

# INTERVENING CAUSATION LAW IN A MEDICAL CONTEXT

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## Abstract

What is the legal position when a plaintiff's tortiously-inflicted accident injuries and ensuing condition are exacerbated by subsequent negligent medical treatment? How will the plaintiff's damages be allocated in terms of causal responsibility between the original tortfeasor and the negligent health carer and his or her insurer? In which circumstances will the plaintiff enjoy a right of contribution from the latter? This article will adopt a comparative law perspective to examine the judicial approaches and tests adopted by the courts of the United Kingdom, Canada, the USA and Australia to resolve the intervening causation issues. It suggests that the current approach of classifying the degree of negligence may be problematic in some circumstances and that an assessment of the degree of causal potency of the negligent medical treatment vis-à-vis the harm sustained may be more appropriate. This article will also consider the legal implications involved in a plaintiff's unreasonable refusal to accept medical treatment for his or her tortiously-inflicted injuries as well as the operation of the *novus actus interveniens* doctrine in the wrongful birth/conception context where it is alleged, for example, that a mother has unreasonably refused to terminate a pregnancy following upon a physician's negligent failure of contraception or abortion.

## I INTRODUCTION

Plaintiffs are often confronted with significant obstacles in proving causation against defendant health care professionals in the medical litigation context. Some of these obstacles were alluded to by Kirby J in *Chappel v Hart*:

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[T]he legal burden of proving causation is, and remains throughout the proceedings, upon the plaintiff. It is not an insubstantial burden. In some medical contexts it has even been described as Herculean. In cases similar to the present [ie, loss of a chance], it has been characterised as 'the most formidable obstacle confronting health care consumers'. The reasons include the imprecision of, and uncertainty about, some medical conditions; the progressive nature of others; the complexity of modern medical practice and technology; and the fact that some mistakes, serious enough in themselves, have no untoward results which can be properly attributed to them.<sup>1</sup>

Compared with mainstream causation issues which commonly arise in the medical litigation context and were alluded to by Kirby J, relatively little has been written on the narrower and arguably more complex issues involving aspects of intervening causation. This article will examine the operation of the *novus actus interveniens* doctrine in the context of medical malpractice litigation where a plaintiff's tortiously-inflicted injuries are exacerbated by subsequent medical treatment which he or she receives for those injuries. For the sake of completeness, other themes which will be examined include the operation of the doctrine in cases involving the unreasonable refusal to accept medical treatment and wrongful birth claims.

We shall turn first to cases involving medical negligence. Hospitals and health carers are often involved in situations where the patient presents with injuries which are attributable to the defendant's negligent conduct. Such situations typically include motor vehicle and industrial accidents. However, as a result of the negligence of the hospital and/or health carer, some further damage is sustained by the plaintiff. Such negligence can include carelessness in examination, diagnosis and/or treatment<sup>2</sup> or a failure to disclose a material risk inherent in the proposed procedure.<sup>3</sup> In such a case, provided a plaintiff acts reasonably in seeking and accepting medical treatment and the original injury is exacerbated by negligence in the administration of the medical treatment, it is the generally accepted view of most common law jurisdictions that the negligent medical treatment will not be regarded as a *novus actus interveniens* relieving the original defendant of liability for the aggravated injuries, because the original injury may be regarded as carrying some risk that medical treatment might be negligently administered. In those cases where

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1 *Chappel v Hart* (1998) 195 CLR 232, [93] (footnotes omitted).

2 *Reibl v Hughes* [1980] 2 SCR 880 (SCC); *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 (HL); *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Rogers v Whitaker* (1992) 175 CLR 479 (HCA).

3 A risk is a 'material' risk if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it: *Rogers v Whitaker* (1992) 175 CLR 479, 490 (joint judgment).

negligent medical treatment is deemed to be a recognisable risk for which an accident victim might hold the original defendant responsible, the plaintiff will be permitted to recover from the original defendant (or his or her insurer) full damages for both the accident-related injuries as well as for the aggravated injuries attributable to the medical negligence, subject to the right of the original defendant to seek contribution and apportionment of damages from the negligent health carers in relation to the aggravated injuries.<sup>4</sup> On the other hand, where the injured plaintiff receives inexcusably bad or grossly negligent medical treatment or advice, such treatment will break the causal chain and the negligent health carer (or insurer) is solely responsible for any exacerbation of the plaintiff's injuries. While the original defendant would remain fully responsible for the accident-related injuries, he or she would not carry any legal responsibility for the aggravated, medically-related injuries.

## II THE UNITED STATES OF AMERICA

The long-held and orthodox approach of the American case authorities is to generally hold a negligent defendant liable for injuries which have been exacerbated by subsequent medical treatment, even though such treatment was negligent in the actionable sense. The only qualifications to this general presumption appear to be intentional misconduct, recklessness or gross negligence on the part of the health carer. The law on this point has been put in the leading case of *Thompson v Fox* as follows:

Doctors, being human, are apt occasionally to lapse from prescribed standards, and the likelihood of carelessness, lack of judgment or of skill, on the part of one employed to effect a cure for a condition caused by another's act, is therefore considered in law as an incident of the original injury, and, if the injured party has used ordinary care in the selection of a physician or surgeon, any additional harm resulting from the latter's mistake or negligence is considered as one of the elements of the damages for which the original wrongdoer is liable.<sup>5</sup>

Thus, generally speaking, actionable or ordinary (as opposed to gross) negligence will not sever the causal chain and the original wrongdoer will also be held responsible for the aggravated, medically-related injuries. Thus, a mistake in medical treatment will negative causal connection if it is considered to be extravagant according to generally accepted standards of medical practice or hospital protocols. In *Purchase v Seelye*,<sup>6</sup> for example, the plaintiff was injured through a

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4 *Scout Association of Queensland v Central Regional Health Authority* (1997) Australian Torts Reports 81-450; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522; *Aquilina v NSW Insurance Ministerial Corporation* (Unreported) New South Wales Supreme Court (5 December 1994).

5 (1937) 192 A 107, 108 (Pa).

6 (1918), 231 Mass 434, 121 NE 413.

railroad's negligence and was operated on by the defendant surgeon on the wrong side. The surgeon attributed his mistake to a case of mistaken identity, having believed that the patient was another of his patients who required hernia surgery on the left side. The court held that the surgeon's mistake was so extravagant that the unauthorised operation could not be considered a consequence of the railway's wrong.

This distinction between ordinary and extraordinary negligence has been maintained in s 457 of the American Law Institute's *Restatement of the Law of Torts, Second*<sup>7</sup> which states as follows:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

According to the *Restatement's* accompanying commentary, the damages assessed against the defendant include not only the injury originally caused by the defendant's negligence but also the harm resulting from the manner in which the medical, surgical or hospital services are rendered, irrespective of whether those services are negligently rendered or not, so long as the negligence, if any, is a recognisable risk which is inherent in the human fallibility of those who render such services.<sup>8</sup> As for a rationale for imposing additional liability on the defendant, if the latter knows or should know that his or her negligence may result in harm sufficiently severe to require health care services, the defendant 'should also recognise [negligently-administered health care services] as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the [defendant] is responsible for any additional injury resulting from the other's exposure to this risk.'<sup>9</sup> By way of illustration, if A's negligence causes serious harm to B requiring B to be taken to a hospital, and a surgeon improperly diagnoses the case and performs an unnecessary operation or, after proper diagnosis, performs a necessary operation carelessly, there is no break in the causal chain and A's negligence is also a legal cause of the additional harm which B sustains.

The *Restatement* commentary also makes it clear that the original defendant is not answerable for harm caused by medical misconduct which is 'extraordinary' in the sense of falling outside the risks which

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7 (1965-1979).

8 American Law Institute, *Restatement (Second) of Torts* (1965-1979) 496-7. The American Law Institute has yet to publish the *Third Restatement* provision on this issue.

9 Ibid.

are normally recognised as inherent or incidental in the necessity of submitting to medical treatment.<sup>10</sup> While mere medical misadventure or actionable negligence will not sever the causal chain, recklessly unreasonable medical treatment will. Nor will the original defendant be liable for harm resulting from negligent treatment of a disease or injury which is not due to the defendant's negligence, even though the plaintiff takes advantage of being in hospital to have it treated.<sup>11</sup>

### III AUSTRALIA

#### A *The Common Law*

Australian courts, including the High Court, have consistently held over a long period that only gross medical negligence will sever the causal chain, thereby relieving the original defendant of liability for the aggravated medically-related injury. Otherwise, ordinary actionable medical negligence, or something less like medical misadventure, will not sever the chain<sup>12</sup> and the defendant, along with the negligent health carers, will be responsible therefor. This is the approach adhered to in a long line of Australian workers' compensation cases involving the statutory liability of employers for work-related injuries which have held that the total condition of a worker whose compensable injury is exacerbated by medical treatment, reasonably undertaken to alleviate that injury, is to be causally attributed to the workplace accident.<sup>13</sup> The leading decision is that of the Supreme Court of South Australia in *South Australian Stevedoring Company Limited v Holbertson*.<sup>14</sup> That case involved an employer's appeal from an arbitrator's award under the *Workmen's Compensation Act 1932* (SA). The employer had unsuccessfully applied for termination of the weekly payment to the respondent worker upon the ground that his incapacity at that time was not due to the workplace accident (in which a piece of timber had fallen on his arm fracturing it) but to improper medical treatment. Following the accident, the worker had been taken to hospital where his arm was placed in a cast but, due to an undetected misalignment of the bones, his left hand and arm had been rendered useless for the purpose of any work. The employer

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10 Ibid 498.

11 Ibid. So, for example, if A negligently fractures B's arm forcing B to go to hospital for treatment and, while there, an examination reveals that he is suffering from a hernia, and B decides to take advantage of being in hospital to have a hernia operation performed which is negligently carried out by the surgeon, A is not liable for harm done to B by the hernia operation.

12 *Moore v AGC Insurances* [1968] SASR 389.

13 See *Lindeman Ltd v Colvin* (1946) 74 CLR 313, 321 (Dixon J); *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, 48 (NSWCA) (Mason JA).

14 [1939] SASR 257.

contended that with proper medical treatment the worker would have made a full recovery within four months of the accident, and that since then the ongoing incapacity had been solely attributable to the medical treatment. The arbitrator held at first instance that the existing incapacity was not referable to any impropriety in medical treatment. The Supreme Court held that the onus rested on the employer to prove *novus actus interveniens*<sup>15</sup> and that the critical issue was whether the employer had demonstrated that the present incapacity was due to the manner in which the worker's injury had been medically treated or whether it can fairly be regarded as resulting from the workplace accident. Napier J, in delivering the Court's judgment, stated:

The respondent was taken to the hospital, where he was treated by fully qualified practitioners, who acted according to the best of their ability and judgment. In spite of that, by some mistake - either a blunder or an error of judgment - the treatment was ineffective and the arm is useless. It seems to us that it is unnecessary to inquire whether the respondent has a cause of action for negligence against the hospital or any of the doctors who attended him... But it is sufficient to say that there was, in our opinion, no evidence of any gross negligence - any grave departure from the standard of reasonable skill and care - in the treatment of the injury.<sup>16</sup>

And later His Honour added:

As a matter of common sense we think that a mistake of this kind is a *sequelae* [sic] of the injury. When a man gets his arm broken all that he can do is to get it set by a competent practitioner, and he has to take the risk of the doctor making a mistake. If the treatment is so obviously unnecessary or improper that it is in the nature of a gratuitous aggravation of the injury, it may be possible to find the cause of the incapacity without relating it back to the original injury, but in the case of slight negligence ... we think that it is impossible to say that the chain of causation is broken... We think that it would be monstrous if the Act, which insures the workman against the consequences of his own negligence, should leave him uninsured against *sequelae* of this kind, in a case where his own conduct has been beyond criticism. It seems to us that, as a matter of reason and justice, the risk of the treatment being less skilful than it might have been is one of the risks of any employment that involves the risk of an injury that requires treatment...<sup>17</sup>

This distinction between ordinary and gross medical negligence which has been applied in Australian workers' compensation cases has also informed, and been applied in, cases involving the tort of negligence. In the ordinary case where efficient medical services are available to an injured plaintiff and provided he or she acts reasonably in seeking medical treatment, the original injury can be regarded as carrying some

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15 Citing *Bower v Meggitt and Jones* (1916) 86 IJ (KB) 463.

16 *South Australian Stevedoring Company Ltd v Holbertson* [1939] SASR 257, 263.

17 *Ibid* 264.

risk that such treatment might be negligently given.<sup>18</sup> Nevertheless, the original injury does not carry the risk of medical treatment or advice that is 'inexcusably bad'<sup>19</sup> or 'completely outside the bounds of what any reputable medical practitioner might prescribe.'<sup>20</sup>

It has since been held that a mere error of judgment or medical misadventure will not sever the causal chain. In *Liston v Liston*<sup>21</sup> the plaintiff sustained back injuries in a car accident caused by the defendant's negligence. Her surgeon recommended a laminectomy which was correctly performed but ultimately unsuccessful and which added to her injuries. The plaintiff was left with a permanent back disability. Although expert evidence cast doubts upon the necessity or prudence of the operation, the Supreme Court of South Australia held the defendant liable for the consequential disability. According to Zelling J, even if the surgeon had made an error of judgment in recommending the operation, the defendant could have reasonably foreseen that the plaintiff would accept the surgeon's advice and that further injury might result from error in medical treatment. His Honour could not find any negligence on the surgeon's part and thus no *novus actus interveniens* was established.

The leading case authority in Australia is the High Court's decision in *Mabony v J Kruschich (Demolitions) Pty Ltd*.<sup>22</sup> There a worker sued his employer for damages for personal injuries sustained by him in the course of his employment. The employer sought contribution from the worker's doctor under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), alleging that his negligent medical treatment had caused or contributed to the worker's continuing incapacities. In the course of its unanimous judgment, the High Court stated:

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.<sup>23</sup>

And the High Court later added:

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18 *Lawrie v Meggitt* (1974) 11 SASR 5, 8; *Beavis v Apthorpe* (1962) 80 WN (NSW) 852, 858; *Moore v AGC (Insurances) Ltd* [1968] SASR 389, 394.

19 *Martin v Isbard* (1946) 48 WALR 52, 56 (Walker J).

20 *Lawrie v Meggitt* (1974) 11 SASR 5, 8 (Zelling J).

21 (1981) 31 SASR 245.

22 (1985) 156 CLR 522.

23 *Ibid* 528.

When an injury is exacerbated by medical treatment ... the exacerbation may easily be regarded as a foreseeable consequence for which the first tortfeasor is liable. Provided the plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a *novus actus interveniens* which relieves the first tortfeasor of liability for the plaintiff's subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given ...<sup>24</sup>

The High Court also observed that the original injury does not carry the risk of 'grossly negligent medical treatment or advice'<sup>25</sup> but, as in the case of so many other courts, did not offer any assistance as to how such negligence might be differentiated from ordinary actionable medical negligence. In the High Court's view, the former type of negligence, being unforeseeable, would sever the causal chain whereas the latter, being foreseeable, would not.

The *Mabony* case<sup>26</sup> has been subsequently applied by Australian state courts. In *Scout Association of Queensland v Central Regional Health Authority*<sup>27</sup> the plaintiff suffered a hip injury as a result of the Scout Association's negligence. As a result of the Health Authority's failure, through its doctors, to diagnose the plaintiff's injury as a hip injury, the plaintiff developed necrosis of the hip. The court held that the Scout Association was not relieved of liability for the hip necrosis as it was considered that the negligent medical treatment was not sufficiently gross to operate as a *novus actus interveniens*. In the result, the Health Authority was found to be 70 per cent responsible for the necrosis while the Scout Association was found to be 30 per cent responsible. The New South Wales Supreme Court has also applied the *Mabony* distinction between ordinary and gross medical negligence in its unreported decision in *Aquilina v NSW Insurance Ministerial Corporation*.<sup>28</sup> The plaintiff sued the defendant for compensation for injuries and continuing back pain sustained in two motor vehicle accidents. He also sued two doctors for injuries sustained during a surgical operation necessitated by the two car accidents. During exploratory surgery, the surgeon perforated the plaintiff's right internal iliac artery. Because of the failure by the surgeon and anaesthetist to resuscitate the plaintiff earlier, the

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24 Ibid 529.

25 Ibid 530. It is interesting to note that in the context of the unreasonable reactions of third parties to the initial wrongdoing in the medical negligence context, the German *Reichsgericht* has taken the same approach as the High Court of Australia where the physician 'contrary to all medical rules and experiences is guilty of a gross failure to take into account the elementary requirements of reasonable and reliable medical practice': (1921) RGZ 102, 230.

26 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

27 (1997) Australian Torts Reports 81-450.

28 (Unreported) New South Wales Supreme Court (5 December 1994).



plaintiff suffered a cardiac arrest and brain damage. The issue presented to the Court was to determine whether the defendant was liable to compensate the plaintiff not only for the car accident injuries but for the additional incapacities flowing from the negligently performed surgery. Applying the *Mabony* decision,<sup>29</sup> the Court held that the defendant was liable for both (subject to its right to seek contribution against the doctors) on the ground that the doctors' negligence did not amount to gross negligence in the circumstances and that the original car accident injuries carried some risk that negligent medical treatment might be given.<sup>30</sup>

The *Mabony* decision<sup>31</sup> and the distinction it articulated has also been approved of, and applied, by Victorian courts in the context of accident compensation legislation. In *Kidman v Sefa*<sup>32</sup> a worker who had injured her wrist in a workplace accident later underwent surgery to improve her wrist condition. During the operation, the median nerve in her wrist was unintentionally and negligently severed, resulting in a largely useless hand. The worker sought compensation for injuries suffered during the surgery. The Full Court relied on and applied the holding in *Mabony's* case<sup>33</sup> that exacerbation of an injury by subsequent medical treatment is a foreseeable consequence of the tortfeasor's negligence such that the original injury may be regarded as carrying some risk that medical treatment might be negligently administered. The effect of the Full Court's decision in *Kidman*<sup>34</sup> is that in the absence of gross negligence, the medically induced exacerbated injuries and the workplace injury are causally connected with no break in the chain of causation. For the purposes of statutory interpretation of the phrase 'an injury arising out

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29 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

30 The approach taken by the Australian court in *Vieira v Water Board* [1988] Australian Torts Reports 80-166 demonstrates that it may be possible to decide the *novus actus* issue without the need to categorise the quality of the medical negligence. In that case the plaintiff's hand was injured in a workplace accident and an orthopaedic surgeon, who mistakenly suspected that the plaintiff was suffering from an elbow condition, performed an ulnar nerve transfer to relieve that condition. While the plaintiff had not suffered elbow pain before the operation, he experienced pain in his elbow after the operation, although the pain in his hand had stopped. The New South Wales Court of Appeal affirmed the trial judge's decision not to hold the defendant liable for the elbow condition on the ground that the workplace injury had not caused it. The elbow pain suffered post-operatively was caused by the intervening medical treatment in the surgeon mistakenly believing that the elbow condition had been caused by the accident. This was not a case of unsuccessful medical treatment being performed to relieve accident-caused symptoms but of treatment performed to relieve symptoms unrelated to the accident.

31 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

32 [1996] 1 VR 86.

33 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

34 *Kidman v Sefa* [1996] 1 VR 86.

of or in the course of employment', Brooking J (with whom Ormiston J agreed) held that the surgeon's negligence was such an injury.<sup>35</sup> In *Victorian WorkCover Authority v Hartley*<sup>36</sup> the Supreme Court of Victoria – Court of Appeal has recently affirmed the approach taken in *Kidman's case*<sup>37</sup> and *Mabony's case*<sup>38</sup> by way of certain obiter dicta in factual circumstances where no medical negligence or intervening causation issues arose.

### B *Australian Statutory Causation Principles*

Before concluding this section on the Australian legal position, it is necessary to consider the extent to which recent statutory reforms in the civil liability field have impacted on the operation of common law intervening causation principles in the clinical negligence context. In the context of negligence actions, Australian legislatures have adopted generally the recommendations of the Ipp Panel in the 2002 *Review of the Law of Negligence Report* ('*Ipp Report*').<sup>39</sup> A number of the common law ingredients a plaintiff is required to prove in such an action as well as some defences will now be governed in Australia by both statute and common law. Causation is one such ingredient. Recommendation 29 of the *Ipp Report* is particularly important in this context. It reads:

The Proposed Act should embody the following principles:

Onus of Proof

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

The two elements of causation

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

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35 See to the same effect *Howe v Simmons Bedding Co Pty Ltd* [1980] VR 177.

36 [2010] VSCA 74.

37 [1996] 1 VR 86.

38 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

39 Negligence Review Panel, *Review of the Law of Negligence*, Final Report (Commonwealth of Australia, 2002). The Panel was chaired by Justice David Ipp and other members of the Panel were P Cane, D Sheldon and I Macintosh.

Scope of liability

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

Although no specific Australian intervening causation cases are referred to in the relevant sections of the *Ipp Report*, it is readily apparent from Paragraph 7.43 thereof that *novus actus interveniens* cases squarely fall within the conceptual phrase ‘scope of liability’. Paragraph 7.43 states:

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

Recommendation 29 and its two-element approach to the determination of legal causation issues in civil proceedings – factual causation and scope of liability/attribution of liability/policy questions/questions of law – have been adopted generally by Australian legislatures.<sup>40</sup> As it appears from the foregoing that the phrase ‘scope of liability’ was intended to include within its ambit, *inter alia*, remoteness of damage, intervening causation and policy issues, it would appear that the policy-based common law doctrine of *novus actus interveniens* developed over the past two centuries in most common law jurisdictions will continue to operate largely unmodified within the new statutory paradigm. As has been observed, it remains to be seen what judges will make of the ‘rather opaque wording’ of these new statutory provisions dealing with causation; ‘they may have little, if any, impact on the development of the law or on the outcomes of individual cases.’<sup>41</sup>

The statutory reform approach to causation has been considered by the High Court of Australia in *Adeels Palace Pty Ltd v Moubarak*.<sup>42</sup> It

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40 See, for example, the provisions of ss 5C and 5D of the *Civil Liability Act 2002* (WA) which refer to the phrase ‘scope of liability’ (specifically s 5C(1)(b)). See also s 5D(1) of the *Civil Liability Act 2002* (NSW), s 51(1) of the *Wrongs Act 1958* (Vic), s 13(1) of the *Civil Liability Act 2002* (Tas), s 34(1) of the *Civil Liability Act 1936* (SA), s 11(1) of the *Civil Liability Act 2003* (Qld).

41 K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (5<sup>th</sup> ed, Oxford University Press, 2012) 568.

42 [2009] HCA 48.

is clear that cases involving events which are the subject of litigation will be governed by the statutory provisions if those events post-date their coming into force.<sup>43</sup> According to the High Court, the common law ‘common sense’ approach does not apply to the new statutory provisions:

Dividing the issue of causation [between the elements of factual causation and scope of liability] expresses the relevant questions in a way that may differ from what was said by Mason CJ in *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, at 515, to be the common law’s approach to causation. The references in *March v Stramare* to causation being ‘ultimately a matter of common sense’ were evidently intended to disprove the proposition ‘that value judgment has, or should have, no part to play in resolving causation as an issue of fact’. By contrast, s 5D(1) [of the *Civil Liability Act 2002* (NSW)] treats factual causation and scope of liability as separate and distinct issues.<sup>44</sup>

In terms of the limited relevant High Court of Australia authority available to date, the very recent decision (handed down on 8 May 2013) in *Wallace v Kam*<sup>45</sup> may provide some helpful guidance in this matter. Although this case dealt with a medical practitioner’s failure to warn a patient of material risks inherent in a surgical procedure (and, as such, did not implicate any intervening causation issue which is the focus of this article), nevertheless certain observations of the unanimous judgment<sup>46</sup> of the Court shed some light on the relationship between the common law and statutory causation principles. According to the Court, determination of causation for the purpose of attributing legal responsibility under the common law of negligence involves two questions:

- A question of historical fact on how the particular harm occurred<sup>47</sup> in the sense that the negligence must constitute a necessary condition of the occurrence of the harm (so-called ‘factual causation’) through the application of the ‘but for’ test;<sup>48</sup>
- A normative question as to whether legal responsibility for the particular harm should be attributed to a particular

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43 [2009] HCA 48, [41] (joint judgment of French CJ, Gummow, Hayne, Heydon and Crennan JJ).

44 [2009] HCA 48, [42-44] (footnote omitted). In *Wallace v Kam* [2013] HCA 19, [23] the High Court of Australia observed that resort to ‘common sense’ will ordinarily be of limited utility in a novel case in which it is sought to assess the normative scope of liability question.

45 [2013] HCA 19.

46 The bench consisted of French CJ, Crennan, Kiefel, Gageler and Keane JJ.

47 *Wallace v Kam* [2013] HCA 19, [11].

48 *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190-191 (that is to say, a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence).

person<sup>49</sup> which essentially comprises a determination that it is appropriate for the scope of the tortfeasor's liability to extend to the harm caused ('scope of liability') (so-called 'legal causation').<sup>50</sup>

Importantly, for the purposes of the present article, the Court stated:

In a case falling within an established class, the normative question posed by [the New South Wales statutory causation provision<sup>51</sup> on 'scope of liability'] is properly answered by a court through the application of precedent. Section 5D guides *but does not displace* common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.<sup>52</sup>

In a novel case, however, it is incumbent on a court answering the normative 'scope of liability' question 'to consider and explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.'<sup>53</sup> According to the Court, what is required in a novel case is the identification and articulation of an evaluative judgment by reference to 'the purposes and policy of the relevant part of the law'.<sup>54</sup> As the cases canvassed in this article fall within 'an established class', it is therefore anticipated that existing common law precedent will generally be sufficient to resolve intervening causation issues arising in the clinical negligence context.

#### IV CANADA

The Canadian case-law appears somewhat bifurcated on the issue of what degree of medical negligence will sever the causal chain. One strand of authority regards ordinary actionable medical negligence as sufficient to amount to a *novus actus interveniens* while another line of cases is authority for the proposition that the original injury carries some risk of ordinary medical negligence for the defendant. The leading case for the former line of authority is the 1941 decision of the Ontario Court of Appeal in *Mercer v Gray*.<sup>55</sup> There the child plaintiff was struck by the defendant's automobile and received fractures of both legs. One of the plaintiff's fractured legs became worse when her

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49 *Wallace v Kam* [2013] HCA 19, [11].

50 *Ibid* [21].

51 Section 5D(1)(b) *Civil Liability Act 2002* (NSW).

52 *Wallace v Kam* [2013] HCA 19, [22] (emphasis added).

53 *Ibid* [23]. Section 5D(4) *Civil Liability Act 2002* (NSW) recites: 'For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.'

54 *Wallace v Kam* [2013] HCA 19, [23], quoting *Barnes v Hay* (1988) 12 NSWLR 337, 353.

55 [1941] 3 DLR 564.

doctors mistakenly failed to cut her cast soon enough after a cyanosed condition became evident. At trial the defendant successfully contended that the aggravation of the leg injury due to the lack of skill in the medical treatment could not be attributable to the defendant. The Court of Appeal remitted the case for a new trial on the ground that 'if reasonable care is used to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages.'<sup>56</sup> However, McTague JA, in delivering the Court's judgment, added:

There may be cases where the medical or surgical treatment is so negligent as to be actionable. This would be in effect *novus actus interveniens* and the plaintiff would have his remedy against the physician or surgeon.<sup>57</sup>

This approach distinguishes between innocent errors of judgment and actionable mistakes and indeed there may often be a fine line between the two. The problem can be perceived as to whether the damage was the result of the normal incident of the risk created by the defendant's conduct. As medical attention has usually been treated as such a normal risk, it is difficult to understand why bad surgery should be in any other category.<sup>58</sup> As one American commentator has remarked, 'it would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg.'<sup>59</sup>

Subsequent cases have applied the *Mercer v Gray*<sup>60</sup> distinction and held that the original injury carries only the risk of *bona fide* medical error and that ordinary actionable medical negligence is sufficient to sever the causal chain.<sup>61</sup> So, for example, in *Watson v Grant*<sup>62</sup> liability was imposed on the original wrongdoer for the consequences of improper (presumably non-negligent) medical treatment when two unnecessary operations were performed on the injured plaintiff. As Aikens J explained:

[I]f A injures B, it is reasonably foreseeable that B will seek advice and treatment for his injuries... [I]t is foreseeable that B will seek advice and treatment from ... a qualified doctor. The reasonable man, in my opinion, would be aware that a doctor may err in diagnosis or in treatment, or both, without the patient ... having

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56 *Mercer v Gray* [1941] 3 DLR 564, 567.

57 *Ibid* 568.

58 'Negligence-Causation-Novus Actus Interveniens' (1941) 19 *Canadian Bar Review* 610 (author unstated).

59 W Prosser, *Prosser on Torts* (2<sup>nd</sup> ed, West Publishing Co, Minneapolis, 1955) 273.

60 [1941] 3 DLR 564, 567.

61 *Block v Martin* (1951) 4 DLR 121 (Alta SC).

62 (1970) 72 WWR 665 (BC).

any reason to suppose he is being badly advised or treated ... [T]here is inherent risk that B may suffer further loss or injury because of *bona fide* error on the part of the doctor ... [T]he great majority of people who are injured or are ill are well aware that the doctor chosen may make some mistake in diagnosis or treatment, but are driven by necessity to accept the risk. It seems to me plain that it is reasonably foreseeable that a person injured to the extent that medical help is required, is driven to accept risk of medical error.<sup>63</sup>

Implicit in His Honour's judgment is the categorisation of the improper medical treatment as medical misadventure falling short of actionable medical negligence. In a later case, Lacourcière JA of the Ontario Court of Appeal similarly observed that '[e]very tortfeasor causing injury to a person placing him in the position of seeking medical or hospital help, must assume the inherent risks of complications, *bona fide* medical error or misadventure ...'<sup>64</sup> Two more recent cases have held that a radiologist's failure to diagnose the plaintiff's shoulder injury as a shoulder dislocation and to prescribe appropriate medical treatment amounted to chain-breaking intervening actionable medical negligence, thereby relieving the original wrongdoer (or the statutory compensation fund) of responsibility for the aggravation of the injury thereby caused.<sup>65</sup>

A second line of case-authority has emerged since *Mercer v Gray*<sup>66</sup> was decided in 1941. Some Canadian courts have moved closer to the approach adopted by their American and Australian counterparts in their willingness to also impose liability on the original wrongdoer for actionable medical negligence (falling short of gross negligence). So, for example, in *Kolesar v Jeffries*, Haines J indicated that an original defendant may be held liable for the subsequent negligence of a doctor or hospital which aggravates a plaintiff's injuries 'unless it is completely outside the range of normal experience'.<sup>67</sup> This test implies that certain instances of actionable medical negligence might well be compensable from the initial tortfeasor's standpoint as falling within the realm of reasonable foreseeability but that more serious and egregious instances would fall beyond the range of foreseeability and thus amount to a *novus actus interveniens*.<sup>68</sup> Other Canadian cases adopting this approach

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63 Ibid 672.

64 *Papp v Leclerc* (1977) 77 DLR (3d) 536, 539. His Honour added that the onus rests on the defendant to prove that intervening actionable medical negligence has broken the chain of causation: at 539.

65 *Rebak v McLennan* [1992] OJ No 1202 (QL) (Gen Div); *Mitchell v Rabman*, [2002] MBCA 19 (Man CA).

66 [1941] 3 DLR 564.

67 (1976) 9 OR (2d) 41, 43 (Ont HC).

68 As we have seen, this approach was adopted by the High Court of Australia in *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

include *Katzman v Yaeck*<sup>69</sup> and *Price v Milawski*.<sup>70</sup> In the latter case Arnup JA of the Ontario Court of Appeal held that one negligent doctor could be held liable for the additional loss caused by another doctor's negligence where the first doctor negligently records incorrect details in a patient's medical record such that it is foreseeable that later another doctor may negligently rely on the accuracy of such record. In reaching this conclusion, Arnup JA observed:

Applying these principles to a case in which there are negligent acts by two persons in succession, I would hold that a person doing a negligent act may ... be held liable for future damages arising in part from the subsequent negligent act of another, and in part from his own negligence, where such subsequent negligence and consequent damage were reasonably foreseeable as a possible result of his own negligence ... The later negligence of Dr Carbin compounded the effects of the earlier negligence of Dr Murray. It did not put a halt to the consequences of the first act and attract liability for all damage from that point forward.<sup>71</sup>

It would thus appear that this same principle applies regardless of whether the original negligent actor is a lay person or physician.<sup>72</sup>

A third category of Canadian case dealing with intervening improper medical treatment has not found it necessary to adopt a strict classification of the medical error as between mere misadventure, ordinary negligence or gross negligence. This has occurred particularly in cases involving omissions. In *Thompson v Toorenburg*<sup>73</sup> a woman with a minor heart condition received injuries in an accident caused by the defendant's negligence. She was treated for lacerations at the hospital and released. She returned to hospital later the same evening and died of a pulmonary edema precipitated by the accident. It was clear from the evidence that proper medical treatment at the time of the readmission could have saved her life. The original defendant was still held liable for her death. Although there was no specific finding on whether the medical error was negligent or non-negligent,<sup>74</sup> Kirke Smith J did not consider that the causal chain had been severed. This conclusion was affirmed by the British Columbia Court of Appeal on the ground that the failure to provide an *actus interveniens* which would have saved an accident victim's life was not the same thing as committing an *actus*

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69 (1982) 136 DLR (3d) 536.

70 (1977) 82 DLR (3d) 130, 141-2 (Ont CA).

71 Ibid [51]-[53].

72 *Phillip (Next Friend of) v Bablitz* 2010 Carswell Alta 1763 (Alberta Court of Queen's Bench) [326], [329].

73 (1972) 29 DLR (3d) 608 (BC).

74 On the facts it is difficult to conclude that the error was mere medical misadventure.



*interveniens* that caused her death.<sup>75</sup> And in *Davidson v Connaught Laboratories* Linden J held that a pharmaceutical company's warnings concerning a rabies vaccine were 'inadequate and unreasonable in the circumstances'<sup>76</sup> but that the failure by doctors to disclose material risks associated with the vaccine resulted in the failure of the plaintiff to prove causation. It was not the doctors' practice to discuss neurological side-effects with their patients for fear that the latter might refuse what the former considered as necessary treatment. The *novus actus interveniens* consisted of an independent judgment of the doctors which was interposed between the manufacturer's negligent warnings and the plaintiff's injury.

In the context of successive negligent omissions to diagnose by a treating physician and a specialist, a Canadian judge has articulated the following reasons for eschewing a strict or rigid classification of the relative degrees of medical negligence:

The issue is what is the strength of the alleged intervening cause, not the degree of negligence by which it was created. Muddling around in the categorization of negligence by degree does not assist with the question and may lead to unfair results. For example, a conclusion might be reached that the intervening negligence was gross but not particularly causative. Nevertheless, the original tortfeasor would escape liability at the expense of one who was far less blameworthy. In my view, it is the impact or force of the intervening act which determines whether the chain is broken, not how ill advised the act may have been.<sup>77</sup>

The second line of Canadian case-authority is consistent with the American and Australian judicial approaches and is based on a realistic acknowledgement that the risk of medical negligence in subsequent treatment of the plaintiff should reasonably be contemplated by the initial tortfeasor whose negligence necessitated such treatment. In these circumstances, it does not make sense to require the plaintiff to also sue the physician and medical insurer separately, unless of course the quality of the clinical negligence is considered gross or reckless.

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75 *Thompson v Toorenburgh* (1975) 50 DLR (3d) 717, 721 (Robertson JA). The approach of Robertson JA was approved of, and applied in, the English case of *Pantber v Wharton* 2001 WL 825087 (High Court of Justice Queen's Bench Division) (omission to provide a timely medical diagnosis which would have dispensed with the need to amputate the plaintiff's leg distinguished from a positive intervening medical act which would have created the need for such amputation).

76 14 CCLT 251, 276 (Ont HCJ).

77 *Phillip (Next Friend of) v Bablitz* 2010 CarswellAlta 1763 (Alberta Court of Queen's Bench) [339] (Clackson J). It was ultimately held in this case that the later medical negligence did supersede the earlier medical negligence on the ground that the original medical tortfeasor would brush aside as 'far-fetched' the subsequent medical negligence, thereby implicitly applying the test of reasonable foreseeability; at [334].

## V ENGLAND

In the Court of Appeal decision in *Rabman v Arearose Ltd* Laws LJ observed that '[t]he English authorities are, with deference, somewhat equivocal upon the question'<sup>78</sup> of what degree of intervening medical negligence is required to sever the causal chain between the negligence of the original wrongdoer and the plaintiff's injury.

Early English authorities adhered to the view that gross negligence would amount to a *novus actus interveniens*. In the workers' compensation case of *Rocca v Stanley Jones & Co*<sup>79</sup> a worker's arm had been fractured and had been treated in hospital, but there had been gross negligence on the part of the casualty officer. The arm was not placed in splints but only bound up and the worker had been allowed to return to work. On these facts the arbitrator held that the employers were not liable for incapacity resulting from the medical treatment administered by the casualty officer and the Court of Appeal held, in turn, that the arbitrator's decision had proceeded from a correct interpretation and application of the law. Since then, however, and up until recently, the English case-law has been characterised by a persistent refusal by the courts to concede that negligent medical treatment can be a recognisable risk for which an accident victim might hold the original wrongdoer responsible.<sup>80</sup> In the 1944 decision of the Court of Appeal in *Rothwell v Caverswall Stone Co Ltd*, another workers' compensation case, Du Parcq LJ reviewed the relevant cases and summarised their legal effect as follows:

[N]egligent or inefficient treatment by a doctor or other person may amount to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury.<sup>81</sup>

Thus, ordinary actionable medical negligence falling short of gross medical negligence would suffice to sever the causal chain. Only medical misadventure or *bona fide* medical error would keep the chain intact.<sup>82</sup>

The leading authority for many years on this issue has been the 1949 decision of the House of Lords in *Hogan v Bentinck West Hartley Collieries (Owners) Ltd*,<sup>83</sup> another workers' compensation case. The

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78 [2001] QB 351, 366.

79 (1914) 7 BWCC 101.

80 JG Fleming, 'Liability for Suicide' (1957) 31 *Australian Law Journal* 587, 588.

81 [1944] 2 All ER 350, 365.

82 This is the position adopted by the first line of Canadian case-authority discussed in the previous section.

83 [1949] 1 All ER 588 (HL).

worker, a miner, suffered from a congenital defect - two top joints to his right thumb, the additional joint forming a false thumb in addition to his normal thumb. His false thumb was fractured in a workplace accident and, despite the worker returning to work, the thumb continued to be painful. The worker was sent to hospital by his own doctor where it was discovered that the fracture had not united, and an operation was advised and performed for the removal of the false thumb and the top joint of the normal thumb. The operation was unsuccessful and the worker could only do light work after that. On an application by the worker for compensation under the *Worker's Compensation Act 1925* on the ground of pain in the stump, the county court judge, sitting as an arbitrator thereunder, accepted the view of the medical witnesses that the operation was a proper one to cure the congenital deformity but not to cure the pain caused by the workplace accident, and compensation was refused on the ground that the incapacity then existing was due, not to the accident, but to an 'ill-advised' operation. However, there was no suggestion of gross negligence. The question before the House of Lords was whether the worker's incapacity resulted from the original workplace injury or the operation. By a majority of three to two,<sup>84</sup> the Law Lords held that the inappropriate medical treatment operated as a *novus actus interveniens*. On a true construction of s 9(1) of the *Worker's Compensation Act 1925* which required that the incapacity for work results from the workplace injury, it was for the arbitrator to determine as a fact whether or not the incapacity existing at the date of the arbitration resulted from the original accident or from the operation. As there was sufficient evidence on which the arbitrator could properly find that the incapacity resulted from the operation, there was no misdirection and no ground for interfering with his award. The majority adopted as a correct statement of the existing law on the issue the above-cited passage from the judgment of Du Parc J in the *Rotwell* case.<sup>85</sup> Lord Normand stated the principle as follows:

I start from the proposition, which seems to me to be axiomatic, that if a surgeon, by lack of skill or failure in reasonable care, causes additional injury or aggravates an existing injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury should be attributed to it and not to the original accident. On the other hand, an operation prudently advised and skilfully and carefully carried out should not be treated as a new cause, whatever its consequences may be.<sup>86</sup>

In a forceful dissent, Lord Reid reluctantly accepted previous authority that intervening medical treatment could constitute a *novus actus* but

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84 Lords Simonds, Normand and Morton forming the majority with Lords Reid and MacDermott in dissent.

85 *Rotwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350, 365.

86 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588, 596.

insisted that only ‘grave lack of skill and care’<sup>87</sup> could sever the causal chain. Any negligence falling short of that would be attributable to the original wrongdoer and the health carers. Lord MacDermott, also dissenting, would have excluded liability ‘in regard to acts of surgical negligence of such an exceptional kind that what has been done cannot fairly be related to an endeavour to cure or reduce the infirmity – as, eg, where a workman loses a sound limb because the surgeon takes him for somebody else’.<sup>88</sup> As a worker’s compensation case, it should be noted that *Hogan*<sup>89</sup> is merely persuasive in the context of the tort of negligence.<sup>90</sup> The dissenting judgments in *Hogan’s* case<sup>91</sup> are consistent with the conventional American and Australian judicial approaches on this point and may perhaps represent where the law may ultimately develop in this area (based on two more recent English Court of Appeal decisions which will be discussed shortly).

The law on this point as stated in the *Rothwell*<sup>92</sup> and *Hogan*<sup>93</sup> cases appears to have been endorsed by the Judicial Committee of the Privy Council in *Algol Maritime Limited v Acori*.<sup>94</sup> There the plaintiff was employed by the defendants under a seaman’s employment contract and suffered a back injury from a fall during the course of his employment. One of the questions raised on appeal was whether a laminectomy operation performed on the plaintiff after the date of the accident severed the causal chain between the accident and the plaintiff’s disability. The trial Judge had made the following findings:

In my view the operation was an integral and ongoing part of [the plaintiff’s] treatment as perceived by the doctors in Spain who were treating the plaintiff and does not constitute a *novus actus interveniens*. The operation with hindsight and in the opinion of the expert medical witness Mr Wade ... ought not to have been attempted where there was no evidence of sciatic pain and not so soon after the injury was sustained. However that is not to say that the doctors treating the plaintiff were negligent in any way ... Their intervention did not break the proximate chain of causation.<sup>95</sup>

Their Lordships refused to interfere with the finding that the laminectomy did not break the chain of causation, and held that the lower courts had not erred in directing themselves in accordance with

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87 Ibid 607. See *Conley v Strain* [1988] IR 628.

88 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588, 601.

89 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

90 The late Professor Fleming argued that the same conclusion would follow *a fortiori* in cases of common law negligence. See JG Fleming, n 80, 587, 588.

91 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

92 *Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350.

93 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

94 [1997] UKPC 38 (21 July 1997) (Gibraltar).

95 Ibid [8].

the law as laid down in the *Rothwell*<sup>96</sup> and *Hogan*<sup>97</sup> cases. Here, the medical treatment amounted to mere medical misadventure but their Lordships indicated that if the medical treatment had been negligently performed, it might amount to 'a new and separate cause of the injury in which case the chain of causation ... might be broken.'<sup>98</sup>

The English Court of Appeal has had occasion to deal with intervening medical negligence in a number of cases. In *Robinson v The Post Office*<sup>99</sup> the plaintiff technician slipped and injured his leg through the defendant employer's negligence. To guard against infection a test dose of antitetanus serum was administered. Instead of waiting the usual time of half an hour for a reaction, a doctor administered the full shot after only one minute. The plaintiff subsequently developed a severe reaction to the antitetanus shot owing to a rare allergic reaction and this resulted in encephalitis and brain damage. The Court of Appeal held that the doctor was not liable in negligence as it was most unlikely that a proper test dose would have disclosed the plaintiff's allergy. Thus the failure to wait the prescribed time before administering the antitetanus shot was medical misadventure or non-actionable error of judgment. As such, it did not cause the plaintiff's injury and could not, therefore, constitute a *novus actus interveniens*. In its 2002 decision in *Forbes v Merseyside Fire and Civil Defence Authority*<sup>100</sup> the Court of Appeal held that a *bona fide* medical error of judgment was not sufficient to sever the causal chain, without making any reference to the *Rothwell*<sup>101</sup> and *Hogan*<sup>102</sup> cases. The plaintiff was a divisional commander of the Merseyside Fire and Civil Defence Authority who sustained a groin strain and a hernia while undergoing a lifting strength test under the supervision of the second defendant. Due to his injuries, the plaintiff was ultimately retired by the first defendant and he claimed damages both for the negligently-caused injury itself and for the consequential financial loss as a result of his early retirement. The second defendant argued that she should be liable only for damages attributable to the injuries themselves and that she should not be liable for the consequential financial loss on the ground that the Authority had acted on negligent advice tendered to it by its occupational health doctor. It was alleged that when the early retirement decision had been taken, insufficient time had elapsed since the accident to make it possible to reach an appropriate conclusion

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96 *Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350.

97 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

98 *Algol Maritime Limited v Acori* [1997] UKPC 38 [9].

99 (1974) 2 All ER 737 (CA).

100 [2002] EWCA Civ 1067.

101 *Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350.

102 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

concerning the prospects of the plaintiff being able to continue to work. It was also argued that subsequent reports of medical experts had concluded that there was no sufficient disability to have justified the Authority's decision to retire the plaintiff. Latham LJ accepted the trial Judge's conclusion, however, that the advice of the doctor was neither negligent nor unreasonable but was rather furnished in good faith. At most the advice amounted to an error of judgment which could not be considered sufficient to sever the causal chain. Accordingly, the second defendant was also responsible for the plaintiff's consequential financial loss. The conclusion of the Court of Appeal on the *novus actus* issue could well have been accommodated by an application of the rule laid down in the *Rothwell*<sup>103</sup> and *Hogan*<sup>104</sup> cases. It would appear that that rule and those House of Lords decisions remain good law in England today but the rule and these older authorities may be coming under challenge as seen in two other more recent Court of Appeal decisions.<sup>105</sup>

The proposition that only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the causal chain was approved by the Court of Appeal in *Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust*.<sup>106</sup> Citing the decision of the High Court of Australia in *Mabony v J Kruschich (Demolitions) Pty Ltd*<sup>107</sup> (discussed above), the subsequent negligence of a surgeon in advising the plaintiff to undergo an above-the-knee amputation of her leg did not 'eclipse' the defendant employer's original wrongdoing. On the facts, the surgeon was not adjudged grossly negligent but liability was apportioned 75:25 as against the surgeon and employer respectively for the amputation and its consequences. Thus, if the plaintiff acts reasonably in seeking or accepting treatment, negligence (falling short of gross negligence) in performing the treatment will not necessarily sever the causal chain

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103 *Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350.

104 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

105 The decision of the High Court of Australia in *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 was referred to but neither endorsed nor rejected by Laws LJ in his judgment in *Rahman v Arearose Ltd* [2001] QB 351, 366 (CA). As for intervening pharmaceutical negligence, the Court of Appeal has held in *Prendergast v Sam & Dee Ltd* [1989] 1 Med LR 36 that a pharmacist's foreseeable negligence in misreading a doctor's prescription and supplying the patient with the wrong drug did not sever the causal chain from the doctor's initial negligence in writing an illegible prescription. See also *Horton v Evans* 2006 WL 3327727 (High Court of Justice Queen's Bench Division) (a doctor's not unreasonable reliance on an inaccurate prescription dispensed by defendant pharmacist does not negative causal connection).

106 [2001] EWCA Civ 1141; [2002] PIQR P8; [2001] Lloyd's Rep Med 500, [55].

107 (1985) 156 CLR 522.

relieving the first tortfeasor from liability for the plaintiff's aggravated condition as the original injury can be regarded as carrying some foreseeable risk that medical treatment might be negligently given.

The Court of Appeal has recently reaffirmed its position taken on the intervening causation issue in *Webb's* case<sup>108</sup> in *Wright v Cambridge Medical Group (a partnership)*.<sup>109</sup> The plaintiff, an infant child, was admitted to hospital where she developed a bacterial super-infection which had not been diagnosed by the time of her discharge therefrom. The bacteria caused osteomyelitis in her hip bone. Three days after her discharge, the plaintiff's mother spoke by telephone to a general practitioner at the defendant's surgery who failed to arrange for the plaintiff to be seen. The defendants conceded that he had been negligent in not doing so and that if he had seen her, a hospital referral would or should have been made. The plaintiff's condition continued to deteriorate and she was referred to hospital where she received inadequate treatment which resulted in a permanent injury to the plaintiff's hip. The plaintiff sued the defendant clinic in negligence for the late hospital referral (but did not add the hospital as a party/defendant). Having admitted negligence, the defendants denied liability for the permanent injury on the basis of a lack of a factual causal link. The Court of Appeal held (by majority) that the late referral and the inadequate hospital treatment were *each* causative of the plaintiff's damage and the plaintiff had therefore established such a link between the defendant's negligence and her damage. Lord Neuberger of Abbotsbury MR rejected the argument that the hospital's failure to render proper treatment to the plaintiff broke the chain of causation between the defendants' negligence and the plaintiff's damage. In the words of His Lordship, 'It was not such an egregious event, in terms of the degree or unusualness of the negligence, or the period of time during which it lasted, to defeat or destroy the causative link between the defendants' negligence and the claimant's injury.'<sup>110</sup> The reference to 'egregious event' is reminiscent of the notion of gross or reckless negligence alluded to by the courts in *Mabony's* case<sup>111</sup> and *Webb's* case.<sup>112</sup> In a dissenting judgment, Elias LJ considered that the defendant doctor should not be held liable on the ground that the plaintiff's permanent injury did not fall within the scope of the breached duty. However, by way of an *obiter dictum*, Elias LJ did observe: 'Nor could it

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108 *Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust* [2001] EWCA Civ 1141; [2002] PIQR P8; [2001] Lloyd's Rep Med 500.

109 [2013] QB 312.

110 [2013] QB 325, para. 37.

111 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

112 *Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust* [2001] EWCA Civ 1141; [2002] PIQR P8; [2001] Lloyd's Rep Med 500.

be said that the negligence in this case, although serious, deserved to be characterised as gross or egregious so as to break the chain of causation and make it unjust for that reason to impose liability on the [initial tortfeasor], such as was envisaged in *Webb v Barclays Bank plc ...*.<sup>113</sup> The intervening causation propositions advanced by Lord Neuberger and Elias LJ are entirely consistent with the approach taken by the High Court of Australia in *Mabony's* case<sup>114</sup> and may point to an emerging but gradual shift in judicial opinion in England.

The majority position of the House of Lords in *Hogan v Bentinck*<sup>115</sup> appears to have been followed by the Scottish courts. In *Hutchison v Dundee DC*<sup>116</sup> the defendant employer was held liable for a worker's injuries sustained in a workplace accident as well as for further damage to the worker attributable to rare complications arising from subsequent non-negligent treatment. In holding that the intervening complications did not sever the causal connection, Lord Osborne could find no medical negligence and the defendant employer was accordingly also held liable for the rare, albeit not uncommon, complications associated with the arthroscopy procedure. Similarly, in *MacKenzie v Aberdeen City Council*,<sup>117</sup> a Scottish court could find no evidence of negligence in the plaintiff's subsequent medical treatment and the defendant's *novus actus* plea was accordingly dismissed. There a family sought damages for alleged carbon monoxide poisoning against their landlords. The family members were recommended by their physician to undergo hyperbaric oxygen treatment to alleviate the effects of the poisoning. While in the treatment chamber, one of the plaintiffs suffered from panic attacks and alleged that he developed a phobia which made travelling difficult for him. The court stated *obiter* (having found no evidence of negligence against the defendant) that the hyperbaric chamber treatment did not amount to a *novus actus interveniens* on the ground that there was 'a respectable body of [medical] opinion' which supported the use of such treatment in similar circumstances and that the court 'would need to be able to say that no reasonable doctor would have done what he did, before [it] could conclude that the [intervening medical treatment] did amount to a *novus actus*'.<sup>118</sup> No mention was made in either case of the distinction between ordinary and gross medical negligence and the consequences which flow therefrom as a result of its application.

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113 [2013] QB 342, [111].

114 *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

115 *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588.

116 1996 Rep LR 181 (Outer House).

117 2002 Hous LR 88.

118 *MacKenzie v Aberdeen City Council* 2002 Hous LR 88, 95.



## VI REFUSAL TO ACCEPT MEDICAL TREATMENT AS NOVUS ACTUS INTERVENIENS

A line of English workers' compensation cases has considered the employer's contention that the worker's incapacity is the result of unwillingness to undergo medical treatment rather than of the workplace accident itself. This culminated in the case of *Steele v Robert George & Co*<sup>119</sup> in which the House of Lords held that where the worker's refusal has been unreasonable, he or she is not entitled to compensation. As Viscount Simon LC stated:

[T]he Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end, or be reduced, if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity 'results from the injury' within the meaning of the Workman's Compensation Act, 1925, s. 9, after the time when the rejected remedy might be confidently expected to bring about a cure.<sup>120</sup>

The test of reasonableness was also relied on by Starke J in his judgment in *Adelaide Chemical and Fertilizer Company Limited v Carlyle*.<sup>121</sup> There the deceased, an acid burn victim, did not follow advice given to him in hospital to seek the assistance of a doctor on the following day but, in His Honour's view, the evidence did not establish any fault on the part of the deceased or his wife that might otherwise have severed the causal chain. According to Starke J, '[a]fter treatment at the Adelaide Hospital, the deceased did not report to the nearest doctor next day, as advised, but his wife treated him to the best of her ability with tannemol, which a chemist advised her was a proper treatment for burns, as in fact it was, and she called in a doctor so soon as unexpected complications developed.'<sup>122</sup> The defendant was thus not relieved of responsibility for the deceased's death. Later Australian cases involving a refusal to accept medical treatment have also considered as determinative whether the plaintiff's refusal is reasonable in the prevailing circumstances. In *Walker-Flynn v Princeton Motors Pty Ltd*<sup>123</sup> it was held to be relevant evidence for the jury to consider that the plaintiff's refusal to use contraceptives to mitigate the damage further pregnancies would cause

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119 [1942] 1 All ER 447 (HL).

120 *Steele v Robert George & Co* [1942] 1 All ER 447, 448.

121 (1940) 64 CLR 514.

122 *Adelaide Chemical and Fertilizer Company Limited v Carlyle* (1940) 64 CLR 514, 528.

123 (1960) SR (NSW) 488.

to her crushed pelvis arose because the plaintiff was a Catholic and rejected birth control. The jury concluded she acted reasonably and the causal chain thus remained intact. In *Boyd v SGIC*<sup>124</sup> however, a decision by the son of a Jehovah's Witness to refuse a blood transfusion in order to placate his father was held to be an unreasonable failure to mitigate damage.<sup>125</sup>

The Ontario Court of Appeal has adopted a somewhat different approach in two cases decided in the 1980s. In *Ippolito v Janiak*<sup>126</sup> and *Brain v Mador*<sup>127</sup> it was held that when accident victims unreasonably refuse medical treatment, their damages will be reduced because of failure to mitigate their loss, but they will not be denied compensation (as they otherwise would in the wake of a successful *novus actus* plea). The burden would appear to be on the defendant to prove that the plaintiff's refusal to mitigate was unreasonable.<sup>128</sup> A contrary authority is the decision of the Judicial Committee of the Privy Council in *Selvanayagam v University of West Indies*.<sup>129</sup> There the plaintiff university lecturer was injured when he fell into an unguarded ditch. Although he was rendered virtually unemployable, he refused to undergo a recommended operation which was said to have 'quite good' changes of enabling him to return to work within six months. The plaintiff's refusal was prompted by his awareness that his diabetes increased the risk of infection. The Privy Council held that the onus of proving the reasonableness of his refusal, and failure to comply with the duty to mitigate his damage, lay upon the plaintiff. The plaintiff discharged this onus as the medical advice was merely one factor among many to be weighed in determining whether the refusal was reasonable.

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124 [1978] Qd R 195.

125 The cases are not readily distinguishable apart from the plaintiff's less serious condition in *Walker-Flynn v Princeton Motors Pty Ltd* (1960) SR (NSW) 488. For a Canadian decision involving refusal of a blood transfusion see *Hobbs v Robertson* (2004) 243 DLR (4th) 700 where the Supreme Court of British Columbia refused to hold a surgeon liable for the death of a patient due to blood loss when the patient had signed a document releasing the surgeon and hospital from 'any responsibility whatsoever' for complications arising from the patient's refusal to accept blood. The effective cause of death was the patient's refusal to accept blood rather than the surgeon's negligence in creating the circumstances in which a life-saving blood transfusion became necessary.

126 (1981) 18 CCLT 39.

127 (1985) 32 CCLT 157. See also *Gray v Gill* [1993] BCJ No 2289, 18 CCLT (2d) 120, 133 (SC); but compare where a refusal to mitigate is deemed reasonable: *Engel v Kam-Ppelle Holdings Ltd* [1993] SCJ No 4, 15 CCLT (2d) 245.

128 *Janiak v Ippolito* [1985] 1 SCR 146; *Munce v Vinidex* [1974] 2 NSWLR 235 (CA).

129 (1983) 1 All ER 824 (JCPC).

## VII WRONGFUL BIRTH CLAIMS AND PLAINTIFF'S FAILURE TO MITIGATE DAMAGE THROUGH TERMINATION OF PREGNANCY

Wrongful birth<sup>130</sup> actions originate where it is claimed that there has been a negligent failure of contraception, sterilisation or abortion. It is sometimes alleged that if the defendant (usually a doctor) had not been negligent, a child would not have been born. A plaintiff can institute proceedings against the medical practitioner who failed to prevent conception and pregnancy through an ineffective vasectomy or sterilisation or a failed abortion. The critical issues to be resolved by the courts include whether damages should be awarded to the mother for the birth of the child as a result of the failure of the contraception device or negligently-tendered contraception advice and, if so, what heads of damage are recoverable.<sup>131</sup> Claims for recovery of damages from medical practitioners and their insurers often arise when the unexpected or unwanted child is born with congenital defects, and not unexpectedly raise controversial issues with philosophical, ethical and moral overtones. As the late Professor Fleming has observed:

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130 Wrongful birth or conception is the phrase used to refer to the birth of an unwanted or unplanned child caused by a third person's wrongful conduct. Such terminology is misleading inasmuch as what is wrongful is not the birth of the child but the conduct of the doctor or other third party: C Van Dam, *European Tort Law* (Oxford University Press, 2006) 156.

131 As for the former, any award of damages recognises the parents' moral and legal (often statutory) obligation to provide maintenance for the unplanned child which directly impacts upon the family unit's financial situation and private and family life and parental autonomy to plan and limit the size of the family unit: *Rees v Darlington Memorial Hospital* [2003] UKHL 52, [122] (Lord Millet). As for the latter, considering the child itself as damage would undermine the dignity of the child. As the French *Cour de cassation* has explicitly acknowledged '... the existence of the child ... cannot in itself constitute for the mother a legally reparable loss': Civ 1re 25 June 1991, D 1991, 566. Wrongful conception may nevertheless give rise to various types of pecuniary and non-pecuniary loss: the cost of maintaining the child and loss of income sustained by a working mother (pecuniary) and pain and suffering and the inconveniences associated with pregnancy and birth (non-pecuniary). Until 1999 the English courts had awarded damages for the costs of raising a healthy child: *Eneb v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044 (CA); *Thake v Maurice* [1986] 1 All ER 497 (CA); *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651. However in *McFarlane v Tayside Health Board* [1999] 4 All ER 963 (HL) the House of Lords unanimously held that the parents of a healthy child are not entitled to recover damages for the cost of bringing up a child. Although the risk of such a pure economic loss was plainly foreseeable, considerations of fairness, justice and public policy (including the allocation of finite public funds) militated against recovery. Subsequently in *Rees v Darlington Memorial Hospital* [2003] UKHL 52 the House of Lords affirmed *McFarlane v Tayside Health Board* [1999] 4 All ER 963 (HL) and dismissed the mother's claim for the cost of raising her child but a narrow majority awarded a nominal, conventional and non-compensatory sum in order to recognise that an unwanted or unplanned birth of a child results in a legal wrong to the mother.

[T]he defendant has not caused the infant's injury but merely failed to prevent its birth. To hold a physician responsible for possibly lifetime support of the child may well strike one as a disproportionate sanction for his fault.<sup>132</sup>

In terms of causation, the issue arises as to whether the mother's refusal to terminate the pregnancy, or persistence in having intercourse in the knowledge of such medical negligence, amounts to a *novus actus interveniens* relieving the medical practitioner of liability.<sup>133</sup>

Some courts have adopted a strict and cautious approach to the intervening causation issue, as illustrated in the decision of the New South Wales Court of Appeal in *CES v Superclinics (Aust) Pty Ltd*.<sup>134</sup> In that case doctors negligently failed to detect a young woman's pregnancy. When her pregnancy was finally diagnosed, she was too far along in her pregnancy to have an abortion. She claimed damages against the doctors for the cost of raising her healthy child. The Court of Appeal dismissed her 'wrongful birth' claim for various reasons, one of which was the characterisation of the plaintiff's own conduct in not giving up her newborn child for adoption as a *novus actus interveniens*. According to Priestley JA:

The point in the present case is that the plaintiff chose to keep her child. The anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however compelling the psychological pressure on the plaintiff may have been to keep the child, the opportunity of choice was in my opinion real and the choice made was voluntary. It was this choice which was the cause, in my opinion, of the subsequent cost of rearing the child.<sup>135</sup>

A more plaintiff-sensitive and empathetic approach has been taken by the English courts. In *Emeb v Kensington, Chelsea and Westminster Area Health Authority*<sup>136</sup> the plaintiff underwent sterilisation. Despite this she conceived again but did not discover the pregnancy until well

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132 JG Fleming, n 80, 184.

133 The issues raised in this context also include a victim's general common law duty to mitigate his or her damages. Failure to do so may trigger a finding of contributory negligence and a consequent reduction of the plaintiff's damages. In wrongful conception cases the defendant doctor's argument that the plaintiff could have mitigated her damage by terminating the pregnancy has consistently been rejected by the courts: C Van Dam, n 56, 158.

134 (1995) 38 NSWLR 47.

135 *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47, 84-5. In the American case of *Albala v City of New York* (1981) 445 NYS 2d 108 (CA), the infant plaintiff was conceived after her mother's uterus had been perforated and after she had had an abortion and also after a malpractice claim for the perforated uterus had been commenced by her mother. Wachtler J held that no cause of action for the pre-conception tort was cognisable as the mother was in the best position to avoid the damage to her child.

136 [1984] 3 All ER 1044 (CA).

into the second trimester. She refused to undergo a lawful abortion to avoid a further operation. The trial Judge held that she was not entitled to recover the cost of bringing up her congenitally abnormal child because her refusal to terminate the pregnancy was unreasonable and, as such, amounted to a *novus actus*. The Court of Appeal reversed this judgment, recognising that abortion at such a late period in the pregnancy was attended by trauma and risk. Slade LJ held that, except for the most exceptional circumstances, a choice to refuse termination of pregnancy could not be regarded as unreasonable.<sup>137</sup> Where the defendant has negligently created the plaintiff's dilemma, he or she should not be permitted to successfully claim that the plaintiff acted unreasonably in deciding on how to respond to that dilemma.<sup>138</sup>

In *McFarlane v Tayside Health Board*<sup>139</sup> the House of Lords confirmed that the failure to undergo a termination of pregnancy or the failure to give up the child for adoption following birth did not break the chain of causation between a negligently performed sterilisation operation or negligent advice as to its success and the birth.<sup>140</sup> This case involved the first plaintiff regaining his fertility after a vasectomy. The operation was carried out skilfully and with due care and the plaintiffs were advised to adopt contraceptive measures until sperm samples had been analysed. Five months after the operation, the surgeon advised the first plaintiff that his sperm counts were negative and that contraceptive measures were no longer necessary. The plaintiffs acted on this advice but the second plaintiff again became pregnant and gave birth to a healthy daughter. The plaintiffs sued the defendant claiming negligence in the compilation of the seminal analysis record and in advising the plaintiff that he could dispense with contraceptive measures when the defendant had not received two samples which tested negative for motile sperm. Although the defendant was not relieved of responsibility on the basis of a successful *novus actus* plea, their Lordships did limit the recoverable heads of damages. The plaintiffs were only entitled to general damages for pain and suffering and associated special damages. The House of Lords held that damages for the cost of rearing a healthy child were not recoverable in an action for wrongful birth.

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<sup>137</sup> *Ibid* 1053.

<sup>138</sup> *Ibid*.

<sup>139</sup> [1999] 3 WLR 1301; [2000] 2 AC 59 (HL).

<sup>140</sup> *McFarlane v Tayside Health Board* [1999] 3 WLR 1301, 1311, 1317, 1339, 1347. Likewise where a child develops a rare condition which is considered to be a natural and foreseeable consequence of childbirth: *Groom v Selby* [2001] EWCA Civ 1522; [2002] Lloyd's Rep Med 1. But it may be otherwise in the case of disabilities due to an infection arising after the perinatal period since the risk of disablement to an otherwise healthy child is one of life's vicissitudes: A Dugdale and M Jones (eds) *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19<sup>th</sup> ed, 2006) [114], para 2-103.

A similar conclusion was reached on the intervening causation issue in the Australian case of *Melchior v Cattanach*.<sup>141</sup> Mr and Mrs Melchior sued Dr Cattanach, an obstetrician and gynaecologist, after he performed a tubal ligation upon Mrs Melchior. Prior to the procedure, Mrs Melchior had informed Dr Cattanach that her right ovary and right fallopian tube had been removed. During the tubal ligation, the right fallopian tube was obscured by bowel adhesions resulting from the previous surgery. This appeared to confirm what Mrs Melchior had previously told Dr Cattanach who proceeded to attach a clip only to the left fallopian tube. Contrary to the information provided by Mrs Melchior, however, her right fallopian tube had not been removed and she gave birth to a healthy son. It was thus alleged that the defendant medical practitioner negligently failed to warn her of the possibility that the operation may not have been effective and that such negligence was a material cause of her pregnancy. Mr and Mrs Melchior claimed that Dr Cattanach's negligence had caused them to become the parents of an unintended child and thereby suffer financial loss. Dr Cattanach was found liable in negligence for merely accepting his patient's assertion and not warning her about a risk of conception if her assertion proved to be incorrect. Holmes J rejected the arguments that the failure of the plaintiffs to give up their child for adoption or to terminate the pregnancy was either a *novus actus interveniens* or a failure to mitigate damage. Rather than an interruption in the causal chain, such failures were more of a failure to interrupt such chain. According to His Honour, one could not assume that resorting to abortion or adoption would be less catastrophic than the decision to keep the child. In effect, then, the decision of the plaintiffs could not be said to be unreasonable in the circumstances. On appeal to the High Court of Australia,<sup>142</sup> McHugh, Gummow, Kirby and Callinan JJ (Gleeson CJ, Hayne and Heydon JJ dissenting) held that a court can require the doctor to bear the modest and reasonable costs of raising and maintaining until age 18 a child born as a consequence of medical negligence, and that the benefits received from the birth of a healthy child (the so-called 'joys of parenthood') are not legally relevant to the costs associated with raising and maintaining the child.<sup>143</sup> The *novus actus* and failure to mitigate issues were not directly addressed in the High Court of Australia. In the United Kingdom, the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*<sup>144</sup> unanimously

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141 [2000] QSC 285 (23 August 2000).

142 *Cattanach v Melchior* (2003) 215 CLR 1.

143 The decision of the High Court of Australia was subsequently legislatively overturned by the legislatures in New South Wales, South Australia and Queensland: see *Civil Liability Act 2003* (Qld) s. 49A; *Civil Liability Act 1936* (SA) s 67; *Civil Liability Act 2002* (NSW) s 71.

144 [2004] 1 AC 3.

refused to follow *Cattanach v Melchior*,<sup>145</sup> deeming it inappropriate to regard an unexpected child solely as a financial liability. It was therefore considered unjust to hold a physician or medical authority liable for the costs of raising such child.

By contrast, where a plaintiff knows that she is not sterile following a failed sterilisation operation and decides nevertheless to engage in sexual intercourse without taking contraceptive measures, the causal chain between the negligent performance of the surgery and the subsequent birth of the child will be held to be severed. The plaintiff's unreasonable conduct will be deemed to constitute a *novus actus interveniens*.<sup>146</sup>

### VIII ALTERNATIVE APPROACHES: NOVUS ACTUS INTERVENIENS VERSUS DUTY TO MITIGATE

In relation to the previous sections of this article on the Refusal to Accept Medical Treatment as *Novus Actus Interveniens* and Wrongful Birth Claims, the question arises as to whether the proper judicial approach should be one of intervening causation analysis or the failure of the plaintiff to mitigate his or her damage. In relation to the latter, the so-called common law doctrine of failure to mitigate is based on the notion that a victim of negligence must take reasonable steps to minimise the loss suffered as a result of that negligence, effectively providing the victim with 'an incentive to engage in self-help'.<sup>147</sup> In the clinical negligence context, a plaintiff may unreasonably fail to mitigate

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<sup>145</sup> (2003) 215 CLR 1.

<sup>146</sup> *Sabri-Tabrizi v Lothian Health Board* 1998 SLT 607, 610-11, citing *The Oropesa* [1943] P 32, 39 (Lord Wright); *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 162. But see *Pidgeon v Doncaster Health Authority* [2002] Lloyd's Rep Med 130 (County Court) where the judge distinguished *Sabri-Tabrizi* and *McKew*. There the plaintiff was negligently advised in 1988 that a smear test for cervical cancer was normal when it actually showed pre-cancerous abnormalities. A further test in 1997 resulted in a diagnosis of cervical cancer. During the intervening period the plaintiff had received four letters from the defendants' cervical cancer screening programme about the need to have a smear test. Although she had been aware that she could develop cervical cancer, the plaintiff had not undergone further testing because she found it painful and embarrassing. The plaintiff's failure to undergo further smear testing was held not to sever the causal chain. *Sabri-Tabrizi* and *McKew* were distinguished on the basis that in those cases the plaintiffs were aware of their particular condition whereas Ms Pidgeon did not know of her condition and had been reassured by the 1988 test result. As the Court observed, there was 'an important difference between a claimant indulging in behaviour against a background of known vulnerability, whether it be weakness of the leg or ability to conceive, and a claimant failing to take steps which may reveal a condition, if in fact present, having previously been reassured that it was not present' (at [23]). Although her failure was not 'so utterly unreasonable' as to sever the causal chain, Ms Pidgeon was adjudged to be two-thirds contributorily negligent.

<sup>147</sup> K Barker, P Cane, M Lunney and F Trindade, n 41, 702.

his or her loss by failing or refusing to seek timely medical treatment or procedures to prevent the tortiously caused injury from getting worse and which would have enabled him or her to return to work sooner, thereby reducing his or her loss of income.<sup>148</sup> If the plaintiff fails to take reasonable steps to reduce the effects of the loss, and the medical treatment or procedures would have had a beneficial effect prior to the trial, compensatory damages will be reduced from that date to acknowledge the diminished injury the plaintiff would have sustained if treatment had been sought and effectively provided.<sup>149</sup>

The onus of proof in Australia lies with the tortfeasor<sup>150</sup> to prove, on the balance of probabilities, facts which show that the plaintiff's cause of action does not entitle him or her to such a large amount as proof of the cause of action would otherwise justify. It is a question of fact assessed objectively whether it was unreasonable for the plaintiff to fail or refuse to undergo the medical treatment or procedures.<sup>151</sup> In making this assessment, it is material to consider whether the plaintiff received conflicting or unanimous medical advice on the advisability of the treatment<sup>152</sup> and the chances of a successful outcome.<sup>153</sup>

As a matter of preferred judicial policy, it is the author's view that it would be fairer (from the plaintiff's viewpoint at least) to adopt and apply a failure to mitigate analysis over an intervening causation analysis. The effect of a successful *novus actus* plea has the (harsh) effect of disentitling the plaintiff to any damages from a certain temporal point onwards when the tortfeasor's own negligence has triggered the chain of events in the first place, presenting the latter with somewhat of a windfall. The application of a failure to mitigate approach presents judges with more flexibility in allowing them to reduce compensatory damages to the extent required by their determination of the extent to which the plaintiff's inaction or refusal contributed to the overall damages sustained. This represents a more equitable allocation of responsibility between the two parties in the sense that while not disqualifying the plaintiff from damages completely, his or her damages will be reduced on the basis of a plaintiff's personal responsibility to engage in self-help when required. However, in relation to wrongful birth claims, it may be inapt or perhaps insensitive on public policy grounds to employ intervening causation and failure to mitigate damages

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148 Ibid.

149 Ibid.

150 *Plenty v Argus* [1975] WAR 155.

151 *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345.

152 *Polidori v Staker* (1973) 6 SASR 273.

153 *Plenty v Argus* [1975] WAR 155.



analyses to restrict recovery in light of the personal philosophical, moral, religious, emotional and psychological considerations which confront the plaintiff in choosing between termination of pregnancy and giving up the child for adoption (where the plaintiff otherwise comes to court with clean hands).

## IX CONCLUSION

Perhaps as a matter of procedural fairness, the approach of the American and Australian courts, in holding that intervening negligent medical treatment falling short of gross negligence can be a recognisable risk for which an accident victim might hold the original wrongdoer responsible, is preferable. As Professor Linden has observed, it is confusing and somewhat arbitrary to make liability for the intervening medical error turn on whether or not there is actionable negligence.<sup>154</sup> It may be harsh to require an injured plaintiff to undertake two actions to recover full damages when the original defendant triggered the chain of events. It might be preferable to hold the original defendant liable for medical negligence (falling short of gross negligence) who could then in turn sue the negligent health carers for contribution.<sup>155</sup> The original defendant who triggered the chain of events would thus, and for good reason, bear more of the procedural burden, and the plaintiff's recovery would be facilitated more expeditiously. Nevertheless, while some acts are capable of classification with relative ease - errors of judgment committed in an emergency situation will not normally be classified as actionable negligence whereas a surgical operation on the wrong patient will constitute gross negligence - that is not always the case and may involve classification issues in a significant intermediate grey area upon which experts can reasonably disagree.

That is why it may prove more helpful in appropriate cases to assess the impact or force or causal potency of the intervening medical negligence, regardless of its classification as actionable ordinary negligence or gross negligence, on the damage ultimately sustained by the plaintiff rather than to attempt to classify the medical conduct as constituting a mere error of judgment, actionable negligence or gross negligence, as the case may be.<sup>156</sup> As Lord Neuberger of Abbotsbury MR stated in *Wright*

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<sup>154</sup> A Linden and B Feldthusen, *Canadian Tort Law* (Butterworths, 8<sup>th</sup> ed, 2006) 416.

<sup>155</sup> *Mabony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522; *Scout Association of Queensland v Central Regional Health Authority* (1997) Australian Torts Reports 81-450.

<sup>156</sup> This notion of 'significant influence' was cogently argued by Clackson J in the Canadian case of *Phillip (Next Friend of) v Bablitz* 2010 Carswell Alta 1763 (Alberta Court of Queen's Bench), [339].

*v Cambridge Medical Group (a partnership)*<sup>157</sup> ‘where there are successive tortfeasors, the contention that the causative potency of the negligence of the first is destroyed by the subsequent negligence of the second depends very much on the facts of the particular case.’ It may be that it is fairer in clinical negligence cases to apportion liability between successive tortfeasors where the conduct of each has contributed to the plaintiff’s damage rather than allow the *novus actus interveniens* doctrine to run rampant in effectively denying recovery against the first tortfeasors on a questionable determination of the classification of the negligence involved.

It is not only Anglo-American-Australasian lawyers who are familiar with and utilise this concept of ‘causal potency’. Continental European ‘individualising’ theorists have tended to select a condition as the cause of an event if it contributed more of the energy needed to produce the event on a particular occasion than any other condition.<sup>158</sup> One of the individualising theories – the ‘efficiency’ theory – recognised that events may possess causal efficiency in varying degrees.<sup>159</sup> The cause of an event is considered to be the most efficient condition or conditions. In some cases (such as in the present context), several factors may contribute the causal energy or potency needed for the production of the ultimate consequences.<sup>160</sup> The chief exponent of the efficient cause theory was Birkmeyer<sup>161</sup> who argued that a certain amount of energy attached to each condition of an event and that its cause or causes, for legal purposes, meant the condition or conditions to which the greatest amount of energy attached and which therefore made the greatest causal contribution to the result.<sup>162</sup> Although it could be argued that the concept of ‘causal potency’ is interpretatively open-ended and subjective, being elusive of precise objective assessment, it may not be any more so than the phrase ‘scope of liability’ as contained in Recommendation 29 of the Ipp Panel<sup>163</sup> or the notion of ‘common sense’ causation espoused by the High Court of Australia in *March v E & M H Stramare Pty Ltd*.<sup>164</sup>

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157 [2013] QB 312, 324 (CA).

158 Hart HLA and Honoré, *Causation in the Law* (Clarendon Press Oxford, 1959) 411.

159 *Ibid* 384.

160 *Ibid*.

161 *Ursachenbegriff und Kausalzusammenhang im Strafrecht Rektoratsrede, Rostock* (1885).

162 Hart and Honoré, above n 158, 388.

163 *Ipp Report*, above n 39.

164 (1991) 171 CLR 506.