By Tania Leiman

ANYTHING BUT UNIFORM

Causation under civil liability legislation

Consideration of the impact of the Australian civil liability legislation in the decade since its introduction would be incomplete without addressing the issue of causation.

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As with many of the provisions, the sections on causation are not uniform across Australian jurisdictions. Apart from the Northern Territory (NT), which has imposed limitations on the scope of damages,[1] but adopted few other recommendations from the Review of the Law of Negligence,[2] causation in all other Australian jurisdictions requires the plaintiff to establish[3] both factual causation of harm and that it is 'appropriate for the scope of liability to extend to that harm'.[4] The legislation also makes provision for hard-to-prove cases that do not satisfy the test for factual causation, referring to these cases variously as 'exceptional';[5] 'appropriate';[6] or negligent exposure 'to a similar risk of harm by a number of different' people/persons.[7] Peter Handford has noted that, 'as tort becomes increasingly dominated by statutes …it becomes vitally important to identify the limits of these provisions…'[8] and, in particular, to identify the type of claims to which the various tests of causation apply.

WHEN DO THE LEGISLATIVE TESTS FOR CAUSATION APPLY?

Except for those claims specifically excluded from the *Civil Liability Act* 2002 (NSW), including intentional torts,[9] the NSW test for causation applies 'to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'.[10] Similar provisions apply in the Australian Capital Territory (ACT),[11] Victoria,[12] and Tasmania.[13] In Queensland, the test for causation 'applies to any civil claim for damages for harm',[14] except those specifically excluded from coverage of the Act.[15] The statutory tests for causation may cover a broader range of claims in South Australia (SA) and Western Australia (WA) than elsewhere. The WA test 'applies to any claim for damages for harm caused by the fault of a person', 'even if the damages are sought to be recovered in an action for breach of contract or any other action', and does not elsewhere exclude claims from the coverage of the WA Act.[16] The SA legislation does not contain any clauses equivalent to NSW. Instead, the SA Act applies to 'the determination of liability and the assessment of damages for harm arising from an accident'.[17] 'Harm' is defined broadly; 'accident' includes 'motor vehicle accident',[18] and there is nothing that excludes intentional torts from the operation of this test for causation.[19]

It is important to check carefully which test for causation (whether under legislation or pre-existing common law[20]) applies when commencing a claim. *Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd*[21] was a claim for pure economic loss founded in negligence, breach of contract, claims under s42 of the *Fair Trading Act* 1987 (NSW), and ss52 and 74 of the *Trade Practices Act* 1974 (Cth). Different tests for causation applied to the various claims. It was suggested, but not necessary for the court to decide, that s5D of the *Civil Liability Act* 2002 (NSW) did not apply to claims under the *Fair Trading Act*.[22] The court did conclude that claims under s52 of the *Trade Practices Act* were not covered by s5D.[23] Discussing the claims which '[appeared] to have been assumed to involve a failure to exercise reasonable care and skill'[24] (whether breach of contract or in tort), Basten JA (with whom McColl and Young JJA agreed) noted:

> '[73] Although the purpose of s5D(1)(b) and (2) is to focus on what may, succinctly, be identified as policy issues, there is no suggestion that the content of the principles is uniform, rather than varying according to the circumstances. Nor is there any suggestion that they will not vary according to the cause of action.'[25]

FACTUAL CAUSATION

Apart from the NT, all other Australian jurisdictions require that a plaintiff proves both factual causation of harm and that it is appropriate for the scope of the defendant's liability to extend to that harm. NSW, SA and Victoria all use the same wording in relation to factual causation:

> '(1) A determination that negligence caused particular harm comprises the following elements:
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> (a) that the negligence was a necessary condition of the occurrence of the harm ('factual causation'); and…'[26]

The ACT is similar – although it substitutes 'decision' for 'determination' and omits 'and' at the end of that subsection.[27] Queensland and Tasmania refer to a 'breach of duty' rather than using the word 'negligence'.[28] WA differs by referring to 'a determination that the fault of a person (the *tortfeasor*)…'[29]

According to the High Court in *Adeels Palace Pty Ltd v Moubarak*, when the civil liability legislation does apply, 'it is the applicable statutory provision that must be engaged'[30] and factual causation is to be 'determined by the "but-for" test'.[31] 'The issue whether damage has been caused by a negligent act invites a comparison between a plaintiff's present position and what would have been the position in the absence of the defendant's negligence.'[32]

The most recent statement from the High Court on causation under the civil liability legislation is *Strong v Woolworths Ltd t/as Big W & Anor*,[33] handed down in March 2012. There, the majority (referring to *Adeels*) reiterated: 'The determination of factual causation under s5D(1)(a) is a statutory statement of the "but-for" test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence.'[34] In cases where a plaintiff relies on a defendant's omission as the negligence, it is necessary to consider 'the probable course of events had the omission not occurred'.[35]

In that case, the accident took place at a sidewalk sales area outside the entrance to the Big W store at the Centro Taree Shopping Centre in NSW. Mrs Strong had fallen at about 12:30pm when her crutch slipped on a french fry-style chip or grease from such a chip. '[I]t was not known when the slippery substance was deposited.'[36] Woolworths was in breach of its duty by 'failing to employ a system for the periodic inspection and cleaning of the sidewalk area where Mrs Strong fell and was injured'.[37]

The majority (French CJ and Gummow, Crennan and Bell JJ) focused on the question of whether or not Mrs Strong had proved 'that it was more probable than not that Woolworths' negligence was a necessary condition of her fall'.[38] They held that 'there was no basis for concluding that chips are more likely to be eaten for lunch than for breakfast or…during the course of the morning'.[39]

> 'Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall.'[40]

Heydon J, dissenting, took a different view of the evidence. After discussing three different uses of the phrase 'evidential burden', he firmly located the 'legal (ie, persuasive) burden of proof'[41] on the plaintiff. It was for Mrs Strong to prove 'that the chip fell before 12:15pm on the balance of

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probabilities'[42] and she could not do this merely by a 'mere mechanical comparison of probabilities'.[43] Heydon J found for Woolworths because he did 'not subjectively believe that the chip was dropped before 12:15pm'.[44]

In *Idameneo (No. 123) Pty Ltd v Gross*,[45] CS contracted HIV after unprotected sex with his partner LB. LB had previously attended a medical clinic for tests, but had not been informed those tests were equivocal and that she needed retesting. When she was finally able to be contacted, LB attended the clinic. She was seen by Dr Gross who made serious errors in his advice to her, telling her that her blood tests were clear, except for Candida, when in fact LB was HIV positive. The claim dealt with 'cross-claims between the doctors who had provided medical services [to LB] and the corporate manager of the medical centre where those services were provided'.[46] On appeal, the clinic submitted 'LB's consultation with Dr Gross was an extreme example of medical negligence', implying that causation could not be established.[47] Hoeben JA, with whom McColl and Ward JJA agreed, applied *Strong*:

> '[72] The decision in *Strong* recognises that the test of factual causation in s5D(1)(a) may be satisfied in circumstances not only where the defendant's negligence was a necessary condition of the occurrence of the harm, but also in circumstances where there are two sets of conditions jointly sufficient to account for the occurrence of the harm and the defendant's negligence was necessary to complete one of those sets of conditions. As the majority said:
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> "20 Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm."
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> [73] To the extent that the appellant's submission is that causation is not made out if there is more than one necessary condition for the occurrence of the injury, that submission must be rejected. It is clear from the evidence that both the negligence of the appellant and of Dr Gross made a material contribution to the harm suffered by CS and in the way described in *Strong*, satisfied the "but-for" test.'[48]

In *Wallace v Kam*, a decision of the NSW Court of Appeal in April 2012 (now on appeal to the High Court), President Allsop noted that:

> '...the task involved in s5D(1)(a) is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as "proximate cause" or whether dictated by a rule that the factual enquiry should be limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in s5D(1)(b), if s5D(1)(a) is satisfied, or in s5D(2), if it is not.'[49]

SCOPE OF LIABILITY

All jurisdictions except NT require explicit consideration of scope of liability in addition to factual causation before a determination that legal causation exists can be made. The relevant provisions are entirely uniform across ACT, NSW, SA and Victoria. They state: '(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability")', with only very slight variations in wording in Queensland, Tasmania and WA.

President Allsop in *Zanner v Zanner* listed a number of issues that might be relevant to this inquiry: more than one sufficient condition; intervening causes; 'cumulative operation of two or more factors to cause indivisible harm and material contribution'; 'other expressions of material contribution of joint and concurrent tortfeasors; the place of increase of risk; foreseeability; the state of the plaintiff'; coincidence; and individual responsibility.[50] In *Zanner,* both President Allsop[51] and Tobias JA applied a common sense approach to application of scope of liability:

> '[The] determination of whether it is appropriate for the scope of [the defendants'] liability to extend to the harm caused to the [plaintiff], is to be considered as a matter of common sense taking into account any relevant policy considerations that might assist in determining whether or not, and why, responsibility for the harm to the [plaintiff] should be imposed upon the [defendant].'[52]

This issue was not in contention in *Strong*,[53] but the High Court nevertheless confirmed the 'division of causal determination under [s5D] into the distinct elements of factual causation and scope of liability',[54] in line with the Ipp recommendations.[55] They identified 'policy considerations... [as] the subject of the discrete "scope of liability" inquiry'.[56]

Scope of liability, particularly in the context of doctors' failure to warn of potential risks of treatment, is currently under consideration by the High Court in *Wallace v Kam*.[57]

MATERIAL CONTRIBUTION, EVIDENTIARY GAPS AND EXCEPTIONAL CASES

Problems arise in cases where factual causation cannot be established as a necessary condition using the but-for test. The Review of the Law of Negligence identified 'two types of situation where an evidentiary gap may exist':[58]

> 'One involves harm which is brought about by the *cumulative* [italics in original] operation of two or more factors, but which is indivisible in the sense that it is not possible to determine the relative contribution of the various factors to the total harm suffered. This was the situation in ... *Bonnington Casting v Wardlaw,* [sic] which lays down the principle that any of the contributory factors can be treated as a cause of the total harm suffered, provided it made a 'material contribution' to the harm.'[59]
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> '... the second type of case ... is ...*Fairchild v Glenhaven Funeral Services Ltd* ... [where the] court held that ... proof (on the balance of probabilities) that the defendant's

negligent conduct ' materially increased the risk' that the plaintiffs would contract mesotheliomasuffice to establish a causal connection between the conduct and the harm. The status of this principle in Australian law is unclear. The High Court has not yet had a chance to consider it.'

'The material contribution to harm' and 'material contribution to risk' principles both allow negligent conduct to be treated as a factual cause of harm even though it cannot be proved on the balance of probabilities that there was in fact a causal link between the conduct and the harm. In other words, in certain circumstances, it may be appropriate to "bridge the evidentiary gap" by allowing proof that negligent conduct materially contributed to harm or the risk of harm to satisfy the requirement of proof of factual causation.'[60]

As Laleng has noted:

'The net effect of *Fairchild* was that a material risk of harm would be treated as if it made a material contribution to harm. As Lord Hoffmann suggested in *Fairchild*, this is a legal fiction because it is to treat a possible cause as a probable cause in circumstances where the medical evidence is quite unable to make the probable connection between wrongdoing and harm. But this legal fiction plugged directly into conventional legal doctrine relating to causation and created a virtual legal but illogical equivalence with *Bonnington Castings Ltd v Wardlaw* whereby a claimant can establish causation by proving a defendant's breach of duty materially contributed to the harm actually suffered. This conceptual sleight of hand arguably assuaged concerns about potential doctrinal damage caused by *Fairchild* and its impact on legal coherence and certainty. Whilst recognising that this modification of the conventional rules would inevitably encourage claimants to test its boundaries in future cases, the House of Lords stressed that the modified test was "exceptional". In particular, Lords Bingham and Rodger attempted to delineate its boundaries by means of a number of stringent threshold conditions none of which have withstood the test of time.' [footnotes omitted][61]

Unfortunately, the Australian legislative response to this issue differs widely between jurisdictions. Tasmania and Queensland are almost identical apart from punctuation, referring to 'exceptional case', 'in accordance with established principles', and 'breach of duty'.[62] NSW is largely similar, although substituting 'negligence' for 'breach of duty'.[63] 'The mere fact that the evidence is insufficient to allow the court to conclude that the harm would not have occurred but for the defendant's negligence does not make the case "exceptional".'[64] Victoria is similar to NSW, but substitutes 'appropriate case' for 'exceptional case'. WA also uses 'appropriate', but the rest of the provision is different. This use of 'appropriate' may allow a court a wider discretion to conclude that legal causation exists even though the 'but-for' test has not been satisfied.[65] WA, SA and the ACT differ substantially from the other states, and from each other.

Although the High Court and state courts have addressed the issue of bridging this evidentiary gap in a number of recent cases (many of them dealing with dust diseases),[66] none has dealt specifically with the application of s5D(2) of the NSW Act or its equivalents interstate. The High Court in *Adeels* noted:

'It may be that s5D(2)was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd* ... where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s5D(2) would be engaged in such a case need not be decided now.'[67]

The meaning of 'exceptional' was touched on in *Jovanovski v Billbergia Pty Ltd* (although on the facts not an exceptional case):

'The exceptional cases, referred to in s5D(2) *Civil Liability Act* appear to concern cases where, because of the inadequacy of the state of scientific knowledge, a plaintiff is unable to attribute the harm suffered to a defendant's failure to exercise reasonable care but where it was nonetheless appropriate that the defendant be held liable because the defendant's failure to exercise reasonable care increased the risk of that harm eventuating...'[68]

In *Clothier v Dr Fenn & Greater Southern Area Health Service*,[69] Williams DCJ (again, not an exceptional case) noted:

'... the circumstances that compel against a finding of factual causation in the present case are not attributable to any "evidentiary gap" caused by a lack of such knowledge or the like, but rather an evidentiary gap caused by the appropriate evidence not being put before the court.'[70] >>

In *Strong* (despite Woolworths' submissions on this point), the majority held that Mrs Strong's claim had 'nothing to do with the concepts of material contribution to harm, material increase in risk of harm, or any of the difficulties … of the limitations of a "but-for" analysis of factual causation'.[71]

The authors of Luntz et al comment that 'i]n *Strong* … the High Court said that it had not considered the *Fairchild* doctrine and in *Amaca v Ellis* … the plaintiff's counsel expressly eschewed reliance on it'.[72]

'Established principles' (mentioned in the NSW, Qld, Tasmania, Victoria, and WA sections) and 'established common law principles' (mentioned in the ACT Act) are nowhere defined, but presumably refer to those common law principles applied where courts have come to conclusions about causation in cases involving scientific uncertainty[73] or increased risk.[74] Whether Australian courts will interpret s5D(2) and its equivalents using the line of English cases decided after *Fairchild* (such as *Barker v Corus (UK) Ltd*[75] and *Sienckiewicz v Greif (UK) Ltd*[76]) remains to be seen.

Laleng argues that *Sienckiewicz* has not clarified the *Fairchild* exception to proof of causation in tort law.[77] This has particular significance for SA, where s34 *Civil Liability Act* 1936 (SA) states:

'(2) Where, however, a person (the "plaintiff") has been negligently exposed to a similar risk of harm by a number of different persons (the "defendants") and it is not possible to assign responsibility for causing the harm to any one or more of them –

(a) the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm;[1] but

(b) the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.

Note – 1 See *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89.'

Use of 'the principle' in connection with the note seems to define s34(2)(a) in terms of *Fairchild*. Does this mean that interpretation of the SA provision is forever frozen with *Fairchild*, or should it encompass the development of case law in the UK following that decision? *Fairchild* and the subsequent English cases all deal with claims involving asbestos injuries, where the lethal nature of the condition, the scientific uncertainties and short life expectancies for plaintiffs once they are diagnosed provide a strong policy incentive to bridge evidentiary gaps. In *Fairchild*, both Lord Bingham[78] and Lord Hoffmann[79] limit their focus to asbestos injuries. Causation in dust diseases claims in SA is now covered by the *Dust Diseases Act* 2005 (SA), so s34 and its reference to *Fairchild* are presumably left to cover only causation in non-dust diseases claims. The courts are yet to consider whether there are now any policy reasons existing that justify making such leaps on causation in those matters. ■

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Notes: **1** *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). **2** Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra (2002) (the Ipp Report). **3** *Civil Law (Wrongs) Act* 2002 (ACT) s46; *Civil Liability Act* 2002 (NSW) s5E; *Civil Liability Act* 2003 (Qld) s12; *Civil Liability Act* 1936 (SA) s35; *Civil Liability Act* 2002 (Tas) s14; *Wrongs Act* 1958 (Vic) s52; *Civil Liability Act* 2002 (WA) s5D. **4** *Civil Law (Wrongs) Act* 2002 (ACT) s45(1); *Civil Liability Act* 2002 (NSW) s5D(1); *Civil Liability Act* 2003 (Qld) s11(1); *Civil Liability Act* 1936 (SA) s34(1); *Civil Liability Act* 2002 (Tas) s13(1); *Wrongs Act* 1958 (Vic) s51; *Civil Liability Act* 2002 (WA) s5C(1). **5** *Civil Liability Act* 2002 (NSW) s5D(2); *Civil Liability Act* 2003 (Qld) s11(2); *Civil Liability Act* 2002 (Tas) s13(2). **6** *Wrongs Act* 1958 (Vic) s51(2); *Civil Liability Act* 2002 (WA) s5C(2). **7** *Civil Law (Wrongs) Act* 2002 (ACT) s45(2); *Civil Liability Act* 1936 (SA) s34(2). **8** P Handford, 'Intention, Negligence and the Civil Liability Acts', *Australian Law Journal* Vol. 86, 2012, pp100-17 at 101-2. **9** *Civil Liability Act* 2002 (NSW) s3B. **10** *Ibid* s5A. **11** *Civil Law (Wrongs) Act* 2002 (ACT) s41. **12** *Wrongs Act* 1958 (Vic) ss44 and 45. **13** *Civil Liability Act* 2002 (Tas) s6 and s3 [definition of 'duty']. **14** *Civil Liability Act* 2003 (Qld) s4. **15** *Ibid* s5. **16** *Civil Liability Act* 2002 (WA) s5A. **17** *Civil Liability Act* 1936 (SA) s4(1). **18** *Ibid* s3. **19** P Handford, see note 8 above, pp100-17 at 114. **20** *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12. **21** *Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd* [2012] NSWCA 94. **22** *Ibid* at [75]. **23** *Ibid* at [79]. **24** *Ibid* at [63]. **25** *Ibid* at [73]. **26** *Civil Liability Act* 2002 (NSW) s5D(1); *Civil Liability Act* 1936 (SA) s34(1) and s13(1); *Wrongs Act* 1958 (Vic) s51. **27** *Civil Law (Wrongs) Act* 2002 (ACT) s45(1). **28** *Civil Liability Act* 2003 (Qld) s11(1); *Civil Liability Act* 2002 (Tas) s13(1). **29** *Civil Liability Act* 2002 (WA) s5C(1). **30** *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 at [44]. **31** *Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 at [45]. **32** Keifel J in *Tabet v Gett* [2010] HCA 12 at [140]. **33** *Strong v Woolworths Ltd t/as Big W & Anor* [2012] HCA 5. **34** *Ibid* at [18]. **35** *Ibid* at [32]. **36** *Ibid* at [4]. **37** *Ibd* at [8]. **38** *Ibid* at [34]. **39** *Ibid* at [37]. **40** *Ibid* at [38]. **41** *Ibid* at [74] and [77]. **42** *Ibid* at [75]. **43** *Ibid* at [76] citing Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361; [1938]HCA 34. **44** *Ibid* at [76]. **45** *Idameneo (No. 123) Pty Ltd v Gross* [2012] NSWCA 423. **46** *Ibid* at [2]. **47** *Ibid* at [68]. **48** *Ibid* at [72-73]. **49** *Wallace v Kam* [2012] NSWCA 82 at [4]. **50** *Zanner v Zanner* [2010] NSWCA 343 at [6]. **51** *Ibid* at [12]. **52** *Ibid* at [79]. **53** *Strong* at [19]. **54** *Ibid* at [19]. **55** The Ipp Report, Recommendations 28 and 29. **56** *Strong* at [19]. **57** *Wallace v Kam* [2012] HCA Trans 251. **58** The Ipp Report, paras 7.27-7.36. **59** *Ibid*, para 7.28; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. **60** *Ibid*, para 7.31. **61** Per Laleng, *Sienckiewicz v Greif (UK) Ltd* and *Willmore v Knowsley Metropolitan Borough Council: 'A Material Contribution to Uncertainty?' Modern Law Review* Vol. 74(5), 2011, pp767-93 at 780. **62** *Civil Liability Act* 2003 (Qld) s11(2); *Civil Liability Act* 2002 (Tas) s13(2). **63** *Civil Liability Act* 2002 (NSW) s5D(2). **64** H Luntz, D Hambly, K Burns, J Dietrich and N Foster, *Torts Cases and Commentary* 7th edn, LexisNexis Butterworths, Chatswood, 2013, p269. **65** *Ibid*, p269. **66** For epidemiological evidence see: *Amaca Pty v Ellis* [2010] HCA 5 and *Amaca Pty Limited (Under NSW Administered Winding Up) v Booth; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth* [2011] HCA 53. **67** *Adeels Palace* at [57]; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89. **68** *Jovanovski v Billbergia Pty Ltd* [2010] NSWSC 211 at [71]. **69** *Clothier v Dr Fenn & Greater Southern Area Health Service* [2010] NSWDC 96. **70** *Ibid* at [91]. **71** *Strong* at [29]. **72** H Luntz et al, see note 64 above, p279. **73** For example, see: *Amaca Pty v Ellis* [2010] HCA 5, *Amaca Pty Limited (Under NSW Administered Winding Up) v Booth; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth* [2011] HCA 53, *Seltsam Pty Ltd v McGuiness; James Hardie & Coy Pty Limited v McGuiness* [2000] NSWCA 29. **74** *McGhee v National Coal Board* [1972] 3 All ER 1008 (HL); *Wilsher v Essex Area Health Authority* [1988] AC 1074. **75** *Barker v Corus (UK) Ltd* [2006] 2 AC 572 (HL). **76** *Sienckiewicz v Greif (UK) Ltd* [2011] 2 AC 229 (SC). **77** Per Laleng, see note 61 above. **78** *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 at [2]. **79** *Ibid* at [62].

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