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UNWINDING THE COMMON THREAD: WHEN IS IT UNCONSCIENTIOUS TO DENY SUBROGATION RIGHTS?

Nicholas Lehm

Previously uncertain, the juridical basis of equitable subrogation in Australia is now firmly established as being the restraint of unconscientious conduct by the defendant. However, it remains unclear how this basis bears upon when a claimant will be entitled to subrogation, and when they will not. This article seeks to elucidate the unifying element between circumstances where subrogation is awarded, concluding that subrogation operates to allocate a burden to the party upon whom equitable principles conclude ultimate liability

should lie. In this manner, subrogation adjusts the interests of the parties involved to give effect to an equity independently generated. This article argues that a liability-based analysis is consistent with the historical development of the doctrine and modern conceptions of the nature of subrogation rights. It proceeds to apply the analysis to the key areas in which subrogation is awarded, with a view to demonstrating that the relevant unconscientiousness is found in the denial of the carriage of ultimate liability. 505

IN WHAT CIRCUMSTANCES WILL AUSTRALIAN COURTS DEPART FROM THE "BUT FOR" APPROACH TO CAUSATION IN NEGLIGENCE CASES?

Alan Sullivan KC

Notwithstanding its formal displacement by the "commonsense" approach to determining factual causation at common law in negligence cases, the "but for" approach, that is, whether the plaintiff's injury would not have occurred but for the defendant's negligence, continues to be of central importance in the determination of factual causation in cases. This article seeks to explain the circumstances in which Australian courts will depart from the "but for" approach. Further, since causation in many negligence cases in Australia is now determined exclusively by the civil liability legislative regime, this article also examines how the "but for" approach continues to be of importance to determination of factual causation under that legislation and argues, in similar factual scenarios, factual causation issues are likely to have the same outcome irrespective of whether the common law approach or the legislative approach is applied. 530

CLASS ACTIONS IN CONTEXT: DISTINGUISHING REGULATION, TORT, AND PROCEDURE

Andrew Higgins and John Yap

The description of the use of class actions in mass torts litigation as "an evolutionary form of 'privatised regulation'" is not normatively inert. It has the potential to shape the way we understand, justify, and evaluate mass torts class actions, with practical implications for their development. Unfortunately, the description is inaccurate and distorting. Class actions cannot be understood as a form of regulation. Neither substantive tort law nor its enforcement can be understood in terms of regulation without serious distortion. Use of the class action procedure does not change this. Rather, class actions fall to be evaluated against procedural norms of the civil justice system. In this regard, the use of some sort of class action procedure should be encouraged. However, the successful design and management of class actions raises different questions, to which regulatory considerations are neither here nor there – and rightly so. 544

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