UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

LITIGATION MASTER CLASS SEMINAR

26 March 2013

TOPIC 2

Proof – substantive and procedural considerations

OVERVIEW

This paper is an outline of the matters to be examined in the session scheduled for less than an hour on 26 March 2013. Its contents aim to stimulate thought and to promote discussion. It is not a definitive statement. Necessarily, the content and detail of the paper is constrained by the time available for the session.

Legal practitioners are cautioned to rely on their own research and enquiries to advise clients. This paper does not purport to be the first or last word on the matters examined. Legal practitioners will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in individual matters.

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A. Introduction

In 1501 a twenty-six year old sculptor living in Florence was commissioned to carve a statue of a biblical hero out of a giant piece of second-hand, milky white marble. In 1504 the sculptor finished his work. He had carved a seventeen foot tall marble statue of the shepherd boy who slayed Goliath.

The sculptor was named Michelangelo. He was asked how he had made such a magnificent statue.

*Michelangelo replied: "**I just removed everything that wasn't David.**"*

1. That approach has been described as the art of subtraction. For a litigator adoption of that approach engenders a sound mindset which is more likely to lead to success. It is also a mandatory rule for all aspects of litigation in these times of the *overriding purpose*.

2. In litigation the art of subtraction may find expression in the adage: "One must remove everything that does not in some way strengthen your client's case." This is particularly apt for matters of proof.

3. The art of subtraction may be used in litigation to improve the potency of proof by removing matters which reduce the impact of the most persuasive evidence.

4. What is proof? Its purpose best identifies its nature. The purpose of proof at law, unlike science or philosophy, is to apportion legal responsibility. That requires the courts, by a judgment, to "reduce to legal certainty questions to which no other conclusive answer can be given".

5. A final consideration by way of introduction is the burden of proof. This is often understood as the legal burden of proving all facts essential to a claim. *Cross on Evidence*, 8th Ed at [7065] states as follows:

> One of the clearest Australian expositions of the general rule is the following statement of Walsh JA's:
>
> > [T]he burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg, if its existence is a condition precedent to his right to maintain an action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, *prima facie*, the plaintiff has."

B. The process of proof

6. A litigator without a goal is like a ship's captain without a destination. Neither will know if they are on course, or when the journey has finished.

7. From the earliest stage of any litigation it is essential to identify the client's realistic and achievable outcome in the dispute. After that exercise has been completed, (mindful that as facts change the realistic outcome may have to change with new information), a strategy to achieve that outcome may be developed. Preparation for hearing then follows.

8. The preparation stage of litigation involves assessing and assembling the evidence to sustain your case, i.e. your proof. The first and last consideration for evidence is relevance. Helpfully the Legislature has provided guidance as to the meaning and application of that concept in the *Evidence Act 1995*:

> **55 Relevant evidence**
>
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. (*my emphasis*)
>
> (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
>
> (a) the credibility of a witness, or
>
> (b) the admissibility of other evidence, or
>
> (c) a failure to adduce evidence.

9. The reason for the focus on relevance is the need for evidence to be received or admitted into evidence at the hearing before the Court. To do so, the evidence must be admissible. Thus the Evidence Act provides:

> **56 Relevant evidence to be admissible**
>
> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible.

10. The purpose of tendering evidence at hearing is to provide the factual foundation upon which propositions of law are constructed to persuade the decision-maker of the justness of your client's cause. Furthermore, findings of fact are a necessary precursor to the Court determining the rights and obligations of the parties at law.

11. The decision-making process by a judge in regard to facts has been described by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 as:

> … The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. …
>
> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

C. Proof and the distinction between harm and damages

12. The Review of the Law of Negligence was published in September 2002 and is often referred to as the Ipp Report. The authors of the Ipp Report used the term **harm** to refer to a party's detriment as opposed to the then more conventional common law term of **damage**.

13. In December 2002 Parliament implemented many recommendations made in the Ipp Report by means of substantial amendments to the *Civil Liability Act 2002* (**CL Act**).

14. Amendments to the CL Act included substituting section **5 Regulations** with:

> **5 Definitions**
>
> In this Part:
>
> ***harm*** means harm of any kind, including the following:
>
> (a) personal injury or death,
>
> (b) damage to property,
>
> (c) economic loss.
>
> ***negligence*** means failure to exercise reasonable care and skill.
>
> ***personal injury*** includes:
>
> (a) pre-natal injury, and
>
> (b) impairment of a person's physical or mental condition, and
>
> (c) disease. (*my emphasis*)

15. The common law concept of damage is now referred to as harm in proceedings in which the CL Act is engaged.

16. This taxonomy is important to all stages of a cause of action founded upon CL Act negligence. Harm is relevant to precautions which ought to have been taken to establish breach of duty pursuant to the requirements of CL Act ss5B & 5C, together with determination of causation pursuant to s5D.

17. Another significant legislative change to the common law was to introduce statutory provisions which apply to all proceedings alleging a failure to exercise reasonable care and skill, regardless of what cause of action is pleaded.

18. By way of example at common law it is essential that a party prove damage caused by the breach of a duty of care owed to the party to complete a good cause of action in the tort of negligence. Damage is the gist of the action in negligence. By contrast, a cause of action founded on the law of contract is complete is complete upon proof of breach, which will sound in an award of at least nominal damages.

19. At common law the difference may, depending on the factual circumstances, have been significant. *Tabet v Gett* (2010) 240 CLR 537 (***Tabet v Gett***) was a claim in the tort of negligence that a breach of duty by a medical specialist made a material contribution to brain damage which did not engage the *Civil Liability Act*. In considering alternative potential causes of action Gummow ACJ stated:

> [20] … The patient has the right to performance of the contract on its terms and on that basis there might be recovery of damages representing the loss of a chance of less than 50 per cent of a better outcome. But, as indicated above, there was no contractual claim in this case and no occasion to consider the approach.

20. By the 2002 amendments to the CL Act the distinctions between the traditional common law causes of action available arising from a failure to exercise reasonable care and skill were removed in matters alleging a failure to exercise reasonable care and skill. All such causes of action are determined by application of the provisions **Part 1A Negligence**, by operation of:

> **5A Application of Part**
>
> (1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise. (*my emphasis*)
>
> (2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

21. Thus the provisions ss5B & 5C in **Division 2 Duty of Care** will apply regardless of the cause of action pleaded in regard to breach of that duty. Furthermore, as explained by the High Court of Australia in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [13]: "*the heading 'Duty of care', … is apt to mislead…as* (those) *provisions are evidently directed to questions of breach of duty.*"

CL Act: *harm* is not the same as *damages*

22. Pursuant to section 3 of the Act, the term **damages** is given a statutory definition as follows:

> ***damages*** includes any form of monetary compensation but does not include: (my emphasis)
>
> (a) any payment authorised or required to be made under a State industrial instrument, or
>
> (b) any payment authorised or required to be made under a superannuation scheme, or
>
> (c) any payment authorised or required to be made under an insurance policy in respect of the death of, injury to or damage suffered by the person insured under the policy.

23. The distinction between the two concepts is identified by resort to the common law distinction between damage and damages explained by the High Court of Australia in *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 (***Mahony v Kruschich***) at 527:

> … "damage" in s5(1)(c) is not to be equated to the "damages" awarded by a court. In negligence, "damage" is what the plaintiff suffers as the foreseeable consequence of the tortfeasor's act or omission. Where a tortfeasor's negligent act or omission causes personal injury, "damage" includes both the injury itself and other foreseeable consequences suffered by the plaintiff. The distinction between "damage" and "damages" is significant. Damages are awarded as compensation for each item or aspect of the damage suffered by a plaintiff, so that a single sum is awarded in respect of all the foreseeable consequences of the defendant's tortious act or omission. But concurrent tortfeasors whose negligent acts or omissions occur successively rather than simultaneously may both be liable for the same damage, being a foreseeable consequence of both torts, although one is liable for some only of the damage for which the other is liable and an award of damages against the one would necessarily be less than an award of damages against the other. (*my emphasis*)

24. In *Tabet v Gett* the Court did not accept that in medical negligence claims an award of damages was available for a "loss of a chance of a better outcome" by analogy to the approach for assessment of damages for the loss of an

opportunity to obtain commercial advantage as explained in *Sellars v Adelaide Petroleum* (1994) 179 CLR 332. The Court found that there was no damage upon which an award of damages might be made.

25. In *Tabet v Gett* per Hayne & Bell JJ explain the concept of **damage** in the law of negligence. This explanation appears equally applicable to the conceptual basis to **harm**:

> [66] For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference to "difference" is between the relevant state of affairs as they existed after the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred.
>
> [67] In this case, saying that a chance of a better medical outcome was lost presupposes that it was not demonstrated that the respondent's negligence had caused any difference in the appellant's state of health. That is, it was not demonstrated that the respondent's negligence was probably a cause of any part of the appellant's brain damage. (*my emphasis)*

26. The conceptual differences and historical origins of the calculation of damages, such as determining an award of compensatory damages in tort, as opposed to reliance or expectation damages in contract, are subsumed by the CL Act s11A for personal injury damages.

> **11A Application of Part**
>
> (1) This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part by section 3B.
>
> (2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.
>
> (3) A court cannot award damages, or interest on damages, contrary to this Part.
>
> (4) In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.

27. Also, the concept of the remoteness of damage and the differing common law tests for remoteness of damage in tort and contract appear to be incorporated in breach per CL Act s5B.

28. Thus a plaintiff's traditional approach of pleading alternative causes of action in tort and contract in personal injury claims, founded on the same factual matrix alleging a failure to exercise reasonable care and skill, has no effect upon the finding of harm or the award of damages by operation of CL Act.

D. Causation and proof

29. The issue of causation continues to be the subject of much dispute and confusion in litigation. This is not a new development in legal practice.

30. This part of the paper considers past and recent guidance provided by the Courts on the common law concept of causation, including as modified by the CL Act from 2002. There seems merit to consider where we have come from on the topic, better to understand where we are, and what the future might hold. Proceedings founded upon statutory causes of action for damages or other relief, such as the *Trade Practices Act 1974* (*Cth*.) and its successor, the *Australian Consumer Law*, for loss or damage by misleading or deceptive conduct, are beyond the scope of this paper.

31. The utility of the case law on causation to a litigator, as opposed to philosophical or academic theory, is trite.

32. It is probably unarguable that the decision of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (***March***) remains the most often quoted case on causation over the last twenty years. Notwithstanding the introduction of a statutory test for causation by the CL Act the utility of the content of *March* is not only that it remains the binding authority of the High Court of Australia on causation at common law, but also the reasons in *March* provide a most accessible and useful articulation of the alternative underpinning concepts relevant to causation in law.

33. By way of illustration in *March* at page 509 Mason CJ provides the following insight:

> Causation in the context of legal responsibility
>
> It has often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because "questions of cause and consequence are not the same for law as for philosophy and science", as Windeyer J pointed out in *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, at 591. In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the

> relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage: see *McLean v Bell* (1932) 147 LT 262, per Lord Wright at 264; *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580, per Windeyer J at 590-591.

34. At common law the question of the cause of a particular occurrence is a question of fact determined ultimately as a matter of common sense. The "but for" test was not an acceptable means to determine causation other than as a negative criterion to resolve the question; see Mason CJ in *March* at 515.

Modification of common law causation in NSW by the CL Act

35. In 2002 the Legislature adopted recommendations made in the Ipp Report and introduced amendments to the CL Act, by the insertion of Part 1A Division 3 Causation:

> **5D General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, 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.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
>
> (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) 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.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. (*my emphasis*)

36. *Strong v Woolworths Ltd trading as Big W & Anor* (2012) 285 ALR 420, 86 ALJR 267; [2012] HCA 5 (***Strong***) was decision of the High Court of Australia in a slip and fall case brought by a plaintiff who suffered injury when she fell due to the presence of a greasy chip on the concourse of a regional shopping centre. The Court found that due to the occupier's unsafe cleaning system, the occupier breached the duty of care which it owed to the plaintiff to take reasonable care to avoid the risk of foreseeable harm, which caused breach caused the plaintiff to suffer harm. The CL Act was engaged by the facts of the proceedings.

37. The majority in *Strong* provided an analysis of CL Act s5D and stated:

> [18] The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation : the plaintiff would not have suffered the particular harm but for the defendant's negligence. While the value of that test as a negative criterion of causation has long been recognised, two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Secondly, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm.
>
> [19] The division of the causal determination under the statute into the distinct elements of factual causation and scope of liability is in line with the recommendations in the Final Report of the Committee convened to review the law of negligence ("the Ipp Report") . The authors of the Ipp Report acknowledged their debt to Professor Stapleton's analysis in this respect. The policy considerations that inform the judgment of whether legal responsibility should attach to the defendant's conduct are the subject of the discrete "scope of liability" inquiry. In a case such as the present, the scope of liability determination presents little difficulty. If the appellant can prove factual causation, it is not in contention that it is appropriate that the scope of Woolworths' liability extend to the harm that she suffered. In particular cases, the requirement to address scope of liability as a separate element may be thought to promote clearer articulation of the policy considerations that bear on the determination. Whether the statutory determination may produce a different conclusion to the conclusion yielded by the common law is not a question which is raised by the facts of this appeal.
>
> [20] Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a

> defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a). In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm ..
>
> …
>
> [27] Section 5D(2) makes special provision for cases in which factual causation cannot be established on a "but for" analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles[1], be accepted as establishing factual causation, subject to the normative considerations to which s5D(2) requires that attention be directed.

38. As to matters of proof the majority in *Strong* stated:

> [34] … As Hayne JA observed, a plaintiff must prove his or her case on the balance of probabilities and it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open[2]. The determination of the question turns on consideration of the probabilities.

39. To similar effect in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 339 Beazley JA (as the President of the Court of Appeal then was) said that the onus of proof of causation "is not discharged by establishing that a particular matter cannot be excluded as a cause of the injury".

40. No doubt significant debate will continue to arise in matter before the Courts as to whether or not the requirement of proof has been satisfied by a plaintiff bearing the onus of proving a fact or the issue of causation generally. There can be no alternative for a litigator other than to read the authorities for guidance.

41. A careful reading and re-reading of the reasons of the High Court of Australia in *Purkess v Crittenden* (1965) 114 CLR 164 will be of immense benefit to a litigator in this field. Often that decision is advanced as a shibboleth to shift the onus, in the same manner that *Makita* is advanced as authority by shorthand on any aspect of expert evidence.

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1 *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 514 per Mason CJ
2 *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408 at 430

42. A reading of the reasons of Heydon J in dissent in *Strong*, commencing at [41], will reward the reader with the benefit of his Honour's great learning of legal history and concise analysis as to "evidential burden", expressed in his Honour's usual crisp prose.

43. The High Court of Australia is currently reserved in the matter of *Wallace v Kam* [2013] HCATrans 45 (13 March 2013) link:

http://www.austlii.edu.au/au/other/HCATrans/2013/45.html.

The Court's orders and reasons in that matter are likely to add to the learning on CL Act s5D, particularly in regard to policy controls and the discretion conferred on a Court by CL Act s5D(1)(b) and possibly CL Act s5D(2).

Exclusionary provision in CL Act s5D(3)

44. Another topic to consider in regard to proof and causation is the exclusionary provision in CL Act s5D(3). In many ways this provision is merely a statutory expression of the reluctance by the Courts to place any weight on a plaintiff's evidence which is perceived as being affected by hindsight bias.

45. Justice Basten has provided a most helpful analysis of CL Act s5D(3), including the limits of the exclusionary provision of CL Act s5D(3)(b) and also practical guidance on matters of proof in *Neal v Ambulance Service of New South Wales* [2008] NSWCA 346 at:

> [35] … because it depends upon an assessment of what the plaintiff would or would not have done, and this Court has had no opportunity to evaluate his evidence. That difficulty is ameliorated in the present circumstances to the extent that no direct evidence from the plaintiff as to what he might or might not have done would have been admissible. That is because the proceedings were governed by the *Civil Liability Act* 2002 (NSW), s 5D …
>
> …
>
> [38] Paragraph (b) excludes the plaintiff's evidence as to what he or she would have done. The Negligence Review stated at par 7.40:
>
> > "[T]he Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff's own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge's view of the plaintiff's credibility is likely to be determinative, regardless of relevant circumstantial evidence.

> As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible."

[39] In the distant past, English courts developed detailed rules of evidence, one purpose of which was to exclude from consideration by a jury evidence which the judges considered not capable of being properly assessed by lay people. Prior to 1833 in the UK, "every person having an *interest*, however minute, in the result of the proceedings, was absolutely barred from being a witness": see *Phipson on the Law of Evidence* (9th ed, 1952) p 469. At common law, the accused in a criminal trial could not give evidence on oath. The modern approach, reflected in the *Evidence Act* 1995 (NSW), is to abandon inadmissibility in favour of allowing the jury (or judge) to assess weight and reliability. Prior to the *Civil Liability Act*, the lack of weight likely to attend self-interested assertions was well understood: see, eg, *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 at 289 (Hutchinson J) quoted by Gummow J in *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [89]; see also Madden and Cockburn, "What the Plaintiff Would Have Done: s 5D(3) of the *Civil Liability Act* 2002 (NSW)" (2006) 3 *Aust Civil Liability* 47. On one view, the difficulty of "counteracting hindsight bias" might have been thought to lie with the plaintiff. It seems unlikely that the provision was introduced to prevent the trivial waste of time which might attend the adducing and challenging of such evidence. Rather, the purpose of the provision appears to be to prevent a trial judge placing any weight on such evidence, in circumstances where it could not be said to be an abuse of his or her advantage as a trial judge. (Were it otherwise, an appellate court could intervene.)

[40] Whatever the real purpose of the provision, the issue for determination is how a court is now to identify what course the plaintiff would have taken, absent negligence. That assessment might include evidence of the following:

(a) conduct of the plaintiff at or about the relevant time;

(b) evidence of the plaintiff as to how he or she might have felt about particular matters;

(c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings or motivations, and

(d) other matters which might have influenced the plaintiff.

[41] Properly understood, the prohibition on evidence from the plaintiff about what he or she would have done is of quite limited scope. Thus, the plaintiff cannot say, "If I had been taken to hospital I would have agreed to medical assessment and treatment". Indeed, as the Negligence Review recognised, such evidence would be largely worthless. However, the plaintiff might have explained such evidence along the following lines:

> "I recall on the trip to the police station that I began to fell less well; my state of inebriation was also diminishing; I began to worry about the pain in my head …"

[42] That evidence (entirely hypothetical in the present case) would not be inadmissible. If accepted, it might provide a powerful reason for discounting any inference as to future conduct drawn from the past refusal of treatment. It would constitute evidence as to the plaintiff's position, beliefs and fears. Because an inference would need to be drawn from that evidence, no doubt the court would take into account the likely response of a reasonable person in such circumstances. That is consistent with the Act requiring that the matter be determined "subjectively in the light of all relevant circumstances". …

Guidance on proof, damage and causation

46. Guidance on proof, damage and causation at common law is provided by Kiefel J (agreed in by Hayne, Crennan and Bell JJ) in *Tabet v Gett* at [112]-[113]

[111] The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable: means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty.

[112] The "but for" test is regarded as having an important role in the resolution of the issue of causation, although more as a negative criterion than as a comprehensive test. The resolution of the question of causation has been said to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation and that may require value judgments and policy choices.

[113] Once causation is proved to the general standard, the common law treats what is shown to have occurred as certain. The purpose of proof at law, unlike science or philosophy, is to apportion legal responsibility. That requires the courts, by a judgment, to "reduce to legal certainty questions to which no other conclusive answer can be given". The result of this approach is that when loss or damage is proved to have been caused by a defendant's act or omission, a plaintiff recovers the entire loss (the "all or nothing" rule).

E. Affidavit evidence

47. An affidavit is a solemn and formal record of the evidence of a deponent which the deponent swears or affirms to be true. That document contains written evidence for use in court proceedings. Exclusionary rules as to admissibility including those found in the *Evidence Act 1995* apply to the contents of an affidavit.

48. A deliberate false statement contained in an affidavit can expose the witness to prosecution for perjury.

49. The concept of relevance and admissibility is paramount to the drafting of a witness' affidavit. The rule of subtraction is particularly apt for the preparation of an affidavit. For an affidavit to be effective the drafter must have a clear understanding of the issues in dispute in the proceedings and the relevance of factual matters contained within an affidavit.

50. There is no substitute for time plus unpressured review and reformulation of the contents of an affidavit to exclude irrelevant and inadmissible material.

51. The drafter of an affidavit should be mindful that in contested litigation, the deponent is likely to be cross examined in regard to facts which are in dispute. Two observations flow from this situation.

52. Firstly, the deponent must feel a sense of ownership of the contents of the affidavit. This will avoid the following unfortunate exchange:

Cross examiner:	"Well, why did you write that in your affidavit?"
Response from deponent:	"Because my solicitor told me to."

53. Secondly, the deponent's written language should bear close resemblance to the deponent's oral evidence in terms of vocabulary, phraseology and structure to avoid evidentiary dissonance.

54. A useful rule in life is to read the directions before rather than after assembling an object. In regard to affidavits the directions are contained in the *Uniform Civil Procedure Rules* 2005 (**UCPR**) Part 35. Surprisingly many affidavits are prepared by litigators which affidavits fail to comply with the requirements of the UCPR and particularly Part 35. In regard to matters of procedure, compliance with the rules will reassure that the drafter of the affidavit knows what he or she is doing. Examples include:

(a) the heading to an affidavit must include the name of the deponent and the date on which the affidavit is made, see UCPR r35.3A;

(b) each matter in an affidavit ought to be put into a separate paragraph, see UCPR r35.4(b);

(c) the pages of an affidavit, together with any annexures, must be consecutively numbered in a single series of numbers, see UCPR r35.6(3);

(d) an exhibit to an affidavit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made, see UCPR r35.6(4). A convenient means of identifying a document in an exhibit is as follows:

> Exhibited to me at the time of making this affidavit is a bundle of documents entitled "**Exhibit: Jane Smith Documents**", which comprises copies of documents to which I refer in the course of this affidavit. For convenience I will refer to the contents of the **Exhibit: Jane Smith Document** by the abbreviation **JSD** and the relevant page number(s), eg **JSD2** refers to the document at page 2 of the Jane Smith Documents.

(e) each page of an affidavit must be signed by the deponent and by the person before whom it is sworn, see UCPR r35.7B;

(f) in regard to conversations recorded in affidavits, it is preferable but not essential to set out that material in direct speech. Furthermore, there is economy to using the following phrase early in the affidavit:

> In this affidavit, wherever I have stated a conversation I have done so in the words used or to the effect of the words used to the best of my recollection.

This is preferable to repeating "words to the effect" in every exchange. Amongst other matters, the additional verbiage distracts the reader from the substance of the affidavit.

55. As to the use of English language in an affidavit the art of subtraction provides guidance. There is much elegance to affidavits using the simple but clear sentence structure of subject, verb, object. Beware of floating qualifiers, conjunctive and disjunctive clauses and the use of the comma more frequently than the full stop.

F. Conclusion

56. My thanks to the University of New South Wales and particularly Mr Chris Lemercier for the opportunity to participate in this Litigation Master Class.

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26 March 2013

The HONORABLE THURGOOD MARSHALL

Associate Justice, The United States

Supreme Court Saturday, November 18, 1978,

http://www.thurgoodmarshall.com/speeches/equality_speech.htm

…

This guy went out from California to Las Vegas and did what all others do. He lost his money. All of it including his fare home. And he was commiserating with himself; and as sometimes happens, he had to go. And when he got to the toilet room (bathroom) ..., he found out, that they had not nickel or dime: they had quarter ones … And he didn't have a nickel. So he was in pretty bad shape.

And just then a gentleman came by and he told the gentleman his problem ... The guy said, "I will give you a quarter". And the guy said, "Well look, you don't know me ... I don't care if you give it back to me or not. You are no problem. Here's a quarter". He took the quarter and went in the room there, and just as he was about to put the quarter in the slot to open the door, the door had been left open for somebody. So he put the quarter in his pocket. He went on in; and when he finished, he went upstairs.

A quarter wasn't going to get him back to Los Angeles. A quarter wasn't even going to feed him. So, he put the quarter in the slot machine. And it wouldn't be any story if he didn't hit the jackpot. Then he hit the bigger jackpot ... and he went to the crap table; he went to the roulette table. He ended up with about ten or fifteen thousand dollars worth.

He went back to Los Angeles invested in the right stock. He got the right business together. And in pretty short order, about fifteen years, he became the second wealthiest man in the world.

And on television, they asked him about it; and he said he would like to tell his story. And he told the story. And he said, "I am so indebted to that benefactor of mine. That man who made all of this possible. And if he comes forth and proves it; that he was the man. I will give him half of my wealth in cash".

So a man came forth ... They had all the elaborate ... private detective investigation; and sure enough, "That was the man". ... The guy said, "Well look. Are you sure you are the one I am looking for?" He said, "Why certainly".

He said, "Who are you?" He said, "I am the man that gave you that quarter". He said, **"Heck, I'm not looking for him. I am looking for the man who left the door opened**. Because you see, if he hadn't left the door open, I would have had to put the quarter in the slot.