circumstances does it render some form of back injury unforeseeable or too remote to require actions by a reasonable employer.

Warn v Best Bar Pty Ltd [2018] WADC 17 -
Nixon v Lines [2017] VSC 723 -
Brian Spratt v Asquith Bowling and Recreation Club Limited [2017] NSWDC 298 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Miloradovic v Osborne Park Commercial Pty Limited [2017] WADC 129 (29 September 2017) (Stevenson DCJ)

243. On the other hand, the defendant relies on *Chapman v Hearse* (1961) 106 CLR 112, 120 – 121 for the proposition that, at common law, a duty of care is owed by the defendant (in this case the third party) if it is reasonably foreseeable that his or her conduct may be likely to cause loss or damage to the plaintiff or a class of persons to whom the plaintiff belongs:

> It is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence.

Miloradovic v Osborne Park Commercial Pty Limited [2017] WADC 129 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Christos v Curtin University of Technology [2017] WASCA 110 -
Christos v Curtin University of Technology [2017] WASCA 110 -
Townend v McAlindon [2017] WADC 63 (11 May 2017) (Sleight Cjdc)
Chapman v Hearse [1961] HCA 46
Crumby v Kuru

Townend v McAlindon [2017] WADC 63 -
Townend v McAlindon [2017] WADC 63 -
Pamela Spencer v QLSL Pty Ltd (trading as Supply-Linq Pty Ltd) [2017] NSWDC 26 -
Oxenham v Protector Aluminium P/L [2016] QDC 312 (02 December 2016) (Long SC DCJ)

26. In addition, reliance was also placed on the following passage in *Chapman v Hearse*: [17]

> "Whether characterization after the event of its consequences as "reasonable and probable" precisely marks the full range of consequences which, before the event, were "reasonably foreseeable" may be, and no doubt will continue to be, the subject of much debate. But one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence."

Oxenham v Protector Aluminium P/L [2016] QDC 312 (02 December 2016) (Long SC DCJ)

26. In addition, reliance was also placed on the following passage in *Chapman v Hearse*: [17]

> "Whether characterization after the event of its consequences as "reasonable and probable" precisely marks the full range of consequences which, before the event, were "reasonably foreseeable" may be, and no doubt will continue to be, the subject of much debate. But one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence."

via

[17] (1961) 106 CLR 112 , at 120-121 .

The Public Trust in its capacity as Administrator of the Estate of Malcolm Wayne Fowlie v Central Norseman Gold Corporation Pty Ltd [2016] WADC 155 -
The Public Trust in its capacity as Administrator of the Estate of Malcolm Wayne Fowlie v Central Norseman Gold Corporation Pty Ltd [2016] WADC 155 -
Jausnik v Nominal Defendant (No 5) [2016] ACTSC 306 (18 October 2016) (Mossop AsJ)
Chapman v Hearse [1961] HCA 46; (1961) 106 CLR 112
Crosby v Kelly

Jausnik v Nominal Defendant (No 5) [2016] ACTSC 306 -
Gulic v Boral Transport Ltd [2016] NSWCA 269 -
Contor v Bickey [2016] QSC 91 (27 April 2016) (North J)

22. Putting to one side the duty owed to a passenger or any other road user, both the plaintiff and the first defendant being persons in control of motor vehicles converging upon one another on the highway owed concurrent duties of care to the other. [87] That is, to take reasonable care in the control of their respective vehicles to prevent harm to the other. The duty is not to prevent harm that is foreseeable per se but that of reasonable care [88] to prevent a foreseeable risk of harm.[89] In the circumstance I am considering, the risk of harm if one or both failed to exercise care was foreseeable, [90] not just in the theoretical abstract, but because both could see the other vehicle or motorcycle or at the very least the lights of the other vehicle.

via

[90] Indeed it was foreseeable that harm might be suffered by either driver, rider, passenger, another road user or for that matter, a rescuer cf *Chapman v Hearse* (1961) 106 CLR 112 ; *March v E & M H Stramore Pty Ltd & Anor* (1990-1991) 171 CLR 506.

Awad v ISPT Pty Limited & Jones Lang LaSalle (NSW) Pty Limited & Glad Cleaning Services Pty Limited (No 3) [2015] NSWDC 331 (02 December 2015) (Neilson DCJ)

21. In *James Hardie v Wyong Shire Council* [2000] NSWCA 107 Handley JA said this:

> "14. This legislation was adopted in England in 1935, in this State in 1946, and at various dates in the other States and Territories. In the intervening periods (in England until the *Civil Liability (Contribution) Act 1978*) the courts in both countries, it seems without debate, regularly, if not invariably, ordered contribution in respect of the plaintiff's costs as well as his damages. Cases in which such orders have been

made or affirmed without comment include in England *Wilkinson v Rea Ltd* [1941] 1 KB 688 CA, 704-5; *Jerred v T Roddam Dent & Son Ltd* [1948] 2 All ER 104, 110 and in the High Court *Broken Hill Pty Co Ltd v Duffy* (1943) 16 ALJ 374; *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJ 100; *Soblusky v Egan* (1960) 103 CLR 215, 239 ; *Chapman v Hearse* (1961) 106 CLR 112, 114 ; and *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 101. In this Court the cases include *Commissioner for Government Transport v Bitumen & Oil Refineries (Australia) Ltd* (1953) 54 SR (NSW) 1, 6 ; *Sinclair v William Arnott Pty Ltd* (1 963) 64 SR (NSW) 88, 97 ; and *Barisic v Devenport* [1978] 2 NSWLR 111, 154. Similar orders were made in *Brazendale v Kenna* [1961] Tas SR 199 FC, 202, 214; *Sherras v Van der Maat* [1989] 1 Qd R 114, 118, 120 ; and *Hanson v Matthew Bros Contractors Ltd* (1991) 55 SASR 183, 196, 198.

15. As Megarry J said in *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at 431-2, such a course of practice is a source of authority which should be followed unless shown to be clearly wrong. The seminal textbook on this topic is *Glanville Williams Joint Torts and Contributory Negligence 1951* which stated at p 488 that the equivalent of ss 5(1)(c) and 5(2) in the 1935 Act:

> "... which give a right of contribution among concurrent tortfeasors, are perfectly general in their wording, and enable the Court to order contribution towards costs payable to the injured party. Normally contribution will be ordered in the same proportions as the wrongdoers are held liable between themselves in respect of the plaintiff's damages. Where the plaintiff has sued only one wrongdoer, D1, and obtains a judgment for damages and costs, D1 may ... be given a final judgment against D2 for the latter's contribution to the costs payable to P".

16. A number of reported cases deal with claims for contribution in respect of the costs incurred by the defendant to his own solicitors in defending the plaintiff's action, where liability to contribute to the costs payable to the plaintiff was not challenged. See *Brazendale v Kenna* [1961] Tas SR 199 (FC), 202, 214; *Sherras v Van der Maat* [1989] 1 Qd R 114, 118, 120 ; and *Hanson v Matthews Bros Contractors Ltd* (1991) 55 SASR 183, 198. "

In the same case Giles JA after quoting s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* s aid this:

> "31. Contribution under s 5 requires that there be a liability for the pecuniary consequences of which the amount of contribution recovered partially compensates, by s 5(2) even completely indemnifies, the tort feasor found liable. The liability is the tort feasor's liability in respect of the damage suffered by the plaintiff as a result of the tort.
>
> 32. Damage here means the physical or economic injury or harm caused by the tort feasor (*Dillingh am Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 at 327, 329). With the utmost respect to Handley JA, it seems to me that regarding costs as part of the tort feasor's liability in respect of the damage is not excluded by the requirement that the contributing tort feasor be liable, actually or presumptively, in respect of the same damage. Both tort feasors are correctly described as liable in respect of the damage. The tort feasor's liability is for damages and costs. For the purposes of s 5 the contributing tort feasor's liability is notional, even if the contributing tort feasor has been found liable, and notionally can also be for damages and costs. Section 5 clearly recognises these two elements of "action brought in respect of [the] damage", see s 5(1)(b).
>
> 33. In my view this provides the textual basis for the established practice by which contribution has been ordered as to costs as well as damages. The phase "in respect of" is wide. In *Trustees Executors & Agency Co Ltd v Reilly* (1941) VLR 110 at 111 Mann CJ said that it has "the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer". This passage has been cited with apparent approval by the High Court, in *State Government Insurance Office (Queensland) v Crittenden* (1966) 117 CLR 412 at 416 and *McDowell v Baker* (1979) 144 CLR 413 at 419. There is an undoubted connection or relation between the injury or harm caused by a tort feasor and the tort feasor's liability for costs when successfully sued, and if there were a contractual indemnity from the plaintiff's claim it would extend to costs (*The Millwall* [1905] P 155 at 174, 176). Costs can readily be regarded as part of the tort feasor's liability in respect of the damage suffered by the plaintiff as a result of the tort."

His Honour then went on in following paragraphs to point out that beyond the textual analysis which he had conducted there were sound reasons for costs being part of the tort-feasors liability in respect of the plaintiff's damage.

Martin v Comcare [2015] FCAFC 169 -
Martin v Comcare [2015] FCAFC 169 -
Erickson v Bagley [2015] VSCA 220 (25 August 2015) (Kyrou JA and Kaye JA)

33. As with the common law [3] , in defining the content of the duty of care, the section focuses on the identification of the risk, its foreseeability, the probability of the risk, and the reasonableness of precautions which are alleged to be required to address that risk. Thus, the first step in the analysis requires the appropriate identification of the risk against which it is alleged that a particular defendant failed to exercise reasonable care. Commonly, the proper identification of the risk can be difficult, if not problematic. [4] Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred. [5] However, the risk, referred to in s 48 , is not to be confined to the precise set of circumstances in which the plaintiff was injured. It is well established that, in order that a defendant be held to be negligent, it is not necessary that that defendant should have reasonably foreseen that the particular circumstances, in which the plaintiff was injured, might occur. Rather, what must be reasonably foreseeable is the nature of the particular harm that ensued, or, more relevantly, the nature of the circumstances in which that harm was incurred. [6]

via

[6] See *Chapman v Hearse* (1961) 106 CLR 112, 120–121 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ) ; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, 220–222 (Dixon CJ, McTiernan, Kitto and Taylor JJ); *Thompson v Bankstown Corporation* (1953) 87 CLR 619, 630 ; *Ultra Thoroughbred Racing Pty Ltd v Those Certain Underwriters at Lloyd's, London* [2011] VSC 589, [284] (J Forrest J).

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

"A negligent tortfeasor does not always avoid liability for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence. A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens (M'Kew v Holland & Hannen & Cubitts [(1970) SC(HL) 20 at 25]). But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see Chapman v Hearse [(1961) 106 CLR 112 at 124–125]. Whether such a line can and should be drawn is very much a matter of fact and degree [Chapman v Hearse at 122]." (Footnotes supplied)

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)
Barnes v Hay (1988) 12 NSWLR 337 Breen v Williams (1996) 186 CLR 71 Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad" (1976) 136 CLR 529 Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 ; 75 NSWLR 649 Cattanach v Melchior [2003] HCA 38 ; 215 CLR 1 Chapman v Hearse (1961) 106 CLR 112 Chappel v Hart [1998] HCA 55 ; 195 CLR 232 Council of the Shire of Wyong v Shirt (1980) 146 CLR 40 Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 ; 200 CLR 1 Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22 F v R (1983) 33 SASR 189 Fox v Percy [2003] HCA 22 ; 214 CLR 118 Gover v State of South Australia (1985) 39 SASR 543 Harriton v Stephens [2006] HCA 15 ; 226 CLR 52 Hawkins v Clayton (1988) 164 CLR 539 Henville v Walker [2001] HCA 52 ; 206 CLR 459 Hill v Van Erp (1997) 188 CLR 159 Hughes v Lord

Advocate [1963] AC 837 Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 ; 247 CLR 613 Jaensch v Coffey (1984) 155 CLR 549 Kenny & Good Pty Ltd v MGICA (1992) Ltd [1999] HCA 25 ; 199 CLR 413 Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 ; 243 CLR 361 Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522 March v E & MH Stramare Pty Ltd (1991) 171 CLR 506 McFarlane v Tayside Health Board [2000] 2 AC 59 Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 ; 205 CLR 254 Montgomery v Lanarkshire Health Board [2015] UKSC 11 Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383 Moyes v Lothian Health Board 1990 SLT 444 ; [1990] 1 Med LR 463 Nader v Urban Transit Authority of New South Wales (1985) 2 NSWLR 501 Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd [1961] AC 388 Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty [1967] 1 AC 617 Paul v Cooke [2013] NSWCA 311 ; 85 NSWLR 167 Perre v Apand Pty Ltd [1999] HCA 36 ; 198 CLR 180 Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309 Roads and Traffic Authority v Royal [2008] HCA 19 ; 82 ALJR 870 Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42 ; 234 CLR 330 Roe v Minister of Health [1954] 2 QB 66 Rogers v Whitaker (1992) 175 CLR 479 Rosenberg v Percival [2001] HCA 18 ; 205 CLR 434 Rowe v McCartney [1976] 2 NSWLR 72 South Australia Asset Management Corporation v York Montague Ltd; sub nom Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191 Strong v Woolworths Ltd [2012] HCA 5 ; 246 CLR 182 Sullivan v Moody [2001] HCA 59 ; 207 CLR 562 Sutherland Shire Council v Heyman (1985) 157 CLR 424 Tabet v Gett [2010] HCA 12 ; 240 CLR 537 Tame v New South Wales [2002] HCA 35 ; 211 CLR 317 Vairy v Wyong Shire Council [2005] HCA 62 ; 223 CLR 422 Wallace v Kam [2012] NSWCA 82 ; [2012] Aust Torts Reports 82–101 Wallace v Kam [2013] HCA 19 ; 250 CLR 375 Waller v James [2013] NSWSC 497 ; Aust Torts Reports 82–130 Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514

Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Downes v Affinity Health Pty Ltd [2015] QDC 197 -
State of New South Wales v McMaster [2015] NSWCA 228 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Clayton Utz (a Firm) v Dale [2015] VSCA 186 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

29. The first two elements in s 5B(1) , foreseeability and significance of risk, will usually constitute matters to be considered in determining whether a duty is owed in particular circumstances to a class of persons including the plaintiff. That does not mean that duty is to be addressed by application of s 5B and s 5C : as explained by Beazley P in *Grills v Leighton Contractors Pty Limited* ,[12] such an approach would be erroneous. The existence of a duty of care depends, in part, upon a prospective determination that physical injury to a class of persons which would include the plaintiff was reasonably foreseeable in circumstances where the defendant did not take reasonable care in conducting its affairs. [13] As Gageler J stated in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* : [14]

> "A duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class."

via

[13] See, eg, Wyong Shire Council v Shirt [1980] HCA 12; 146 CLR 40; Chapman v Hearse [1961] HCA 46 ; 106 CLR 112 at 120.

Fitzpatrick v Moira Shire Council [2015] VCC 527 -
Fitzpatrick v Moira Shire Council [2015] VCC 527 -
Zraika v Walsh [2015] NSWSC 485 (30 April 2015) (Campbell J)

125. Contrary to the submission of BCC, it is not necessary for the plaintiff to show "the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient that it appears that injury to a class of persons of which he was one might reasonably have been conceived of as a consequence": *Chapman v Hearse* at 120 – 1 . As Windeyer J expressed the principle in *Mt Isa Mines Limited v Pusey* (1970) 125 CLR 383 at 402 :

> Foreseeability does not mean foresight of the particular course of events causing the harm. Nor does it suppose foresight of the particular harm which occurred, but only some harm of a like kind.

Zraika v Walsh [2015] NSWSC 485 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Andonovski v Park-Tec Engineering Pty Ltd and Barbeques Galore Pty Ltd; Andonovski v East Realisations Pty Ltd (No 6) [2015] NSWSC 341 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -
Wright by his tutor Wright v Optus Administration Pty Limited [2015] NSWSC 160 -
Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483 -
CAE v Oel [2014] WADC 137 -
Hamcor Pty Ltd v State of Qld [2014] QSC 224 -
Hamcor Pty Ltd v State of Qld [2014] QSC 224 -
Oram v BHP Mitsui Coal Pty Ltd [2014] QSC 230 (19 September 2014) (McMeekin J)

79. But a more fundamental point was that identified by Glass JA. The decision of the High Court in *Chapman v Hearse [58]* denies that "responsibility depends upon the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of." For present purposes Mr Oram now suffers from "a Major Depressive Disorder with symptoms seen in Post Traumatic Stress Disorder", plainly a recognisable psychiatric injury. His sense of guilt might be its cause. But as Glass JA pointed out in his dissent in *Rowe* what is really being argued is that the plaintiff's particular mental make up contributed to the resulting illness. Perhaps not all people would have felt that guilt and perhaps not all, or not many, would have developed a psychiatric illness. But if the "normal fortitude" test is no longer a hurdle to be overcome by the plaintiff to establish his or her suit, as the reasoning in *Tame* requires, [59] but rather one more factor to be weighed up with all others, then Glass JA's analysis is now the orthodoxy.

Oram v BHP Mitsui Coal Pty Ltd [2014] QSC 230 -
Langmaid v Dobsons Vegetable Machinery Pty Ltd [2014] TASFC 6 -
Permanent Custodians Limited v Geagea (No 2) [2014] NSWSC 562 -
Holroyd City Council v Zaiter [2014] NSWCA 109 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Edwards v Endeavour Energy; Precision Helicopters Pty Limited v Endeavour Energy; Endeavour Energy v Precision Helicopters Pty Limited (No. 4) [2013] NSWSC 1899 -
Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd [2013] NTSC 62 -
Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd [2013] NTSC 62 -
Charalambous v Yeung (RLD) [2013] NSWADTAP 44 -
Ireland v Wightman [2013] SASC 139 (06 September 2013) (Blue J)
Chapman v Hearse (1961) 106 CLR 112 ; *Cliff v Quinn* (1988) 54 SASR 151; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118; *Marlborough Harbour Board v Charter Travel Co Ltd* (1989) 18 NSWLR 223; *Napolitano v Coyle* (1977) 15 SASR 559; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388; *Owen v State of South Australia* (1996) 66 SASR 251; *Renowden v McMullin* (1970) 123 CLR 584; *Weldon v Neal* (1887) 19 QBD 394, considered.

Ireland v Wightman [2013] SASC 139 -

Commonwealth v Davis Samuel Pty Ltd (No 7) [2013] ACTSC 146 -
Commonwealth v Davis Samuel Pty Ltd (No 7) [2013] ACTSC 146 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Nair-Smith v Perisher Blue Pty Ltd [2013] NSWSC 727 -
Baden Cranes Pty Ltd v Smith [2013] NSWCA 136 -
Baden Cranes Pty Ltd v Smith [2013] NSWCA 136 -
McDonald v Shoalhaven City Council [2013] NSWCA 81 (18 April 2013) (Beazley P, Ward JA and Simpson J)

1. **Beazley P:** The appellant was injured whilst assisting an employee of the respondent out of a trench which had collapsed. The appellant was not an employee of the respondent and the trial judge characterised him as a volunteer and found that the respondent owed him a duty of care in accordance with the principles in *Chapman v Hearse* [1961] HCA 46; 106 CLR 112 . However, the trial judge dismissed the appellant's claim for damages on the basis that he had not established a breach of the duty of care the respondent owed to him. In finding that there had been no breach, his Honour applied the provisions of the *Civil Liability Act 2002*, s 5B .

McDonald v Shoalhaven City Council [2013] NSWCA 81 -
McDonald v Shoalhaven City Council [2013] NSWCA 81 -
McDonald v Shoalhaven City Council [2013] NSWCA 81 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
O'Donovan v Western Australian Alcohol and Drug Authority [No 2] [2013] WADC 13 -
O'Donovan v Western Australian Alcohol and Drug Authority [No 2] [2013] WADC 13 -
Fraser (nee Butcher) v Burswood Resort (Management) Ltd [2012] WADC 175 (18 December 2012) (Stevenson DCJ)

236. The starting point is conveniently stated by Pullin JA in ***MR & RC Smith Pty Ltd t/as Ultratune (Osborne Park) v Wyatt [No 2]*** [2012] WASCA 110 [42] :

> In *Divjakoski v Boral Window Systems* [2011] WASCA 134 Newnes JA (Buss & Murphy JJA agreeing) stated the common law principles. They are uncontroversial. The duty of an employer to his employee is to take reasonable care to avoid exposing the employee to unnecessary risks of injury. In deciding whether there has been a breach of that duty, the first question is whether a reasonable person in the employer's position would have foreseen that its conduct or workplace exposed the employee, or a class of persons including the employee, to a risk of injury. A risk which is not far-fetched or fanciful is real and therefore foreseeable. The test of foreseeability is 'undemanding': see *Dovuro Pty Ltd v Wilkins* [2003] HCA 51; (2003) 215 CLR 317 [104] (Kirby J). In almost every case in which a plaintiff suffers damage, it is foreseeable that if reasonable care is not taken, harm may follow. If a person is injured, the conclusion that harm was foreseeable is 'well nigh' inevitable. Dixon CJ said in argument in *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 115 , that he could not understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence: see *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 [100].

Fraser (nee Butcher) v Burswood Resort (Management) Ltd [2012] WADC 175 -
Fraser (nee Butcher) v Burswood Resort (Management) Ltd [2012] WADC 175 -
Falkingham v Hoffmans (A Firm) [2012] WADC 153 (01 November 2012) (Curthoys DCJ)

Chapman v Hearse [1961] HCA 46 ; (1961) 106 CLR 112

Falkingham v Hoffmans (A Firm) [2012] WADC 153 -
Jeffs v Perkins [2012] WADC 140 -
Jeffs v Perkins [2012] WADC 140 -
Finlay v The State of Western Australia [2012] WADC 132 -
Finlay v The State of Western Australia [2012] WADC 132 -
Pham v Parissis Pty Ltd (t/as Bells Real Estate) [2012] VCC 895 -
Pham v Parissis Pty Ltd (t/as Bells Real Estate) [2012] VCC 895 -
MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -
MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -

Alvarez Cabrera v PIV'S Engineering Pty Ltd [2012] WADC 62 -
Novakovic v Stekovic [2012] NSWCA 54 -
Ultra Thoroughbred Racing v Those Certain Underwriters [2011] VSC 589 -
Gunnersen v Henwood [2011] VSC 440 (07 September 2011) (Dixon J)

310. There must, at least, be a reasonable connection between risk and reaction. It is not the relationship between the negligent conduct and the extent of the plaintiff's mitigatory expenditure that forms the connection. As the High Court said in *Chapman v Hearse* : [110]

> As far as we can see the test has never been authoritatively stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of. The test as we have stated it has been assumed in a multitude of cases both here and in England and is generally in accordance with the view entertained in the United States of America.

Rather, I consider for the expense of a mitigatory response to negligent conduct to be reasonably foreseeable, there must be a reasonable connection between the class of mitigatory response and the type of negligent conduct. Thus, returning to my example, if the negligent cyclist has crashed into a petrol bowser and the owner, foreseeing a risk that such an accident could cause a fire which might destroy his service station, constructs an engineered solution sufficient to restrain a fully laden semi-trailer from demolishing his service station, when a guard around the bowser would suffice, there is no sufficient connection between the conduct — negligent management of a bicycle — and the response of the service station owner. That response is not reasonably foreseeable by a cyclist. The analogy is not an exact one. In these circumstances, could the defendant have reasonably foreseen, generally, an expenditure in mitigation of a risk of future loss might follow on negligent conduct in and about the escarpment in connection with vegetation and water management issues.?

via

[110] (1961) 106 CLR 112 , 121.

Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Reberger v R [2011] NSWCCA 132 -
Jonathan Anthony Crowley v Commonwealth of Australia, Australian Capital Territory and Glen Pitkethly [2011] ACTSC 89 -
Jonathan Anthony Crowley v Commonwealth of Australia, Australian Capital Territory and Glen Pitkethly [2011] ACTSC 89 -
Hodge v Barham [2011] WADC 71 -
Hodge v Barham [2011] WADC 71 -
Dodge v Snell [2011] TASSC 19 -
QBE Insurance (Australia) Ltd v Insurance Australia Ltd [2011] ACTSC 40 -
Benic v State of New South Wales [2010] NSWSC 1039 (30 November 2010) (Garling J)
Chapman v Hearse (1961) 106 CLR 112
Chappel v Hart

Benic v State of New South Wales [2010] NSWSC 1039 -
Shaw v Thomas [2010] NSWCA 169 -
Strong Wise Limited v Esso Australia Resources Pty Ltd [2010] FCA 240 (18 March 2010) (Rares J)

74. In *Chapman* 106 CLR at 122 Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ said that:

> "... the term 'reasonably foreseeable' is not, in itself, a test of 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act."

They concluded that the criterion of reasonable foreseeability embraced all foreseeable intervening conduct whether it be wrongful or otherwise: *Chapman* 106 CLR at 125 . And, the common law test for causation, in general, and in Australian law, in particular, is in many cases a question of fact: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ, 523 per Deane J, 524 per Toohey J and 525 per Gaudron J.

Strong Wise Limited v Esso Australia Resources Pty Ltd [2010] FCA 240 (18 March 2010) (Rares J)
Chapman v Hearse (1961) 106 CLR 112 distinguished

Strong Wise Limited v Esso Australia Resources Pty Ltd [2010] FCA 240 -
Strong Wise Limited v Esso Australia Resources Pty Ltd [2010] FCA 240 -
Giovenco v Dick [2010] NSWDC 4 (04 March 2010) (Levy SC DCJ)
Chapman v Hearse [1961] HCA 46 at [6]; (1961) 106 CLR 112

Giovenco v Dick [2010] NSWDC 4 -
Giovenco v Dick [2010] NSWDC 4 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 (19 October 2009) (Allsop P, Hodgson and Basten JJA)

> 151 Statements that the test of what is reasonably foreseeable may be "undemanding" were described by Gleeson CJ in *Tame* as "tendentious": at [12] . Further, even if the comment of Dixon CJ in *Chapman* in argument, that any event which has happened is foreseeable by a person of sufficient imagination and intelligence, accorded with the principle explained in the judgment, it must be read in its context or it loses its meaning. That context supplies a number of qualifications not expressly recognised by the primary judge. First, the legal principle requires foreseeability on the part of the defendant who is said to owe the duty of care. Secondly, the question of foreseeability, although it must be addressed in a prospective sense, involves an essential causal link between the proposed conduct of the defendant and the risk of harm to the plaintiff. In this context, imagination and intelligence are not enough, or, rather, they presuppose the existence of a form of causal connection. Thirdly, it is erroneous not merely to reason backward from the materialisation of harm to its foreseeability, but also to reason that if the plaintiff's harm followed the defendant's conduct, that conduct caused the harm. That is not merely to employ the improper use of hindsight, but to assume that a causal connection flows from a temporal connection.

CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 (02 October 2009) (Neave and Redlich JJA and Williams AJA)

63. A defendant can only escape liability if the loss or damage sustained can be regarded as 'differing in kind' from what was foreseeable. [49] The loss which actually materialises may not be identical to that foreseen as responsibility does not depend upon the capacity of 'the reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of.' [50] Thus in *Richards* it was found that even though the grave injuries sustained were radically different to the minor

injuries that might reasonably have been anticipated, it was open to the jury to conclude that they were of the same class or kind as was foreseeable. In reaching that conclusion the court recognised that the injury could be viewed as of much greater gravity than any injury reasonably foreseeable or that the precise chain of events causing injury was not foreseeable. [51]

via

[50] *Chapman v Hearse* (1961) 106 CLR 112, 121.

Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)
Chapman v Hearse [1961] HCA 46 ; (1961) 106 CLR 112
Chester v Waverley Corporation

Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Brett v Rees [2009] WASCA 159 (27 August 2009) (Martin CJ)

128. In his written submissions counsel for the appellant referred to many cases to support the proposition that it was not necessary for the appellant to show that the particular accident and the particular damage were probable. It is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act: see, for example, ***Chapman v Hearse*** [1961] HCA 46; (1961) 106 CLR 112, 120. I do not think it is necessary to examine the authorities because the principles are not in dispute. In my opinion the trial judge correctly identified the relevant test in his reference to ***Nagle*** . The essential question is whether the trial judge was correct in finding that a reasonable man in the first respondent's position would not have reasonably foreseen that his conduct in opening the door of the bungalow involved a risk of injury to the appellant.

Brett v Rees [2009] WASCA 159 -
Symonds v Vass [2009] NSWCA 139 (10 July 2009) (Beazley JA at 1; Giles JA at 10; Ipp JA at 47)

292 Whether it was foreseeable that breaches of duty on the respondent's part might contribute materially (in the *Chapman v Hearse* sense) to a compromise of the kind that was in fact effected depends, to a material extent, on the precise breaches found to have occurred, the facts that gave rise to the breaches and the facts that gave rise to the compromise. The precise breaches could only be determined, reliably, at a retrial.

Symonds v Vass [2009] NSWCA 139 -
Symonds v Vass [2009] NSWCA 139 -
Symonds v Vass [2009] NSWCA 139 -
Symonds v Vass [2009] NSWCA 139 -
Lahoud v Lahoud [2009] NSWSC 623 -
R v Reid (Ruling No 1) [2009] VSC 221 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Turner v Eastwest Airlines Limited [2009] NSWDDT 10 -
Turner v Eastwest Airlines Limited [2009] NSWDDT 10 -
Sutton v Firth (No 2) [2009] NSWDC 53 -
Sutton v Firth (No 2) [2009] NSWDC 53 -
Lyle v Soc [2009] WASCA 3 -

Lyle v Soc [2009] WASCA 3 -
Cahill v State of New South Wales (Department of Education and Training and Department of Juvenile Justice) (No 2) [2008] NSWIRComm 246 -
Cahill v State of New South Wales (Department of Education and Training and Department of Juvenile Justice) (No 2) [2008] NSWIRComm 246 -
Elayoubi v Zipser [2008] NSWCA 335 (03 December 2008) (Allsop P at 1; Beazley JA at 2; Basten JA at 3)

> *March v E & MH Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506; *Roads and Traffic Authority v Royal* [2008] HCA 19; 82 ALJR 870; *Alphacell Ltd v Woodward* [1972] AC 824; *Athey v Leonati* [1996] 3 SCR 458; *Snell v Farrell* [1990] 2 SCR 311, applied.
>
> *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; *McGhee v National Coal Board* [19 73] 1 WLR 1, considered.

Chapman v Hearse [1961] HCA 46; 106 CLR 112 ; *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; 156 CLR 522; *Ruddock v Taylor* [2003] NSWCA 262; 58 NSWLR 269; *Lamb v Camden London Borough Council* [1981] QB 625, referred to.

Elayoubi v Zipser [2008] NSWCA 335 -
Elayoubi v Zipser [2008] NSWCA 335 -
State of New South Wales v Burton [2008] NSWCA 319 (27 November 2008) (Allsop P ; Basten JA ; Handley AJA)

> 41 The factual difficulties presented by the present case result to a significant extent from the uncertain aetiology of the mental illness. That difficulty is exacerbated by potentially cumulative contributions from two separate events or courses of conduct. In some circumstances, a later event is a foreseeable outcome of the earlier negligent event: see, eg, *Chapman v Hearse* [1961] HCA 46; 106 CLR 112 . In other cases an initial disease or injury may be exacerbated by subsequent negligent medical intervention. The present case falls into a category in which the compensable harm results from an initial exposure to trauma or injury which, through negligence of the defendant, is not ameliorated by appropriate care or treatment. This category includes cases such as *McGhee v National Coal Board* [1973] 1 WLR 1 (in which a worker was exposed to brick dust which carried the risk of dermatitis, a risk which could have been mitigated by the provision of washing facilities which the employer negligently failed to provide) and *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (in which a night-watchman, suffering from arsenic poisoning, was misdiagnosed at a local hospital and died some hours later).

State of New South Wales v Burton [2008] NSWCA 319 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
The State of South Australia v Ellis [2008] WASCA 200 -
Amaca Pty Ltd v CSR Limited [2008] NSWDDT 18 (25 June 2008) (Curtis J at 1)
Chapman v Hearse (1961) 106 CLR 112
Bolton v Stone

Amaca Pty Ltd v CSR Limited [2008] NSWDDT 18 (25 June 2008) (Curtis J at 1)

> 79. In the course of argument in *Chapman v Hearse* (1961) 106 CLR 112 Dixon CJ observed at 115 that:
>
> > *Foreseeability does not include any idea of likelihood at all. I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.*

Blaxter v Commonwealth of Australia [2008] NSWCA 87 (08 May 2008) (Mason P; McColl JA; Basten JA)

> *Chapman v Hearse* (1961) 106 CLR 112 applied.

Blaxter v Commonwealth of Australia [2008] NSWCA 87 -
Blaxter v Commonwealth of Australia [2008] NSWCA 87 -
Cooper v Sandor [2007] WADC 218 (18 December 2007) (O'Brien DCJ)

> 42 It is only necessary for the plaintiff to prove that the defendant's negligence was a cause of the injury – the plaintiff does not have to prove it was the only cause: ***Chapman v Hearse*** (1961) 106 CLR 112 at 120.

Cooper v Sandor [2007] WADC 218 -
Cooper v Sandor [2007] WADC 218 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 (13 December 2007) (Hodgson JA at 1; Ipp JA at 70; McColl JA at 117)
Chapman v Hearse (1961) 106 CLR 112
Chappel v Hart

Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Wicks v Railcorp; Sheehan v State Rail [2007] NSWSC 1346 -
Wicks v Railcorp; Sheehan v State Rail [2007] NSWSC 1346 -
Latrobe Council v Williams [2007] TASSC 77 -
SOC v Lyle [2007] WADC 140 -
SOC v Lyle [2007] WADC 140 -
SOC v Lyle [2007] WADC 140 -
Sutton v Firth [2007] NSWDC 43 -
Royal v Smurthwaite [2007] NSWCA 76 -
Christou v King Edward Memorial and Princess Margaret Hospitals Board of Management [2007] WADC 44 -
Royal v Smurthwaite [2007] NSWCA 76 -
Summersford v Favelle Favco Cranes Pty Ltd; Favelle Favco Cranes Pty Ltd v Argenci Pty Ltd [2007] NSWSC 271 -
Metron Medical Australia Pty Ltd v Windahl [2007] VSCA 40 -
Leeder v The State of Western Australia [2007] WADC 16 -
Leeder v The State of Western Australia [2007] WADC 16 -
Roche v Malavoca Pty Ltd [2007] WASC 1 -
Hannell v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) [2006] WASC 310 -
Moss v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) [2006] WASC 311 -
Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi [2006] NSWCA 358 (14 December 2006) (Handley JA; Ipp JA; Bryson JA)
Chapman v Hearse (1961) 106 CLR 112
Chappel v Hart

Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi [2006] NSWCA 358 -
Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi [2006] NSWCA 358 -
Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 -
Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 -
Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding [2006] NSWDC 113 -
Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding [2006] NSWDC 113 -
T. Wagstaff v Haslam [2006] NSWSC 294 -
T. Wagstaff v Haslam [2006] NSWSC 294 -
State of New South Wales v Fahy [2006] NSWCA 64 -
State of New South Wales v Fahy [2006] NSWCA 64 -
Coca-Cola Amatil (NSW) Pty Ltd v Pareezer [2006] NSWCA 45 -
Neindorf v Junkovic [2005] HCA 75 -

BI (Contracting) Pty Ltd v The Public Trustee Of South Australia and ANORCSR Limited v The Public Trustee Of South Australia and ANOR [2005] NSWCA 306 (09 September 2005) (Mason P, Handley and Beazley JJA)

> 22 Senior counsel for BI submitted that this shows that the particular risk to which the deceased was exposed was neither foreseen nor foreseeable. But this is to commit the fallacy of requiring foreseeability of the precise risk of injury suffered. Such particularity of foresight is not required. It is sufficient that the defendant foresaw or ought to have foreseen harm of a like kind (see ***Chapman v Hearse*** (1961) 106 CLR 112 ; ***Mount Isa Mines Ltd v Pusey*** (1970) 125 CLR 383 at 402 ; ***Commonwealth v McLean*** (1996) 41 NSWLR 389). Identical arguments with reference to different types of asbestos-related diseases were rejected by this Court in ***Bendix Mintex Pty Ltd v Barnes*** (1997) 42 NSWLR 307 and ***Julia Farr Services Inc v Hayes*** (2003) 24 NSWCCR 138.

BI (Contracting) Pty Ltd v The Public Trustee Of South Australia and ANORCSR Limited v The Public Trustee Of South Australia and ANOR [2005] NSWCA 306 (09 September 2005) (Mason P, Handley and Beazley JJA)

Chapman v Hearse (1961) 106 CLR 112
Commonwealth v McLean

Roney v Priestman [2005] TASSC 52 -
Michael Peter Johnston v Roderick Alexander Smith [2005] NSWSC 433 -
Doubleday v Kelly [2005] NSWCA 151 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Bark v Tylor [2005] WADC 59 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Apex Holiday Centre (Inc) v Lynn [2005] WASCA 58 -
Hirst v Nominal Defendant [2005] QCA 65 -
Hirst v Nominal Defendant [2005] QCA 65 -
Hirst v Nominal Defendant [2005] QCA 65 -
Hirst v Nominal Defendant [2005] QCA 65 -
Talbot & Olivier v Shann [2005] WASCA 34 -
Talbot & Olivier v Shann [2005] WASCA 34 -
Evans v Pallet [2005] WADC 17 -
Evans v Pallet [2005] WADC 17 -
Calvert v Mayne Nickless Ltd [2004] QSC 449 (13 December 2004) (Wilson J)

> 54. Unless the plaintiff has proved that "the actual and direct event' giving rise to her injury was actually foreseen or "reasonably readily foreseeable" by the defendant, the Court must dismiss her claim: para (b) of subsec (1) and subsec (3) of s 312 . At common law, in a claim in negligence, it is not necessary for a plaintiff to prove that the defendant should have envisaged the precise circumstances in which injury occurred (*Chapman v Hearse* (1961) 106 CLR 112 at 121), but under this legislation there is greater focus on the precise circumstances of the injury - "the actual and direct event giving rise to the injury". Further, at common law it is enough that the chance of a risk manifesting itself in an actual occurrence was not far fetched or fanciful (*Wyong Shire Council v Shirt* (1979-80) 146 CLR 40 at 47), but under this legislation a greater degree of probability is required - that it was "reasonably readily foreseeable". See generally the discussion by Davies JA in *Plumb v State of Queensland* [2000] QCA 258 at [17] - [18] .

Calvert v Mayne Nickless Ltd [2004] QSC 449 -
Western Power Corporation v Shepherd [2004] WASCA 233 -
Blayney Crane Services v Western Freight Management [2004] NSWSC 879 -
Blayney Crane Services v Western Freight Management [2004] NSWSC 879 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Farrell v CSL Ltd [2004] VSC 308 -
Kartinyeri v Woolworths (South Australia) Pty Ltd [2004] SASC 172 -

Kartinyeri v Woolworths (South Australia) Pty Ltd [2004] SASC 172 -
Malo v South Sydney District Junior Football League Ltd [2004] NSWSC 495 -
Insurance Commission of Western Australia v Container Handlers Pty Ltd [2004] HCA 24 (26 May 2004) (McHugh J,Gummow, Kirby, Callinan and Heydon JJ)

41. In reply, Container Handlers submits that the relationship between the driving and the consequent injury need not be immediate, nor need it be direct. It contends that the injury may be a consequence of the driving even though other causally relevant events intervene. It argues that in this case the injury was a consequence of the driving of the low loader, because there was an unbroken sequence of causally connected events commencing with the driving and leading to the injury. It submits that the driving caused a mechanical problem which required immediate action. The driving of the vehicle therefore generated a risk that Mr Sutton or Mr Reibel might be injured when attempting to correct such a mechanical problem. That risk eventuated. The intervening acts of the driver and Mr Sutton, therefore, did not preclude a finding that there was a relationship of cause and consequence between the driving and the injury, as they were elements in the sequence of causally related events. In support of its argument, Container Handlers refers to a number of tort cases which address the issue of the requisite causal connection for the purpose of establishing liability [46] . It submits that in this case the fact that the vehicle had to be repaired was "the very kind of thing" likely to result from Container Handlers' negligence. The ICWA answers that submission by contending that "consequence of" is not the same as the requisite causal connection for the purpose of establishing tortious liability. A negligent act can be a direct or indirect contributing cause of the intervening act and therefore remain a cause of the damage in an action in tort. The ICWA also submits that the chaining of the axle cannot possibly be described as the very risk arising from the manner of driving.

via

[46] *Chapman v Hearse* (1961) 106 CLR 112 ; *Caterson v Commissioner for Railways* (1973) 128 CLR 99 ; *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1.

Hillmarl Pty Ltd v Dovebeach Pty Ltd T/a Mandurah Combined Tyre and Battery Service [2004] WADC 53 -
Lainie Radovanovic by her next friend and father Anton Radovanovic v Bryan Cutter and Australian Capital Territory [2004] ACTSC 9 -
Lainie Radovanovic by her next friend and father Anton Radovanovic v Bryan Cutter and Australian Capital Territory [2004] ACTSC 9 -
Tilba Tilba Stud (WA) (ACN 065 413 747) as trustee for the Tilba Tilba Stud Trust v The Executive Officer of Agriculture Western Australia [2004] WASC 31 -
Tambree v Travel Compensation Fund [2004] NSWCA 24 -
Tambree v Travel Compensation Fund [2004] NSWCA 24 -
Misiani v Welshpool Engineering Pty Ltd [2003] WASC 263 -
Southern Area Health Service v Brown [2003] NSWCA 369 -
Southern Area Health Service v Brown [2003] NSWCA 369 -
Southern Area Health Service v Brown [2003] NSWCA 369 -
Craigie v Fluor Daniel Pty Ltd [2003] WADC 254 -
Craigie v Fluor Daniel Pty Ltd [2003] WADC 254 -
Insurance Commission WA v Container Handlers Pty Ltd & Ors [2003] HCATrans 415 -
Shire of Brookton v Water Corporation [2003] WASCA 240 (10 October 2003) (Anderson J, Steytler J, McLure J)
Chapman v Hearse (1961) 106 CLR 112
Cohen v City of Perth

Shire of Brookton v Water Corporation [2003] WASCA 240 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -

Tenix Defence Pty Ltd v MacCarron [2003] WASCA 165 (30 July 2003) (EM Heenan J)

Chapman v Hearse (1961) 106 CLR 112

Tenix Defence Pty Ltd v MacCarron [2003] WASCA 165 (30 July 2003) (EM Heenan J)

44. When one speaks of foreseeability in this context, whether objective foreseeability of a reasonable employer placed in the circumstances of this appellant, or the subjective foreseeability of this particular appellant, it is not necessary to show that the precise sequence of events which led to the death was foreseen or foreseeable. This is not the test for foreseeability because it is sufficient in the circumstances to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow from the use of electric arc welding apparatus in a confined space and in hot working conditions - see ***Chapman v Hearse*** (1961) 106 CLR 112 at 120.

Cattanach v Melchior [2003] HCA 38 -
Strempel v Wood [2003] WADC 145 (20 June 2003) (Jenkins DCJ)

240. A risk is real and foreseeable if it is not farfetched or fanciful, even if it is extremely unlikely to occur; ***The Council of the Shire of Wyong v Shirt & Ors*** (1980) 146 CLR 40 at 48. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected; ***Chapman v Hearse*** (1961) 106 CLR 112 at 1201 21 . One of the factors relevant to, but not decisive of the question of what a reasonable medical practitioner ought to have foreseen is the state of medical knowledge at the time when the duty should have been performed. A reasonable medical practitioner cannot be expected to have foreseen an event uncomprehended by medical knowledge at the time; ***Rose nberg v Percival*** (*supra*) at 456 per Gummow J.

Strempel v Wood [2003] WADC 145 -
Julia Farr Services Inc v Hayes [2003] NSWCA 37 -
Julia Farr Services Inc v Hayes [2003] NSWCA 37 -
MacPherson v Proprietors of Strata Plan 10857 & Anor [2003] NSWCA 96 -
Godfrey v New South Wales [No 2] [2003] NSWSC 275 -
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27 (20 February 2003) (Gillard J)

798. In *Chapman v Hearse* , [65] the High Court said at p.115 –

> "But one thing is certain and that is in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence."

Calipari and Comcare [2003] AATA 176 -
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27 -
Woodcock v The State of Tasmania [2003] TASSC 1 -
Penfold v Higgins [2002] NTSC 65 -
Gliddon v Maurice Kevin Atkins t/as M K Atkins [2002] WADC 246 -
Postnet Pty Ltd v Wood [2002] ACTCA 5 -
Postnet Pty Ltd v Wood [2002] ACTCA 5 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -

Tame v New South Wales [2002] HCA 35 -
Crooks v Fitzgerald [2002] QCA 307 -
Crooks v Fitzgerald [2002] QCA 307 -
McGroder v Maguire [2002] NSWCA 261 -
Earley v Killinger [2002] WASCA 174 -
Earley v Killinger [2002] WASCA 174 -
Ruffles v Chilman [2002] WASCA 145 (07 June 2002) (Wallwork, Anderson and Steytler JJ)

99. Counsel for the appellant acknowledged, in the course of his submissions, that the appellant had misled his doctors, including Dr Judelman, as regards his presentation. He also acknowledged that Dr Judelman was, as he put it, "reckless" in overprescribing drugs. There is consequently no real contest as regards the Commissioner's finding (par 317 of his reasons) "that the ... [appellant's] manipulative behaviour

and the doctor's compliance were key factors in the establishment and maintenance of the ... [appellant's] addiction". The Commissioner found (par 325 of his reasons), in effect, that this confluence of factors led to the consequences complained of by the appellant and that these were not caused by the negligence of the respondents. Whether that was, or was not, so was "very much a matter of fact and degree": (see ***Mahony v J Kruschich (Demolitions) Pty Ltd*** (1985) 156 CLR 522 at 528, per Gibbs CJ and Mason, Wilson, Brennan and Dawson JJ and ***Chapman v Hearse*** (1961) 106 CLR 112 at 122). As each of Wallwork J and Anderson J has said, it was, on the evidence, entirely open to the Commissioner to reach the conclusion at which he arrived.

Ruffles v Chilman [2002] WASCA 145 -
Australian Securities and Investments Commission v Adler [2002] NSWSC 171 -
Australian Securities and Investments Commission v Adler [2002] NSWSC 171 -
National Australia Bank Ltd v Nemur Varity Pty Ltd [2002] VSCA 18 (01 March 2002) (Phillips, Callaway and Batt, Jj.A)

43. With regard to the test for remoteness [23] , the Privy Council in *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [24] laid it down - and it has been accepted in Australia ever since - that the essential factor in determining liability for the consequences of a tortious act of negligence [25] is whether the damage is of such a kind or genus [26] as the reasonable person should have foreseen and not whether the damage was the direct or natural consequence of the tortious act. The Privy Council elaborated this test as regards the degree of foreseeability required in the subsequent case of *Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty.* [27] , holding[28] that it was sufficient if there was "a real risk", that is, "one which would occur to the mind of a reasonable man in the position of the [defendant]". Foreseeability is not required of the precise manner in which the particular injury came about [29] or of its extent: see generally Fleming, *The Law of Torts* [30] . In *Kenny & Good Pty. Ltd. v. MGICA (1992) Ltd.* [31] , an appeal concerning a claim in negligence by a mortgage insurer against a valuer engaged by a lending institution, McHugh, J. made the following observations, which, provided allowance is made for the special nature of a valuation[32], are helpful here:

> "54. Furthermore, I do not think that the fact that the aggrieved party would not have entered into the loss-making transaction but for the negligent valuation is a sufficient ground for holding the valuer liable for the difference between the true value and sale price. The issue is not one of causation but whether the loss caused by the breach is too remote to be recoverable. In principle, the valuer is only liable for losses of a kind that were sufficiently likely to result from the breach of duty to make it proper to hold that the loss

flowed naturally from the breach or that are of a kind that should have been within his or her reasonable contemplation. The valuer is not liable for every loss that flows from his or her breach of duty. Although it is true in one sense that losses from general market declines are within the reasonable contemplation of the parties to a valuation contract or arrangement, I do not think that the notion of reasonable contemplation of loss extends to such generalisations concerning the course of future events.

55. Many kinds of losses or damage that are reasonably foreseeable in a general way are outside the area of recoverability in the law of torts and the law of contract ..."

via

[23] *Chapman v. Hearse* (1961) 106 C.L.R. 112 at 122.

Macquarie Area Health Service v Egan [2002] NSWCA 26 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
Stockwell v State of Victoria [2001] VSC 497 -
Minproc Ltd v Killinger [2001] WASC 347 -
Minproc Ltd v Killinger [2001] WASC 347 -
Minproc Ltd v Killinger [2001] WASC 347 -
McStravick v The State of Western Australia [2001] WASCA 398 -
McStravick v The State of Western Australia [2001] WASCA 398 -
Roads and Traffic Authority v Cremona [2001] NSWCA 338 -
Roads and Traffic Authority v Cremona [2001] NSWCA 338 -
SRA v Madden [2001] NSWCA 252 -
SRA v Madden [2001] NSWCA 252 -
Crooks v Fitzgerald [2001] QSC 371 -
The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian [2001] NSWCA 308 -
The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian [2001] NSWCA 308 -
Toomey v Scolaro's Concrete Constructions Pty Ltd (in liq) (No 2) [2001] VSC 279 -
AMP v RTA & Anor [2001] NSWCA 186 (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)

181 Turning to the cases which have dealt with damages for negligence, I would respectfully adopt the remarks of Handley and Beazley JJA in ***Commonwealth of Australia v McLean*** (1996) 41 NSWLR 389. Their Honours there discussed the issues which arise when an injured person has developed a stress disorder or other psychiatric illness. At p 403, their Honours said:-

"A wrongdoer is responsible for all damage of the same type or kind as that which was reasonably foreseeable, even if the particular damage, or its extent, were not reasonably foreseeable, or the damage occurred in an unexpected and unforeseeable manner: see **Chapman v Hearse** (1961) 106 CLR 112 at 120-121 . The test of liability for nervous shock is foreseeability of injury by shock: see **Mt Isa Mines Ltd v Pusey** (1970) 125 CLR 383 at 402, 412 ; **Jaensch v Coffey** (1984) 155 CLR 549 at 552-553, 561, 563.
The courts have recognised that for some purposes psychiatric injury is a form of bodily injury: see **Page v Smith** [1996] 1 AC 155 at 182-183, 187-188 ; **A boushadi v CIC Insurance Ltd** [1996] Aust Torts Reports, 63,336 at 63,339 a

nd **American Airlines Inc v Georgeopoulos** (Court of Appeal, 26 September 1996, unreported) at 12-15; see also **R v Chan-Fook** [1994] 1 WLR 689 at 695-696; [1994] 2 All ER 552 at 559, where psychiatric injury was held to constitute actual bodily harm. The courts have nevertheless treated damage by nervous shock as different 'in kind' from tangible physical injury."

AMP v RTA & Anor [2001] NSWCA 186 (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)

155 In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 510 Mason CJ (with whom Toohey J and Gaudron J agreed) said that the test of reasonable foreseeability was not a test of causation, but of remoteness. That is, a breach of duty may be said to have caused damage, but recovery might nonetheless be prevented by reason of remoteness, and remoteness turns on reasonable foreseeability. As Windeyer J said in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 397 :

> "we have the blessed, and sometimes overworked, word 'foreseeability' as a single test for both the existence of liability and negligence and the extent of recoverable damage."

In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 510, Mason CJ said:

> "However, in *Chapman v Hearse* [(1961) 106 CLR 112 at 122], this Court said, 'the term 'reasonably foreseeable' is not, in itself, a test of 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act'. More recently, in *Mahony v J Kruschich (Demolitions) Pty Ltd* [(1985) 156 CLR 522 at 528], the Court said:
>
> > 'A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens: *M'Kew v Holland & Hannen & Cubitts* [1970 SC (HL) 20]. But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see *Chapman v Hearse* [(1961) 106 CLR 112 at 124-125]. Whether such a line can and should be drawn is very much a matter of fact and degree [(1961) 106 CLR 112 at 122].'
>
> Just as *Chapman v Hearse* rejected reasonable foresight as a test of causation, so *M'Kew* and *Mahoney* rejected it as an exclusive criterion of responsibility."

AMP v RTA & Anor [2001] NSWCA 186 (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)

151 It has been noted that the Defendant and the Insurer accepted that "but for" the 27 February 1993 back injury there would have been no hearing of the Deceased's application to extend the limitation period, no depression suffered by the Deceased after that hearing, and no suicide in consequence of that depression. But causation does not depend solely on a "but for" test. On what criteria does it depend? They are stated in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. In that case Mason CJ (with whom Toohey and Gaudron JJ agreed) said that the "but for" test was not definitive; that causation was a question of fact; but that it was a question of fact into which considerations of policy and value judgments necessarily entered. He suggested at 510 that traditional formulae about "direct" consequences, or "natural and probable consequences", or "direct and natural consequences", or "proximate" causes or "real effective" causes concealed "the making of value judgments or reliance on unexpressed policy reasons for refusing to allow liability to extend to the damage sustained in particular cases". At 515-516 he said:

"The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case', in the words of Lord Reid: [*Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681] ....
It is beyond question that in many situations the question whether Y is a consequence of X is a question of fact. And, prior to the introduction of the legislation providing for apportionment of liability, the need to identify what was the 'effective cause' of the relevant damage reinforced the notion that a question of causation was one of fact and, as such, to be resolved by the application of common sense.
Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact - to be determined by the application of the 'but for' test - and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing: see e.g., Fleming, *Law of Torts* , 7th ed. (1987), pp. 172-173; Hart and Honoré, *Causation in the Law* , 2nd ed. (1985) p. 110. It is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments: see Fleming, p. 173. However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact. As Dixon CJ, Fullagar and Kitto JJ remarked in *Fitzgerald v Penn* [(1954) 91 CLR 268 at 277] 'it is all ultimately a matter of common sense' and '[i]n truth the conception in question [i.e. causation] is not susceptible of reduction to a satisfactory formula' [(1954) 91 CLR 268 at 278].
That said, the 'but for' test, applied as a negative criterion of causation, has an important role to play in the resolution of the question. So much was conceded by Dixon CJ, Fullagar and Kitto JJ in *Fitzgerald v Penn* [(1954) 91 CLR 268 at 276-277] in their discussion of the unreported decision of this Court in *Skewes v Public Curator (Qld)* (6 September 1954) where A and B were driving their vehicles at excessive speeds in conditions of poor visibility so that their vehicles collided. A was on his correct side of the road, B was not. A's negligence was not causative of injury. Their Honours pointed out that, had the action been tried by a jury, it would have been correct for the judge to instruct the jury 'to ask themselves the question whether they were satisfied that the collision would not have taken place with the same results if driver A had been driving at a reasonable speed'. See also *ICIANZ Ltd v Murphy* [(1973) 47 ALJR 122 at 127-128]; *Duyvelshaff v Cathcart & Ritchie Ltd* [(1973) 47 ALJR 410 at 414-417, 419; 1 ALR 125 at 134-135, 138, 142-143].
The commentators acknowledge that the 'but for' test must be applied subject to certain qualifications. Thus, a factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not causally connected with the injury, unless the risk of the accident occurring at that time was greater: see Hart and Honoré, at p. 122. As Windeyer J observed in *Faulkner v Keffalinos* [(1970) 45 ALJR 80 at 86]:

> 'But for the first accident, the [plaintiff] might still have been employed by the [defendants], and therefore not where he was when the second accident happened: but lawyers must eschew this kind of 'but for' or sine qua non reasoning about cause and consequence.'

The 'but for' test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test 'gives the result, contrary to common sense, that neither is a cause': *Winfield and Jolowicz on*

Tort , 13th ed. (1989), p. 134. In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury: see e.g., *Chapman v Hearse; Baker v Willoughby* [[1970] AC 467]; *McGhee v National Coal Board; M'Kew* (to which I shall shortly refer in some detail). The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations."

He continued (at 517-519):

"In similar fashion, the 'but for' test does not provide a satisfactory answer in those cases in which a superseding cause, described as a novus actus interveniens, is said to break the chain of causation which would otherwise have resulted from an earlier wrongful act. Many examples may be given of a negligent act by A which sets the scene for a deliberate wrongful act by B who, fortuitously and on the spur of the moment, irresponsibly does something which transforms the outcome of A's conduct into something of far greater consequence, a consequence not readily foreseeable by A. In such a situation, A's act is not a cause of that consequence, though it was an essential condition of it. No doubt the explanation is that the voluntary intervention of B is, in the ultimate analysis, the true cause, A's act being no more than an antecedent condition not amounting to a cause. But this explanation is not a vindication of the adequacy of the 'but for' test.

The facts of, and the decision in, *M'Kew* [1970 SC (HL) 20] illustrate the same deficiency in the test. The plaintiff would not have sustained his ultimate injury but for the defendant's negligence causing the earlier injury to his left leg. His subsequent action in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance resulted in a severe fracture of his ankle. This action was adjudged to be unreasonable and to sever the chain of causation. The decision may be explained by reference to a value judgment that it would be unjust to hold the defendant legally responsible for an injury which, though it could be traced back to the defendant's wrongful conduct, was the immediate result of unreasonable action on the part of the plaintiff. But in truth the decision proceeded from a conclusion that the plaintiff's injury was the consequence of his independent and unreasonable action.

The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. In some situations a defendant may come under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk: see *Chomentowski v Red Garter Restaurant Ltd* [(1970) 92 WN (NSW) 1070]. To deny recovery in these situations because the intervening action is deliberate or voluntary would be to deprive the duty of any content.

It has been said that the fact that the intervening action was foreseeable does not mean that the negligent defendant is liable for damage which results from the intervening action: see *Chapman v Hearse* [(1961) 106 CLR 112 at 122]; *M'Kew* [1970 SC (HL) 20 at 25]; *Caterson v Commissioner of Railways* [(1973) 128 CLR 99 at 110]. But it is otherwise if the intervening action was in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence. In *Dorset Yacht* [[1970] AC 1004 at 1030], Lord Reid observed:

> 'But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal

> action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant.'
>
> Much the same approach was adopted by this Court in *Caterson* where Gibbs J [(1973) 128 CLR 99 at 110] (with whom Barwick CJ, Menzies and Stephen JJ agreed) pointed out that, if the plaintiff's action in jumping from the train was, in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence and was not unreasonable, the jury was entitled to find that the plaintiff's injuries were caused by the defendant's negligence. The finding that the plaintiff's action was not unreasonable was then essential to that conclusion because contributory negligence was a defence in New South Wales at the relevant time. See also *Chapman v Hearse* [(1961) 106 CLR 112 at 124-125]; and note the reference in *Mahony* [(1985) 156 CLR 522 at 529], to the acceptance by Gibbs J in *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* [(1975) 132 CLR 323 at 329-330], of the suggestion that, if a pedestrian were run over by two drivers consecutively and both were negligent, the injuries caused by the second driver would be damage for which both drivers were liable if those injuries were also the foreseeable consequence of the first driver's negligence.
>
> As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the 'but for' test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it."

AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 (27 July 2001) (Mason P, Handley and Heydon JJA)

9 The plaintiff placed at the forefront of her submissions in relation to this ground a reference to Dixon CJ's remark in argument in *Chapman v Hearse* (1961) 106 CLR 112 at 115 : "I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence". If that truism were a complete statement of the law on reasonable foreseeability, it would read the requirement that foreseeability be reasonable out of the law; but it did not purport to be, and is not, a complete statement of the law. That which is "foreseeable" is not to be confused with that which is "reasonably foreseeable": *Lamb v Camden London Borough Council* [1981] QB 625 at 642-643 per Oliver J. Whether or not the test of reasonable foreseeability is a demanding test, it is a test with some content. In *Jaensch v Coffey* (1984) 155 CLR 549 at 571-2 Brennan J said that issues of reasonable foreseeability, causation and remoteness:

> "are all questions of fact, but they are questions of impression and degree which cannot be directly proved by evidence of what is too remote and what is not, of what is reasonably foreseeable and what is not. They are matters of judgment for the jury or, where there is no jury, for the judge. Hence Lord Wright in *Bourhill v Young* [1943] AC 92 at 110, in answer to the

question where the thing is to stop, replied that 'it should stop where in the particular case the good sense of the jury or of the judge decides'. The stopping point is not to be defined as a proposition of law, nor are new principles to be invented to stop the thing going too far ....
... The thing will stop where good sense in the finding of facts stops it .... Of course, the room for judgment is manifest as it always is in the evaluation of facts, but that provides no warrant for introducing new criteria to limit liability."

In *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 398-9, Windeyer J said:

"Whether at some time in the past the prospect of the happening of an event which in fact happened was such that it created an obligation to take precautions against it is called a question of fact. It is really a value judgment upon ascertained facts."

In *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35 at [7] , Malcolm CJ said:

"The question of reasonable foresight is more than a question of fact because it involves a value or qualitative judgment about the standard of reasonableness of human behaviour or capacity."

In *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 397, Windeyer J said:

"Foreseeability here predicates the foresight of a reasonable man. The reasonable man is not here anyone on the Clapham omnibus. He is a man who notionally stood in the shoes of the defendant and had such knowledge, and capacity for care and foresight, as that defendant actually had and in addition such as a reasonable man in that position is expected to have. He is, in the words of Lord Wright in *Bourhill v Young* [1943] AC 92 at 111, 'a reasonable hypothetical observer'. He is not a seer who can foretell future occurrences that are quite unlikely according to the natural and ordinary course of events. Happenings that were fortuitous, in the sense that no reasonable man would have thought of them as within the range of possible consequences, cannot be said to have been reasonably foreseeable. And knowledge after the events, when it is easy to be wise, cannot shew that the event was foreseeable. Fullagar J spoke of this in *Rae v Broken Hill Pty Co Ltd* (1957) 97 CLR 419 at 422 :

'The fact of the happening of the accident is, of course, itself a relevant consideration, but, in considering whether it ought to have been foreseen, it is wrong to take as the standard of comparison a person of 'infinite resource-and-sagacity'.'"

See also *Morgan v Tame* (2000) 49 NSWLR 21 at [41] , [128-131], [161]-162] and [166].

Radovanovic v Brisbane City Council [2001] QSC 264 -
Desmond v Cullen [2001] NSWCA 238 -
Desmond v Cullen [2001] NSWCA 238 -
Linda McAulley as representative of the Estate of the late Basil Upton v Alcoa of Australia Ltd [2001] WADC 126 -
Rosenberg v Percival [2001] HCA 18 -
Smith v The Roman Catholic Archbishop of Perth [2001] WASC 86 -
Schneider v Hoechst Schering Agrevo Pty Ltd [2001] FCA 102 -
Schneider v Hoechst Schering Agrevo Pty Ltd [2001] FCA 102 -
White v Malco [2000] NSWSC 1165 (21 December 2000) (James J)

35 Kirby P, with whose judgment Priestley JA concurred, said that the test for remoteness of damage in actions in tort is an "undemanding" one (at p463). His Honour considered that an illustration of how undemanding the test was, was that the plaintiff had succeeded in "the unlikely chain of events involved in Chapman v Hearse" (1961) 106 CLR 112 . As Kirby P pointed out, "in that

case, the driver of a car (Chapman) was thrown on to the side of the road as a result of an accident. A passing medical practitioner (whose executor was the plaintiff) stopped to help. He was, in turn, struck and killed by another passing motorist".

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 (23 November 2000) (Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ)

100. In almost every case in which a plaintiff suffers damage it is foreseeable that, if reasonable care is not taken, harm may follow. The conclusion that harm was foreseeable is wellnigh inevitable. As Dixon CJ said in argument in *Chapman v Hearse* [105] , "I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence." Foresight of harm is not sufficient to show that a duty of care exists.

via

[105] (1961) 106 CLR 112 at 115.

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Lisle v Brice and MMI [2000] QDC 228 (04 August 2000) (Judge Forde)

25. The conceptual distinction between reasonable foreseeability as a test for both remoteness of damage and causation has to be recognised: *Chapman v. Hearse* (1961) 106 CLR 112 at 122 :

> "...in effect, the argument of the respondent proceeded upon the basis that if the ultimate damage was 'reasonably foreseeable' that circumstance would conclude this aspect of the matter against the appellant. But what this argument overlooks is that when the question is whether damage ought to be attributed to one of several 'causes' there is no occasion to consider reasonable foreseeability on the part of the particular wrongdoer unless and until it appears that negligent act or omission alleged has, in fact, caused the damage complained of. As we understand the term 'reasonably foreseeable' is not, in itself, a test if 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act."

Lisle v Brice and MMI [2000] QDC 228 -
Lisle v Brice and MMI [2000] QDC 228 -
Plumb v State of Queensland [2000] QCA 258 -
Plumb v State of Queensland [2000] QCA 258 -
James Hardie & Co Pty Ltd v Wyong Shire Council [2000] NSWCA 107 -
James Hardie & Co Pty Ltd v Wyong Shire Council [2000] NSWCA 107 -
Beale v Meehan [2000] NSWSC 282 -
Beale v Meehan [2000] NSWSC 282 -
Trenorth Ltd v Mallesons Stephen Jaques [2000] HCATrans 61 (08 March 2000) (Gleeson CJ; Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

The other reference is to *Chapman v Hearse* , 106 CLR 112. The reference to the intervening event having effectively to stand as the sole cause appears in two places: at 120 , the foot of the page, to 121 and at 122 at about point 7 on the page. But can I add to that reference, your Honour, that the same approach was taken by this Court in two cases. The first is *Mahony v Kruschich (Demolitions) Pty Ltd* , 165 CLR 522 at 528 to 529 . The other reference in this Court is to – I am sorry, I withdraw that, it is a reference to the judgment of Mr Justice McHugh in *Alexander v Cambridge Credit* (1987) 9 NSWLR 310, and the passage is at 361 to 362 where, and I will paraphrase, his Honour said that an independent intervening event only breaks the chain of causation if it can be treated in a practical sense as the sole cause. It is worth taking the Court to

Trenorth Ltd v Mallesons Stephen Jaques [2000] HCATrans 61 -
Trenorth Ltd v Mallesons Stephen Jaques [2000] HCATrans 61 -
Trenorth Ltd v Mallesons Stephen Jaques [2000] HCATrans 61 -
Seltsam Pty Ltd v McGuiness [2000] NSWCA 29 (07 March 2000)

262 As stated by Windeyer J in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 402 foreseeability does not require foresight of the particular event causing the harm. It does not suppose foresight of the particular harm that occurred. The plaintiff need not prove a distinct or particular injury but only that the injury suffered falls into a class of injury which ought reasonably have been foreseen as a consequence of conduct. The plaintiff had a significant and prolonged exposure to asbestos dust and fibre from the age of 15 years, until his retrenchment in 1991. He was exposed to asbestos dust and fibre for much of his 41 years of employment with the appellants. That his exposure caused a cancer in the kidney as opposed to the lung, the pleura or peritoneum, does not mean that it falls into a different class and was not foreseeable (*Chapman v Hearse* (1961) 106 CLR 112 .

Hosking v Pacific Partner Pty Ltd [1999] QCA 484 -
Hosking v Pacific Partner Pty Ltd [1999] QCA 484 -
Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843 (26 August 1999) (Abadee J)
Chapman v Hearse (1961) 106 CLR 112 ;

Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843 -
Perre v Apand Pty Ltd [1999] HCA 36 (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

186. It also should be remembered that it was not until comparatively recently that this Court determined that responsibility does not depend upon "the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of" [219] and the Privy Council classified as sufficient a "real risk" which would not be brushed aside as far-fetched [220] . The incautious application of criteria which stipulate "foreseeability" may, in economic loss cases, have the undesirable consequences to which Breyer J has pointed. In *Barber Lines A/S v M/V Donau Maru*, his Honour said [221] :

> "To use the notion of 'foreseeability' that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases (unless it leads courts, unwarrantedly, to narrow the scope of 'foreseeability' as applied to persons suffering physical harm)."

However, it needs to be kept in mind, particularly for the present appeal, that the criterion is " *reasonable* foreseeability". Liability is to be imposed for consequences which Apand, judged by the standard of the reasonable man, ought to have foreseen [222] . Such a proposition was identified by Professor Stone as presenting a category of indeterminate reference[223]. This, it should be accepted, allows in a given case, particularly one where the damage alleged was inflicted upon the economic interests of the plaintiff, for interaction between facts and values.

via

[219] *Chapman v Hearse* (1961) 106 CLR 112 at 121.

Kenny & Good Pty Ltd v MGICA (1992) Ltd [1999] HCA 25 -
Kenny & Good Pty Ltd v MGICA (1992) Ltd [1999] HCA 25 -

Murfet, Jane Carolyn v AAPC Australia Pty Ltd, Carrying on Business as Novotel Launceston [1999] TASSC 6 -
Murfet, Jane Carolyn v AAPC Australia Pty Ltd, Carrying on Business as Novotel Launceston [1999] TASSC 6 -
Murfet, Jane Carolyn v AAPC Australia Pty Ltd, Carrying on Business as Novotel Launceston [1999] TASSC 6 -
Kavanagh v Akhtar [1998] NSWSC 779 (23 December 1998) (Mason P, Priestley and Handley JJA)

Assaf v Kostrevski (Court of Appeal, 30 September 1998, unreported) Castellan v Electric Power Transmission Pty Ltd (1967) 69 SR (NSW) 159 ; 87 WN (NSW) (Pt 2) 67 Chapman v Hearse (1961) 106 CLR 112 Chappel v Hart (1998) 72 ALJR 1344 ; 156 ALR 517 Commonwealth v McLean (1996) 41 NSWLR 389 Encev v Encev (Supreme Court of Victoria, 24 November 1997, unreported) Griffiths v Kerkemeyer (1977) 139 CLR 161 Haynes v Harwood [1935] 1 KB 146 Hird v Gibson [1974] Qd R 14 Hughes v Lord Advocate [1963] AC 837 Kadic v Thiess Bros Pty Ltd (1967) 67 SR (NSW) 411 ; 86 WN (NSW) (Pt 2) 270 Lampert v Eastern National Omnibus Co Ltd [1954] 1 WLR 1047 ; [1954] 2 All ER 719 Lynch v Knight (1861) 9 HLC 577 ; 11 ER 854 Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522 March v E & M H Stramare Pty Ltd (1991) 171 CLR 506 Medlin v State Government Insurance Commission (1995) 182 CLR 1 Nader v Urban Transit Authority (NSW) (1985) 2 NSWLR 501 Namala v Northern Territory (1996) 131 FLR 468 NSW Insurance Ministerial Corporation v Myers (1995) 21 MVR 295 Overseas Tankship (UK) Ltd v Mort's Dock & Engineering Co Ltd (The "Wagon Mound" [No 1]) [1961] AC 388 Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The "Wagon Mound" [No 2]) [1967] 1 AC 617 Polemis and Furness, Withy & Co Ltd, Re [1921] 3 KB 560 Quilter v Mapleson (1882) 9 QBD 672 Rose v Chang-Sup Kwow (Supreme Court of the Australian Capital Territory, Miles CJ, June 1996, unreported) Siwek v Lambourn [1964] VR 337 Stapley v Gypsum Mines Ltd [1953] AC 663 Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485

Kavanagh v Akhtar [1998] NSWSC 779 -
Kavanagh v Akhtar [1998] NSWSC 779 -
Emanuele v Hedley [1998] FCA 709 (19 June 1998)

> In the present case it cannot be doubted Mr Emanuele's decision to offer Mr Hedley a bribe represented a "rational and voluntary decision to engage in criminal activity". On the basis that Mr Hedley in fact acted in the manner alleged in the Amended Statement of Claim, it was a foreseeable decision, and so within the outer limit stated in *Chapman.* But that is not sufficient to enable recovery of damages. Particularly having regard to its known criminality, Mr Emanuele's own voluntary act must be regarded as the cause of his alleged damage, rather than the conduct he attributes to Mr Hedley. As a matter of law, the action for intentional infliction of economic harm must fail.

Emanuele v Hedley [1998] FCA 709 -
Emanuele v Hedley [1998] FCA 709 -
Eaves, Christopher Ronald v Huon Valley Council [1998] TASSC 66 -
Eaves, Christopher Ronald v Huon Valley Council [1998] TASSC 66 -
Eaves, Christopher Ronald v Huon Valley Council [1998] TASSC 66 -
Scrase v Jarvis [1998] QSC 49 -
CSR Ltd v Wren 44 NSWLR 463 -
CSR Ltd v Wren 44 NSWLR 463 -
Kenny & Good Pty Ltd v MGICA (1992) Ltd [1997] FCA 743 -
Kenny & Good Pty Ltd v MGICA (1992) Ltd [1997] FCA 743 -
Kenny & Good Pty Ltd v MGICA (1992) Ltd [1997] FCA 743 -
Bendix Mintex Pty Ltd v Barnes 42 NSWLR 307 -
Bendix Mintex Pty Ltd v Barnes 42 NSWLR 307 -
Commonwealth v McLean [1996] NSWSC 657 (31 December 1996) (Handley JA, Beazley JA and Santow A-Ja)

Aboushadi v CIC Insurance Ltd [1996] Aust Torts Rep 63,336 Adelaide Stevedoring Co Ltd v Forst (1940) 64 CLR 538 American Airlines Inc v Georgeopoulos (Court of Appeal, 26 September 1996, unreported) Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 Bennett v Minister of Community Welfare (1992) 176 CLR 408 Bonnington Castings Ltd v Wardlaw [1956] AC 613 Briggs v

James Hardie & Co Pty Ltd (1989) 16 NSWLR 549 Browne v Dunn (1893) 6 R 67 Carlsholm (Owners) v Calliope (Owners), "The Calliope" [1970] P 172 Chapman v Hearse (1961) 106 CLR 112 Clough v Frog (1974) 48 ALJR 481 ; 4 ALR 615 Commonwealth v Dinnison (1995) 56 FCR 389 Commonwealth v Mewett (1995) 59 FCR 391 Dublin, Wicklow & Wexford Railway Co v Slattery (1878) 3 App Cas 1155 D uyvelshaff v Cathcart & Ritchie Ltd (1973) 47 ALJR 410 Gilbert (FB) (Deceased), Re Will of (1946) 46 SR (NSW) 318 ; 63 WN (NSW) 176 Harris v Commercial Minerals Ltd (1996) 186 CLR 1 Havenaar v Havenaar [1982] 1 NSWLR 626 Hotson v East Berkshire Health Authority [1987] AC 750 House v The King (1936) 55 CLR 499 Hughes v Lord Advocate [1963] AC 837 Jaensch v Coffey (1984) 155 CLR 549 Le otta v Public Transport Commission (NSW) (1976) 50 ALJR 666 McGhee v National Coal Board [1973] 1 WLR 1 ; [1972] 3 All ER 1008 McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621 Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd (1996) 40 NSWLR 543 Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522 Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 March v E & M H Stramare Pty Ltd (1991) 171 CLR 506 Medlin v State Government Insurance Commission (1995) 182 CLR 1 Mt Isa Mines Ltd v Pusey (1970) 125 CLR 383 Munce v Vinidex Tubemakers Pty Ltd [1974] 2 NSWLR 235 Nader v Urban Transit Authority (NSW) (1985) 2 NSWLR 501 Nicholson v Atlas Steel Foundry and Engineering Co Ltd [1957] 1 WLR 613 ; [1957] 1 All ER 776 Overseas Tankship (UK) Ltd v Mort's Dock & Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388 Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617 Page v Smith [1996] 1 AC 155 Power v Snowy Mountains Hydro-Electric Authority (1956) 57 SR (NSW) 9 Purkess v Crittenden (1965) 114 CLR 164 Quinn v Cameron & Robertson Ltd [1958] AC 9 R v Chan-Fook [1994] 1 WLR 689 ; [1994] 2 All ER 552 Richards v Victoria [1969] VR 136 Roe v Minister of Health [1954] 2 QB 66 Rowe v McCartney [1976] 2 NSWLR 72 Shanno n v Lee Chun (1912) 15 CLR 257 Smith v Leech Brain & Co Ltd [1962] 2 QB 405 State Pollution Control Commission v Australian Iron & Steel Pty Ltd (1992) 29 NSWLR 487 Stephenson v Waite Tileman Ltd (1973) 1 NZLR 152 Sutherland Shire Council v Heyman (1985) 157 CLR 424 Thompson v Thompson (1942) 59 WN (NSW) 219 Tubemakers of Australia Ltd v Fernandez (1976) 50 ALJR 720 U nited Motors Retail Ltd v Australian Guarantee Corporation Ltd (1991) 58 SASR 156 Wilsher v Essex Area Health Authority [1988] AC 1074 Youell v Bland Welsh & Co Ltd (No 2) [1990] 2 Lloyd's Rep 431

Commonwealth v McLean [1996] NSWSC 657 -
MGICA (1992) Ltd v Kenny & Good Pty Ltd [1996] FCA 766 -
MGICA (1992) Ltd v Kenny & Good Pty Ltd [1996] FCA 766 -
Nominal Defendant v Gardikiotis [1996] HCA 53 (24 April 1996) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

5 Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) (1961) AC 388 at 423, 425 ; Chapman v Hearse (1961) 106 CLR 112 at 122.

6 Livingstone v Rawyards Coal Company

Cash Resources Aust Pty Ltd v Brett [1996] QSC 32 -
Bale v Seltsam Pty Ltd [1995] QSC 306 -
Sandra Visser v South Australian Housing Trust No. SCGRG 95/104 Judgment No. 5275 Number of Pages 13 Negligence (1995) 65 Sasr 571 [1995] SASC 5275 -
Chief Commissioner of Police v Hallenstein [1996] 2 VR 1 -
Thomas Borthwick And Sons (Australasia) Ltd and Anor v Samco Meats Pty Ltd [1995] 2 VR 474 (11 July 1995) (Brooking, Hayne and Charles JJA)

Once it is understood that the "damage" spoken of in the contribution legislation is, in an action such as the present, "what the plaintiff suffers as the foreseeable consequence of the tortfeasor's act or omission" it is apparent that the issue raised by claims made by an employee against successive employers will, in at least many cases, raise a difficult question of fact and degree whether the injury suffered in the course of the later employment was a foreseeable consequence of the first employer's negligence. As the court said in Mahony's case at 528: A negligent tortfeasor does not always avoid liability for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence. A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or

because the chain of causation is broken by a novus actus interveniens: M'Kew v Holland and Hannen and Cubitts [[1970] SC(HL) 20 at 25]. But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone: see Chapman v Hearse [(1961) 106 CLR 112 at 124-125].

Thomas Borthwick And Sons (Australasia) Ltd and Anor v Samco Meats Pty Ltd [1995] 2 VR 474 -
Bryan v Maloney [1995] HCA 17 -
Hooker v Farquhar [1995] QSC 35 -
APQ v Commonwealth Serum Laboratories Ltd [1999] 3 VR 633 (02 February 1995) (Harper J)
Chapman v Hearse (1961) 106 C.L.R. 112 ; Wyong Shire Council v Shirt (1980) 146 C.L.R. 40 ; Jaensch v Coffey (1984) 155 C.L.R. 549 referred to.

APQ v Commonwealth Serum Laboratories Ltd [1999] 3 VR 633 -
APQ v Commonwealth Serum Laboratories Ltd [1999] 3 VR 633 -
Zalewski v Turcarolo [1995] 2 VR 562 -
State Rail Authority of New South Wales v Wiegold 25 NSWLR 500 -
State Rail Authority of New South Wales v Wiegold 25 NSWLR 500 -
State Rail Authority of New South Wales v Wiegold 25 NSWLR 500 -
Lynch v Lynch 25 NSWLR 411 -
Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54 -
Goss v Mount Lyell Mining and Railway Company Ltd [1991] TASSC 100 (05 November 1991)

25. As a matter of judicial comity I should follow that approach unless I am convinced that it is plainly erroneous or has been affected by binding authority. With the greatest of respect to his Honour, I take the view that as a matter of logic and construction, the approach which he adopted was plainly erroneous, but that in any event it proceeded upon an invalid premise. That premise was that any other construction would be anomalous and would result in injustice. *Harvey* 's case was decided prior to the decision of the High Court in *Fox v Wood* (198 1) 148 CLR 438. That case was concerned with a provision in the *Workmen's Compensation Act* 1971 (SA) which required that a worker who received damages from a third party in respect of an injury as to which compensation had been paid under the Act to repay to the employer such amount of compensation as did not exceed the amount recovered from the third party. It was common ground before the High Court that the relevant provision required the employee to pay the gross amount of compensation paid. Contrary to the suggestion appearing in the head note of the report of this case at 35 ALR 607, there was no express reference to income tax in the relevant section. The court held that the plaintiff was entitled to recover damages representing the additional loss occasioned by her having to repay the gross amount of workers' compensation when she had had the benefit of only the net amount after tax. The basis for this was expressed by Gibbs CJ, at pp 440–441, in the following terms:

> "It is established by *Cullen v Trappell* (1980) 146 CLR 1 that in assessing damages for loss of earning capacity the tax which a plaintiff would have paid on the earnings of which he has been deprived must be taken into account. To assess damages on the basis that the plaintiff has lost his gross earnings, when in fact the earnings would have been subject to tax, and the award of damages is not subject to tax, would give the plaintiff more than he had really lost, and would depart from the fundamental principle referred to in *British Transport Commission v Gourley* [1956] AC 185, at p 197, 'that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries.' That general principle must of course govern the present case, but the particular application of it in *Cull en v Trappell* is not of assistance in determining the question that now arises.
>
> A trial judge, in assessing damages in a case such as the present, must first determine what loss of earnings the plaintiff has suffered, using net earnings as

the basis of the assessment. Then the effect of the receipt of the workers' compensation must be considered. The receipt of workers' compensation is not something too remote to be taken into consideration for this purpose. I have referred to this question in *Batchelor v Burke* (1981) 148 CLR 448 and need not repeat what I there said. If the legislation did not require a plaintiff who had been paid damages to repay the compensation which he had received, clearly the receipt of the compensation would reduce the damages otherwise payable. If, on the other hand, the plaintiff repaid to the employer the net amount of compensation which he had received, so that he neither gained nor lost anything by the receipt and repayment, the question of workers' compensation could for practical purposes be ignored in the assessment of damages. ...

... However, it is obvious that as a matter of fact the respondent received the workers' compensation because she had been injured. Moreover her conduct in accepting the compensation was reasonably foreseeable. Indeed it would be surprising and exceptional for a worker entitled to compensation to refuse it on the ground that he or she might later receive damages; the legislation provides that the worker may receive the compensation notwithstanding the existence of a right to damages, and generally speaking it would be imprudent of a worker not to accept it: for one thing, the claim for damages might fail. The receipt of the compensation was a natural and foreseeable consequence of the injuries, and the repayment is not, as was suggested in argument, a special loss due to the financial embarrassment of the respondent, within the principle of *Liesbosch, Dredger v Edison, SS (Owners)* [1933] AC 449. The act of the respondent in accepting the payments was not a superseding cause of the respondent's loss on repayment; see *Chapman v Hearse* (1961) 106 CLR 112, at pp 124–125 .

The Full Court took the view that the damages for that portion of the lost earnings which was replaced by the compensation should be assessed by having regard to the gross earnings lost, because if the respondent received damages 'assessed on a net after tax basis', but had to repay the equivalent in full, she would receive less than her true loss. Although I agree with their Honours' conclusion, it seems to me that it is not right to regard the question for decision as whether the respondent's loss of earnings is to be assessed after taking tax into account, notwithstanding her receipt of payments of workers' compensation. The question is rather whether the receipt and repayment of the compensation increased the respondent's loss, and if so whether that increased loss was caused by the appellant's negligence and was not too remote to be taken into account. For the reasons I have given I consider that the respondent should be compensated for this additional loss, and that if it were not taken into account the damages would provide inadequate compensation for the consequences of her injuries."

Gala v Preston [1991] HCA 18 -
March v E & MH Stramare Pty Ltd [1991] HCA 12 -
March v E & MH Stramare Pty Ltd [1991] HCA 12 -
Commonwealth of Australia v Lee, C.D [1991] FCA 273 -
Byrnes v Groote Eylandt Mining Co Pty Ltd 19 NSWLR 13 -
Byrnes v Groote Eylandt Mining Co Pty Ltd 19 NSWLR 13 -
Byrnes v Groote Eylandt Mining Co Pty Ltd 19 NSWLR 13 -
March v E. & M. H. Stramare Pty Ltd [1989] HCATrans 189 -
Campbelltown City Council v Mackay 15 NSWLR 501 (10 February 1989) (Kirby P, Samuels and McHugh JJA)

Attia v British Gas Plc [1988] QB 304 . Bailey v Bullock [1950] 2 All ER 1167 . Barnes v Hay (1988) 12 NSWLR 337 . Battista v Cooper (1976) 14 SASR 225 . Benson v Lee [1972] VR 879 . Bourhill v Young [1943] AC 92 . Burton v Pinkerton (1867) LR 2 Exch 340 . Chapman v Hearse (1961) 106 CLR 112 . D Galambos & Son Pty Ltd v McIntyre (1974) 5 ACTR 10 . Dillon v Legg 441 P 2d 912 (1968) . Donoghue

v Stevenson [1932] AC 562 . Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 . Falko v James McEwan & Co Pty Ltd [1977] VR 447 . Heywood v Wellers [1976] QB 446 . Hinz v Berry [1970] 2 QB 40 . Hobbs v London & South Western Railway Co (1875) LR 10 QB 111 . Hoffmueller v Commonwealth (1981) 54 FLR 48 . Jansen v Children's Hospital Medical Center of East Bay 106 Cal Rptr 883 (1973) . Jarvis v Swans Tours Ltd [1973] QB 233 . Kohn v State Government Insurance Commission (1976) 15 SASR 255 . Krouse v Graham 562 P 2d 1022 (1977) . McLoughlin v O'Brian [1983] 1 AC 410 . Mafo v Adams [1970] 1 QB 548 . Nader v Urban Transit Authority of New South Wales (1985) 2 NSWLR 501 . Ochoa v Superior Court of Santa Clara County 703 P 2d 1 (1985) . Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388 . Owens v Liverpool Corporation [1939] 1 KB 394 . Rowe v McCartney [1976] 2 NSWLR 72 . Schneider v Eisovitch [1960] 2 QB 430 . Shelley v Paddock [1979] QB 120 . Sutherland Shire Council v Heyman (1985) 157 CLR 424 . Swan v Williams (Demolition) Pty Ltd (1987) 9 NSWLR 172 .

Jenkins v Hansen and Yuncken (Tasmania) Pty Ltd [1989] TASSC 9 -
Jenkins v Hansen and Yuncken (Tasmania) Pty Ltd [1989] TASSC 9 -
Jenkins v Hansen and Yuncken (Tasmania) Pty Ltd [1989] TASSC 9 -
Jenkins v Hansen and Yuncken (Tasmania) Pty Ltd [1989] TASSC 9 -
Barnes v Hay 12 NSWLR 337 (31 March 1988) (Hope, Mahoney and Priestley JJA)

Alexander v Cambridge Credit Corporation Ltd (1987) 9 NSWLR 310 ; 12 ACLR 202 ; 5 ACLC 587 . Boy Andrew (Owners) v St Rognvald (Owners) [1948] AC 140 . Chapman v Hearse (1961) 106 CLR 112 . Fitzgerald v Penn (1954) 91 CLR 268 . Grant v Sun Shipping Co Ltd [1948] AC 549 . Hamilton Fraser & Co v Pandorf & Co (1887) 12 App Cas 518 . Helton v Allen (1940) 63 CLR 691 . Hoffmueller v Commonwealth (1981) 54 FLR 48 . Knightley v Johns [1982] 1 WLR 349 ; [1982] 1 All ER 851 . Liesbosch Dredger (Owners) v Steamship Edison (Owners) [1933] AC 449 . Nader v Urban Transit Authority of New South Wales (1985) 2 NSWLR 501 . National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569 . Pandorf & Co v Hamilton Fraser & Co (1885) 16 QBD 629 ; (1886) 17 QBD 670 . Stansbie v Troman [1948] 2 KB 48 . Yorkshire Dale Steamship Co Ltd v Minister of War Transport; The Coxwold [1942] AC 691 .

Barnes v Hay 12 NSWLR 337 -
Barnes v Hay 12 NSWLR 337 -
Barnes v Hay 12 NSWLR 337 -
Barnes v Hay 12 NSWLR 337 -
Barnes v Hay 12 NSWLR 337 -
Barnes v Hay 12 NSWLR 337 -
Alexander v Cambridge Credit Corporation Ltd 9 NSWLR 310 (25 June 1987) (Glass, Mahoney and McHugh JJA)

The use of terms such as ‘reason’, ‘opportunity’ and ‘occasion’ is, of course, one of convenience only. They do not conclude the question whether what the defendant did was the cause of the relevant loss. There are cases in which the wrong may be the reason of or may have offered the opportunity for that to which it led, and yet may not be the cause of it. The authors of Causation in the Law did not, I think, suggest otherwise: cf Mackie (at 120-126). What these terms do is to draw attention to the things the presence or absence of which in such relationships have been seen by the courts to be relevant in deciding the causal relationship of them. There are, for example, cases in which the defendant in doing what constitutes the wrong did not intend the second actor to do what he did but has been held to have caused what the second actor’s action led to. Thus, where the subsequent act is the kind of thing apt to be done if the defendant commits the wrong in question, it may be appropriate to hold the wrong to be the cause of what flows from the subsequent act: cf Chapman v Hearse (at 121). If the defendant had a duty to do or not to do that which constitutes the wrong, in order that the subsequent act should not, or should, be done, it may be appropriate to find his act or omission to be the cause of the subsequent act and what it led to: the servant who leaves open his employer’s front door may, on this basis, be held to have caused the loss resulting from the robbery on the premises. And an omission by the defendant may be the cause of what the subsequent act led to where that omission created the situation and danger upon which the subsequent act operated: thus, a defendant’s failure to repair the brakes of a truck may be the cause of the injury to the plaintiff which flows from the driving of it by a third person. I do

not mean, by these examples, to exhaust the factors which have been seen relevant in determining whether the particular relation- ship should be held to be causal. But it is relevant to refer to such examples and to the others referred to in Hart & Honore and the other discussions of this problem, in order to decide whether, in the facts of the present case, there is something which warrants the defendant being held to have caused the onset of the Ganser Syndrome."

Alexander v Cambridge Credit Corporation Ltd 9 NSWLR 310 -
Alexander v Cambridge Credit Corporation Ltd 9 NSWLR 310 -
Alexander v Cambridge Credit Corporation Ltd 9 NSWLR 310 -
Alexander v Cambridge Credit Corporation Ltd 9 NSWLR 310 -
Cook v Schuettpelz [1987] TASSC 35 -
Mecho Constructions Pty Ltd v Ryan, W.R [1987] FCA 80 -
Mecho Constructions Pty Ltd v Ryan, W.R [1987] FCA 80 -
Mihaljevic v Longyear (Australia) Pty Ltd 3 NSWLR 1 -
Mihaljevic v Longyear (Australia) Pty Ltd 3 NSWLR 1 -
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Mihaljevic v Longyear (Australia) Pty Ltd 3 NSWLR 1 -
Mihaljevic v Longyear (Australia) Pty Ltd 3 NSWLR 1 -
Nader v Urban Transit Authority of New South Wales 2 NSWLR 501 (25 July 1985) (Samuels, Mahoney and McHugh JJA)

Alphacell Ltd v Woodward [1972] AC 824 . Baker v Willoughby [1970] AC 467 . Beavis v Apthorpe (1962) 80 WN (NSW) 852 . Bonnington Castings Ltd v Wardlaw [1956] AC 613 . Boy Andrew (Owners) v St Rognvald (Owners) [1948] AC 140 . Chapman v Hearse (1961) 106 CLR 112 . Chester v Waverley Municipal Council (1939) 62 CLR 1 . Cunningham v Harrison [1973] QB 942 . D C Thomson & Co Ltd v Deakin [1952] Ch 646 . Doughty v Turner Manufacturing Co Ltd [1964] 1 QB 518 . Duwyn v Kaprielian (1978) 94 DLR (3d) 424 . Fitzgerald v Penn (1954) 91 CLR 268 . Gamser v Nominal Defendant (1977) 136 CLR 145 . Grant v Sun Shipping Co Ltd [1948] AC 549 . Havenaar v Havenaar [1982] 1 NSWLR 626 . Hoffmueller v Commonwealth (1981) 54 FLR 48 . Hughes v Lord Advocate 1961 SC 310 ; reversed [1963] AC 837 . Jaensch v Coffey (1984) 58 ALJR 426 ; 54 ALR 417 . Jobling v Associated Dairies Ltd [1982] AC 794 . Kelly v Bega Valley County Council (Court of Appeal, 13 September 1982, unreported) . King v Phillips [1953] 1 KB 429 . Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350 . McGhee v National Coal Board [1973] 1 WLR 1 ; [1972] 3 All ER 1008 . McHale v Watson (1966) 115 CLR 199 . McLaren v Bradstreet (1969) 113 Sol Jo 471 . McLoughlin v O'Brian [1983] AC 410 . Miller v Jennings (1954) 92 CLR 190 . Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383 . National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569 . Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388 . Pennington v Norris (1956) 96 CLR 10 . Polemis and Furness Withy and Co Ltd, Re [1921] 3 KB 560 . R v Smith [1959] 2 QB 35 . Roe v Minister of Health [1954] 2 QB 66 . Rowe v McCartney [1976] 2 NSWLR 72 . Scott v Shepherd (1773) 2 Wm Bl 892 ; 96 ER 525 . Siwek v Lambourn [1964] VR 337 . Smith v Leech Brain & Co Ltd [1962] 2 QB 405 . Stansbie v Troman [1948] 2 KB 48 . Stapley v Gypsum Mines Ltd [1953] AC 663 . Walker-Flynn v Princeton Motors Pty Ltd (1960) 60 SR (NSW) 488 ; (1960) 77 WN (NSW) 381 . Yorkshire Dale Steamship Co Ltd v Minister of War Transport: The Coxwold [1942] AC 691 .

Nader v Urban Transit Authority of New South Wales 2 NSWLR 501 (25 July 1985) (Samuels, Mahoney and McHugh JJA)

I need not recapitulate the evidence which McHugh JA has analysed in detail. It establishes that the Ganser Syndrome represents a recognized psychiatric illness, although of rare occurrence and uncertain aetiology; and it is not open to doubt that a psychiatric illness of some kind is reasonably foreseeable as a consequence of physical injury. Hence it seems to me that what was foreseeable was harm "of the same general character" (Chapman v Hearse (1961) 106 CLR 112 at 120) as that in fact sustained; and Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383 denies the necessity for any more precise foresight of the harm. But the defendant submitted that the unduly protective

attitude of the plaintiff's parents played a critical role in the onset of his condition, and was unforeseeable. Hence, on the authority of McLaren v Bradstreet (1969) 113 Sol Jo 471, the plaintiff's claim failed, either because his parents' response was a novus actus or an illness so induced was too remote.

Nader v Urban Transit Authority of New South Wales 2 NSWLR 501 -
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Mahony v J Kruschich (Demolitions) Pty Ltd [1985] HCA 37 (11 June 1985) (Gibbs C.J., Mason, Wilson, Brennan and Dawson JJ.)

6. A negligent tortfeasor does not always avoid liability for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence. A line marking the boundary of the damage for which a tortfesor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens (M'Kew v. Holland &Hannen &Cubitts (1970) SC(HL)20, at p 25). But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone- see Chapman v. Hearse (1961) 106 CLR 112 , at pp 124-125 . Whether such a line can and should be drawn is very much a matter of fact and degree (ibid., p.122). In Dillingham, the plaintiff's condition after the subsequent injury was regarded as falling outside the area of foreseeable consequences of the earlier act of negligence: there were "two injuries, two unrelated acts of negligence". Barwick C.J. said (at p.327):

The Commonwealth of Australia v Ferguson, J.M [1985] FCA 65 -
The Commonwealth of Australia v Ferguson, J.M [1985] FCA 65 -
Jaensch v Coffey [1984] HCA 52 (20 August 1984) (Gibbs C.j., Murphy, Brennan, Deane and Dawson JJ)

4. A plaintiff must prove that a psychiatric illness for which damages are claimed has been caused by the defendant's act or omission: Chapman v. Hearse (1961) 106 CLR 112 , at p 122. Reasonable foreseeability of the damage is insufficient if the chain of causation is interrupted. A defendant is not liable if a novus actus intervenes between the defendant's conduct and the damage complained of: McKew v. Holland &Hannen &Cubitts (1969) 3 All ER 1621, at p 1623.

Jaensch v Coffey [1984] HCA 52 (20 August 1984) (Gibbs C.j., Murphy, Brennan, Deane and Dawson JJ)

> " In our view, it is still the law that, while reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like: Chapman v. Hearse (1961) 106 CLR 112 ; (1962) ALR 379 ; Chadwick v. British Railways Board, (1967) 1 WLR 912; (1967) 2 All ER 945; The Law of Torts 4th ed. (1971) Fleming p 157. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness. ... But beyond this the law has not yet gone nor do we think it is for us to attempt to take it" (underlining added).

Jaensch v Coffey [1984] HCA 52 -
Jaensch v Coffey [1984] HCA 52 -
J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER [1984] 1 NSWLR 622 (21 June 1984) (Moffitt P, Glass and Priestley JJA)

> The relevance of Chapman for present purposes is twofold. Although the meaning of "same damage" was not discussed, it was taken to be the physical event (damage-injury) which completed two causes of action arising indepen- dently but simultaneously from concurrent circumstances. This was the view taken by the court in Dillingham. Further, it provides an example close to that used by Gibbs J in Dillingham's case and suggests the explanation of it.

J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER [1984] 1 NSWLR 622 (21 June 1984) (Moffitt P, Glass and Priestley JJA)

> The second reason clearly appears at the end of the passage. The first employer cannot be held liable for the second injury because it was not a foreseeable consequence of the first tort and was therefore too remote from it to be a recoverable head of damage, the doctrine of remoteness marking the limits beyond which a tortfeasor is not liable for damage in fact caused by him: Chapman v Hearse (1961) 106 CLR 112 at 122. The first reason why the first tortfeasor is not liable for the second injury cannot be so readily identified. However, in the sentence emphasized I understand Barwick CJ to be saying that the second injury and the further damage to the plaintiff's back resulting from it could not be causally related to the first employer's tortious conduct.

J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER [1984] 1 NSWLR 622 -
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J KRUSCHICH (DEMOLITIONS) PTY LTD V MAHONY AND ANOTHER [1984] 1 NSWLR 622 -
Bell Wholesale Co Ltd v Gates Export Corporation [1984] FCA 34 -
Mitsui OSK Lines Ltd v The Ship Mineral Transporter [1983] 2 NSWLR 564 (18 October 1983) (Yeldham J)

> Anns v Merton London Borough Council [1978] AC 728 . Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529 . Chapman v Hearse (1961) 106 CLR 112 . Despina R, The [1979] AC 685 . HMS London [1914] P 72 . Junior Books Ltd v Veitchi Co Ltd [1982] 3 WLR 477 ; [1982] 3 All ER 201 . Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners) [1947] AC 265 . Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383 . Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 . Polemis and Furness Withy & Co Ltd, Re [1921] 3 KB 560 . Rowe v McCartney [1976] 2 NSWLR 72 . "World Harmony", The [1967] P 341 .

Mitsui OSK Lines Ltd v The Ship Mineral Transporter [1983] 2 NSWLR 564 -
Fagan v Crimes Compensation Tribunal [1982] HCA 49 -
Horkin v North Melbourne Football Club Social Club [1983] 1 VR 153 -
Havenaar v Havenaar [1982] 1 NSWLR 626 -
Havenaar v Havenaar [1982] 1 NSWLR 626 -
Martin v Abbott Australasia Pty Ltd [1981] 2 NSWLR 430 -
Fox v Wood [1981] HCA 41 -
Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd [1981] HCA 75 -
Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322 (26 September 1979) (Moffitt P., and Reynolds and Samuels Jj.A)

> Alford v. Magee (1952) 85 C.L.R. 437 . Arnold v. Cheque Bank (1876) 1 C.P.D. 578 . Arnott v. Redfern (1826) 3 Bing. 353 ; 130 E.R. 549 . Ashcroft v. Curtin [1971] 1 W.L.R. 1731 ; [1971] 3 All E.R. 1208 . Auburn Municipal Council v. A.R.C. Engineering Pty. Ltd. ; S. D. C. Kennedy and Bird Pty. Ltd. (Third Party) [1973] 1 N.S.W.L.R. 513 . Bank of Athens Société Anonyme v. Royal Exchange Assurance [1938] 1 K.B.

771 . Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees (1855) 5 H.L. Cas. 389 ; 10 E.R. 950 . Baxendale v. Bennett (1878) 3 Q.B.D. 525 . Bellingham v. Dhillon [1973] Q.B. 304 . Belous v. Willetts [1970] V.R. 45 . Bevan Investments Ltd. v. Blackhall and Struthers (No. 2) [1973] 2 N.Z.L.R. 45 . Bowen v. Blair [1933] V.L.R. 398 . Burrows v. March Gas Co. (1870) L.R. 5 Exch. 67 ; affirmed (1872) L.R. 7 Exch. 96 . Chapman v. Hearse (1961) 106 C.L.R. 112 . Claude R. Ogden & Co. Pty. Ltd. v. Reliance Fire Sprinkler Co. Pty. Ltd.; Davies (First Third Party); Stenhouse (N.S.W.) Ltd. (Second Third Party) [1973] 2 N.S.W.L.R. 7 . Cofield v. Waterloo Case Co. Ltd. (1924) 34 C.L.R. 363 . Commonwealth v. Huon Transport Pty. Ltd. (1945) 70 C.L.R. 293 . Cook v. Swinfen [1967] 1 W.L.R. 457 ; [1967] 1 All E.R. 299 . Craig v. Anyon (1925) 208 N.Y.S. 259 ; affirmed 152 N.E. 431 . Darbishire v. Warran [1963] 1 W.L.R. 1067 ; [1963] 3 All E.R. 310 . Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291 . De Havilland v. Bowerbank (1807) 1 Camp. 50 ; 170 E.R. 872 . Dominion Freeholders Ltd. v. Aird (Spargo, Third Party) (1966) 67 S.R. (N.S.W.) 150 ; 84 W.N. (Pt. 2) 190 . Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20 . Dunster v. Hollis [1918] 2 K.B. 795 . Edwards v. Noble (1971) 125 C.L.R. 296 . Frank G. O'Brien Ltd. v. Bain [1975] 1 N.S.W.L.R. 373 . Gamlen Chemical Co. (Asia) Pty. Ltd. v. Shipping Corporation of India Ltd. [1978] 2 N.S.W.L.R. 12 . Gordon v. Swan (1810) 12 East. 419 ; 104 E.R. 164 . Grant v. John Grant & Sons Pty. Ltd. (1954) 91 C.L.R. 112 . Grant v. Sun Shipping Co. Ltd. [1948] A.C. 549 . Hadley v. Baxendale (1854) 9 Exch. 347 (n.) ; 156 E.R. 148 . Healing (Sales) Pty. Ltd. v. Inglis Electrix Pty. Ltd. (1968) 121 C.L.R. 584 . Heavener v. Loomes (1924) 34 C.L.R. 306 . Hoad v. Scone Motors Pty. Ltd. [1977] 1 N.S.W.L.R. 88 . Inglis Electrix Pty. Ltd. v. Healing (Sales) Pty. Ltd. (1967) 69 S.R. (N.S.W.) 311 ; 87 W.N. (Pt. 2) 264 . Jarvis v. Moy Davies Smith Vandervell & Co. [1936] 1 K.B. 399 . Jefford v. Gee [1970] 2 Q.B. 130 . Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110 . Kate, The [1935] P. 100 . Kepitigalla Rubber Estates Ltd. v. National Bank of India Ltd. [1909] 2 K.B. 1010 . Kingston Cotton Mill Co. (No. 2), Re [1896] 2 Ch. 279 . Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 . London Joint Stock Bank v. MacMillan and Arthur [1918] A.C. 777 . Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd. (1938) 61 C.L.R. 286 . McBride's Ltd. v. Rooke & Thomas [1942] 3 D.L.R. 81 . McKenna & Armistead Pty. Ltd. v. Excavations Pty. Ltd. (1957) S.R. (N.S.W.) 515 ; 74 W.N. 289 . McLaren Maycroft & Co. v. Fletcher Development Co. Ltd. [1973] 2 N.Z.L.R. 100 . Marshall v. Colonial Bank of Australasia Ltd. (1904) 1 C.L.R. 632 ; affirmed (1906) 4 C.L.R. 196 . Martins Camera Corner Pty. Ltd. v. Hotel Mayfair Ltd. [1976] 2 N.S.W.L.R. 15 . Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 . Monarch Steamship Co. Ltd. v. A. B. Karlshamms Oljefabriker [1949] A.C. 196 . Morgengry and The Blackcock, The [1900] P. 1 . Mowbray v. Merryweather [1895] 2 Q.B. 640 . Nadreph Ltd. v. Willmett & Co. [1978] 1 W.L.R. 1537 ; [1978] 1 All E.R. 746 . National Insurance Co. of New Zealand Ltd. v. Espagne (1961) 105 C.L.R. 569 . National Surety Corporation v. Lybrand (1939) 9 N.Y.S. (2d.) 554 . New Plymouth Borough v. The King [1951] N.Z.L.R. 49 . Nocton v. Ashburton (Lord) [1914] A.C. 932 . Queen's Bridge Motors and Engineering Co. Pty. Ltd. v. Edwards [1964] Tas. S.R. 93 . Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370 . Sayers v. Harlow Urban District Council [1958] 1 W.L.R. 623 ; [1958] 2 All E.R. 342 . Scholfield v. Londesborough (Earl) [1896] A.C. 514 . Sims v. Foster Wheeler Ltd. [1966] 1 W.L.R. 769 ; [1966] 2 All E.R. 313 . Smith v. Stockdill (Linen Flax Corporation of New Zealand Third Party) [1960] N.Z.L.R. 53 . Southland Harbour Board v. Vella [1974] 1 N.Z.L.R. 526 . Stapley v. Gypsum Mines Ltd. [1953] A.C. 663 . Swan v. North British Australasian Co. (1863) 2 H. & C. 175 ; 159 E.R. 73 . Tilley v. Wales [1943] A.C. 386 . Truth and Sportsman Ltd. v. Kethel (1932) 32 S.R. (N.S.W.) 421 ; 49 W.N. 141 . Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528 . Voli v. Inglewood Shire Council (1963) 110 C.L.R. 74 . Warren v. Coombes (1979) 53 A.L.J.R. 293 . Webster v. British Empire Mutual Life Assurance Co. (1880) 15 Ch. D. 169 . Wilton v. Commonwealth Trading Bank of Australia ; Model Investments Pty. Ltd. (Third Party) [1973] 2 N.S.W.L.R. 644 ; affirmed in part and reversed in part [1974] 2 N.S.W.L.R. 96 . Young v. Grote (1827) 4 Bing. 253 ; 130 E. R. 764 .

L Shaddock & Associates Pty Ltd v Parramatta City Council [1979] 1 NSWLR 566 -
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L Shaddock & Associates Pty Ltd v Parramatta City Council [1979] 1 NSWLR 566 -
Gamlen Chemical Co v Shipping Corporation of India [1978] 2 NSWLR 12 -
Shirt v Wyong Shire Council [1978] 1 NSWLR 631 -
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Shirt v Wyong Shire Council [1978] 1 NSWLR 631 -
Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 (25 November 1977) (Glass, Samuels and Mahoney Jj.A)

Beaudesert Shire Council v. Smith (1966) 120 C.L.R. 145 . Bower v. Peate (1876) 1 Q.B.D. 321 . Campbell v. Paddington Corporation [1911] 1 K.B. 869 . Chapman v. Hearse (1961) 106 C.L.R. 112 . Cunard v. Antifyre Ltd. [1933] 1 K.B. 551 . Dalton v. Angus (1881) 6 App. Cas. 740 . Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners (1951) 83 C.L.R. 353 . Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218 . Grant v. Sun Shipping Co. Ltd. [1948] A.C. 549 . Hall v. Beckenham Corporation [1949] 1 K.B. 716 . Hargrave v. Goldman (1963) 110 C.L.R. 40 . Hubbard v. Pitt [1976] 1 Q.B. 142 . J. Lyons & Sons v. Wilkins [1899] 1 Ch. 255 . Kraemers v. Attorney-General (Tas.) [1966] Tas. S.R. 113 . Matania v. National Provincial Bank Ltd. [1936] 2 All E.R. 633 . Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. Ltd. (Wagon Mound (No. 2)) [1967] 1 A.C. 617 . Quarman v. Burnett (1840) 6 M. & W. 499 ; 151 E.R. 509 . Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880 . Sid Ross Agency Pty. Ltd. v. Actors and Announcers Equity Association of Australia [1971] 1 N.S.W.L.R. 760 . Southport Corporation v. Esso Petroleum Co. Ltd. [1953] 3 W.L.R. 773 ; [1953] 2 All E.R. 1204 ; reversed [1954] 2 Q.B. 182 ; restored [1956] A.C. 218 . Thompson v. Gibson (1841) 7 M. & W. 456 ; 151 E. R. 845 . Torette House Pty. Ltd. v. Berkman (1940) 62 C.L.R. 637 . Van Der Lubbe, Re (1949) 49 S.R. (N. S.W.) 309 ; 66 W.N. 140 . Ward Lock & Co. (Ltd.) v. Operative Printers' Assistants' Society (1906) 22 T. L.R. 327 . Wilson v. Peto and Hunter (1821) 6 Moore 47 .

Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 -
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Fennell v Robson Excavations Pty Ltd [1977] 2 NSWLR 486 -
Rowe v McCartney [1976] 2 NSWLR 72 (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)

The second objection taken is that the plaintiff's sense of guilt was an intervening event which "snaps the causal chain". The first observation to be made is that intervening factors, like factors outside the risk, raise questions of remoteness, not causation. The suggestion made is that the defendant should not be responsible for damage caused by him, because it was also brought about or made worse by a subsequent intervening act and the intervention was not itself foreseeable: Chapman v. Hearse

(1961) 106 C.L.R. 112, at p. 125.

. But the plaintiff's mental reaction to the defendant's injuries cannot, in my view, be treated as an intervention in this sense. I think this is so, not because the plaintiff has acted reasonably: Jones v. Boyce

(1816) 1 Stark. 493; 171 E.R. 540 .

, but because she hasn't acted at all. The defendant's conduct has acted upon her, in the same way as negligently inflicted trauma may act upon a person with abnormal physical susceptibility so as to produce abnormal injury: Dulieu v. White & Sons

[1901] 2 K.B. 669 .

. The Wagon Mound

[1961] A.C. 388 .

cast no doubt upon the correctness of this principle, although the eggshell skull could hardly pass the test of reasonable foreseeability. I deduce that, when a plaintiff's state of mind or body contributes, however unforeseeably, to the extent of the injury, no question of intervention arises to make the subsequent damage remote.

Rowe v McCartney [1976] 2 NSWLR 72 (23 September 1976) (Moffitt P., and Glass and Samuels Jj.A)

(1961) 106 C.L.R. 112 , at p. 121.

Rowe v McCartney [1976] 2 NSWLR 72 -
Rowe v McCartney [1976] 2 NSWLR 72 -
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Rowe v McCartney [1976] 2 NSWLR 72 -
Gaydon v Public Transport Commission of New South Wales [1976] 2 NSWLR 44 -
Geyer v Downs [1975] 2 NSWLR 835 -
Geyer v Downs [1975] 2 NSWLR 835 -
Geyer v Downs [1975] 2 NSWLR 835 -
McNab v Auburn Soccer Sports Club Ltd [1975] 1 NSWLR 544 (02 July 1975) (Sheppard J)

It seems to me that the question which I must ask myself is whether, in the circumstances which prevailed on the morning of the accident, a reason- able man in the position of the defendant should reasonably have foreseen that, if he drove the car carelessly and injured himself seriously, bearing in mind the conversation which had ensued between the plaintiff and the defendant before they entered the car, the plaintiff might suffer some degree of mental distress or upset resulting in a mental illness. I do not feel able to be particularly logical about my answer. I draw attention to the fact that, in Chapman v. Hearse

(1961) 106 C.L.R. 112, at p. 122.

, five judges of the High Court said that the answer to a question such as this must "be very much a matter of circum- stance and degree". In Fleming on Torts, 4th ed., at pp. 185, 186 reference is made to the judgment of the Privy Council in Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. Ltd.

[1967] 1 A.C. 617, at p. 643; (1966) 67 S.R. (N.S.W.) 21, at p. 31 ; 84 W.N. (Pt. 2) 59, at p. 69.

, where their Lordships said that for damages to be recoverable it was sufficient that it was a quite real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched. At p. 188 the learned author says: "Clearly it is a matter of judgment where to draw the line, and in problematical cases this will depend largely on what outcome the court wishes to secure." I do not agree with the second part of the state- ment. It is one which is often attributed to the judicial process by academics, not only in the field of tort, but in many other fields, including those of the construction of statutes and other documents and constitutional law, but I do think that one can say no more about this case than that a question of judgment is involved, and that one has to do one's best in making it. It is my judgment that a reasonable man in the position of the defendant on the morning in question ought not to be placed in the position where it is said that he should have reasonably foreseen that, if he drove carelessly, the plain- tiff, to whom he owed a duty of care, might suffer, not only physical injuries, but a mental illness as a result of a guilt feeling brought about by her remorse in permitting the defendant to drive and thus seriously injure himself. In the result, the plaintiff's damages will be limited to compensation for her physical injuries and disabilities. But in case this matter should go further, I should express a view on what her damages would have been, if she had been entitled to recover in respect of her neurosis.

McNab v Auburn Soccer Sports Club Ltd [1975] 1 NSWLR 544 -
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McNab v Auburn Soccer Sports Club Ltd [1975] 1 NSWLR 544 -
Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd [1975] HCA 23 -
Pratt and Goldsmith v Pratt [1975] VR 378 -
Pratt and Goldsmith v Pratt [1975] VR 378 -
Kornjaca v Steel Mains Pty Ltd [1974] 1 NSWLR 343 -
Kornjaca v Steel Mains Pty Ltd [1974] 1 NSWLR 343 -
Kornjaca v Steel Mains Pty Ltd [1974] 1 NSWLR 343 -
KORNJACA v. STEEL MAINS PTY. LTD. AND OTHERS; STEEL MAINS PTY. LTD. (CROSS-CLAIMANT), DILLINGHAM CONSTRUCTIONS PTY. LTD. (CROSS-DEFENDENT) [1973] 1 NSWLR 598 -
Caterson v Commissioner for Railways [1973] HCA 12 -
Watt v Rama [1972] VR 353 (14 December 1971) (WINNEKE, CJ PAPE and GILLARD, JJ)

Thirdly, it now appears well accepted by a number of decisions of the highest authority that, although in most cases, it may be expected that the injuria and damnum would be contemporaneous, the law of negligence, as developed, does recognize that in many cases there may be a period of time between the injuria and the damnum: see Donoghue v Stevenson; Grant's Case, supra; Herschthal v Stewart and Arden Ltd, [1939] 4 All ER 123 ; Buckland v Guildford Gas Light and Coke Co, [1948] 2 All ER 1086, at p. 1089 ; Hartley v Mayoh and Co, [1953] 2 All ER 525 ; Watson's Case, supra; Chapman v Hearse (1961) 106 CLR 112 ; [1962] ALR 379. The passage of time in itself could in some cases become relevant on the issue of liability (see Herschthal's Case, at p. 127), it should have no application to the facts of this case, since causation is assumed.

Watt v Rama [1972] VR 353 -
Watt v Rama [1972] VR 353 -
Watt v Rama [1972] VR 353 -
Mount Isa Mines Ltd v Pusey [1970] HCA 60 (23 December 1970) (Barwick C.j., McTiernan, Menzies, Windeyer and Walsh JJ)

7. What I have said may seem trite to persons learned in the law of torts today. But I have said it because counsel for the appellant pressed us with passages in judgments about "foreseeable risks". I do not think that these carried him far, but they do raise some linguistic difficulties. The sense that

the word "foreseeable" has acquired for lawyers may cause misgivings for philologists. Dixon J. in the passage I have quoted from Bunyan v. Jordan (1937) 57 CLR, at p 16 , spoke of "reasonable likelihood". He preferred that expression. In Chapman v. Hearse (1961) 106 CLR 112, at p 115, he is reported as intervening in the argument to say so. However, the unanimous judgment of the Court in that case contained the following statement (1961) 106 CLR, at pp 120-121 :

Mount Isa Mines Ltd v Pusey [1970] HCA 60 -
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Mount Isa Mines Ltd v Pusey [1970] HCA 60 -
McKinnon v Burtatowski and Yellow Cabs Of Australia Pty Ltd [1969] VR 899 -
McKinnon v Burtatowski and Yellow Cabs Of Australia Pty Ltd [1969] VR 899 -
Richards v State Of Victoria [1969] VR 136 (14 June 1968) (WINNEKE CJ, ADAM and LITTLE , JJ)

This proposition has particular significance because the learned trial judge directed the jury, as a matter of law, that Traill owed the plaintiff a duty of reasonable care and did not, in his charge or otherwise, treat the existence of that duty as conditional on a finding of fact by the jury that there was at the relevant time reasonable foreseeability of injury. We would agree that it is the reasonable foreseeability of harm arising from one's conduct which in many types of cases gives rise to the duty of care to avoid inflicting such harm, and that reasonable foreseeability also provides the test for determining whether a person injured by the careless conduct of another falls within the class of persons to whom a duty of care is owed: vide Bourhill v Young, [1943] AC 92, at p. 104; [1942] 2 All ER 396; Chapman v Hearse (1961) 106 CLR 112 , at pp. 119-21 ; [1962] ALR 379 . Since Donoghue v Stevenson, [1932] AC 562 ; [1932] 1 All ER Rep 1, it may be stated as a general proposition that a man owes a duty of care to his "neighbour" and only to his "neighbour" and that "neighbours" are those persons who are so closely and directly affected by his conduct that they ought reasonably to be in his contemplation as being so affected when directing his mind to the conduct in question. Thus, whilst there may be said to be a duty on a driver of a motor-car to use proper care not to cause injury to persons on the highway, this duty is one owed only to persons so placed that they may reasonably be expected to be injured by the omission in the particular circumstances to take such care: Bourhill v Young, supra, at (AC) p. 102. In such a case the very existence of a duty of care to the injured person may be said to depend on reasonable foreseeability of harm to him from particular conduct. But there are other cases in which the existence of the requisite duty of care may properly be considered to exist prior to and independently of the particular conduct alleged to constitute a breach of that duty. One such class of case in which such a pre-existing duty may be considered to exist is that derived from the relationship of employer and employee: vide Jury v Commissioner for Railways (NSW), [1935] ALR 321; 53 CLR 273, in which case, at p. 290, Starke, J, said: "The duty arises out of the relationship of the parties."

Richards v State Of Victoria [1969] VR 136 -
Richards v State Of Victoria [1969] VR 136 -
Richards v State Of Victoria [1969] VR 136 -
Andrews v WILLIAMS [1967] VR 831 -
Belous v Willetts [1970] VR 45 -
Hayward v Georges Ltd [1966] VR 202 -
Hayward v Georges Ltd [1966] VR 202 -
Curran v Young [1965] HCA 14 -
Siwek v Lambourn [1964] VR 337 (10 April 1964) (DEAN, J)

The next stage of the process of erosion came with the decisions of the High Court in Chapman v Hearse (1961) 106 CLR 112 ; [1962] ALR 379 , and of the House of Lords in Hughes v Lord Advocate, supra. The problem which arises is, what is it that defendant ought reasonably to have foreseen? Obviously he could rarely foresee the precise injury which his victim would suffer, and it has been held that if the event which actually occurred and which was the ultimate cause of the injury was of the same "kind", "type", or "class" as an event which could have been foreseen, the case is taken out of The Wagon Mound doctrine with the result that the defendant is liable for the damages occasioned by such event. On the other hand, if the event which has occasioned the injury is not an

event of the same type as a foreseeable event, The Wagon Mound doctrine protects the defendant from liability. Hughes v Lord Advocate, supra, may be contrasted for this purpose with Doughty v Turner Manufacturing Co Ltd, [1964] 1 All ER 98 , a decision of the Court of Appeal presided over by Lord Pearce, who was a party to the decision in Hughes v Lord Advocate. I need not refer to the facts of each case as they are of no present importance. In Hughes' Case the event which occurred was said to be one not "differing in kind", but to be the "type" or "kind" of accident or occurrence that could reasonably have been foreseen. The accident was, as Lord Pearce put it, "but a variant of the foreseeable". The same view was taken by the High Court in Chapman v Hearse, supra, where, however, the Court was more concerned with the scope of the duty of care and the question of causation. As to the scope of the duty the Court said at CLR p. 121: "It would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of."

Siwek v Lambourn [1964] VR 337 -
Siwek v Lambourn [1964] VR 337 -
Teubner v Humble [1963] HCA 11 -
Haber v Walker [1963] VR 339 (10 October 1962) (GOWANS , J)

Having now expressed my view as to the construction of the Wrongs Act, and before I consider what has happened in this case, I should like to say something as to what may break the chain of causation between the injury suffered by the deceased and his death. To hold that the conscious act even of a sane person necessarily breaks the chain of causation is inconsistent with the decision of the High Court in Chapman v Hearse (1962) 106 CLR 112 ; [1962] ALR 379 . Whether there is a novus actus is, as the Court said, "very much a matter of circumstance and degree" and (I add for myself) this is a question of fact. But it would seem clear on principle if the act relied on is not the conscious act of a sane person it does not break the chain. Murdoch's Case, supra, and Pigney's Case, supra, hold that where the act relied on as breaking the chain is that of a person insane under the M'Naghten rules it has not that effect. Whether any less degree of mental disturbance in the actor would be sufficient need not be discussed in this case in view of the jury's finding and I express no final opinion on the question though I am disposed to think that something less than legal insanity might be of such a degree as to be held to be insufficient. Both Smith, J, and Hudson, J, have cited much authority which I think supports such a conclusion. I also find it unnecessary to discuss in this case the notions expressed in Daniels v New York Railroad (1903) 183 Mass 393 , of the power of choice of a disordered mind or the "voluntary wilful act of suicide of an insane person". However relevant they may be in the view the American courts take of these cases, they do not arise on the view which I have taken of this case.

Haber v Walker [1963] VR 339 -
Haber v Walker [1963] VR 339 -
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