

CAUSATION UNDER THE *CLA*

Causation under the *Civil Liability Act*

Introduction

Over the years the courts have toyed with the concept of causation, and how it should be determined. Following the Ipp report in 2002,¹ the individual States and Territories supplemented common law principles of civil liability by implementing civil liability regimes, including, in NSW, the *Civil Liability Act* (NSW) 2002 (**the Act**). The subject of this article is the causation provisions of the Act.

As we know, the plaintiff carries the onus of proving that a duty of care was owed and that the defendant's conduct has amounted to a breach of that duty. Following this, the plaintiff must establish that the defendant's conduct caused the plaintiff's loss or damage. The civil liability regimes across the States and Territories have adopted provisions that govern how the courts are to determine questions of causation in civil cases.

Section 5D of the Act (which is mirrored in most States and Territories) frames causation in the following terms:

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.

The law previously

The approach of the courts to questions of causation, in the years before the Act was informed by the High Court decision in *March v Stramare (E and MH) Pty Limited* [1991] HCA 12. The Court held that the 'but for'² test (which had been applied up to that point) had a limited

¹ Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002).

² 'But for' the defendant's breach, would the plaintiff have suffered damage or loss?

practical application and generally should not be used. Of the approach that had been taken by courts to determining causation prior to this case, Mason CJ commented that it:

- '(a) places rather too much weight on the 'but for test' to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact.'³

Mason CJ said that the 'but for' test operated in such a way as to ignore two or more acts or events that would each be sufficient to cause the plaintiff's injury. The court warned of the absurdities that may follow from a strict application of that test, and instead encouraged the application of 'both logic and common sense'.⁴

In effect, the court was endorsing a two step approach to causation:

- 1 factual causation by applying a common sense approach, and
- 2 scope of liability by applying a value judgment.

The Act changes things

The Act maintains the two elements of causation, namely factual causation and scope of liability, however it reinstates the 'but for' test that *March v Stramare* had dispensed with. The Ipp report refers to the 'but for' test as the basic test of factual causation, which is used to establish whether the negligence was a 'necessary condition' of the harm. From this observation, s.5D of the Act evolved.

Factual causation

The NSW Court of Appeal in *Hudson Investment Group Limited v Atanaskovic Hartnell & Ors* [2014] NSWCA 255 (**Hudson**) recently summarised the proper approach to determining factual causation under s.5D(1)(a) as follows:

'The effect of s.5D(1)(a) is that factual causation is to be determined by the 'but for' test: 'but for the negligent act or omission, would the harm have occurred?': *Adeels Palace* at [45]; *Strong v Woolworths* at [18]. The test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would have been prevented. The test is not satisfied merely by showing that taking the steps the plaintiff alleges should have been taken might have made a difference: *Adeels Palace* at [50]. The plaintiff must show that it is more probable than not that, if the defendant had taken reasonable care, the harm would have been prevented: *Adeels Palace* [53]. However, if the defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm, the test of factual causation will be satisfied: *Strong v Woolworths* [20].'⁵

The Court of Appeal in *Hudson* determined that the plaintiff had satisfied the test of factual causation. The court held that but for the lack of reasonable care by the solicitors in drafting an Entitlement Deed, it would have been free of any doubt or ambiguity. Accordingly, had the Entitlement Deed been drafted clearly, the likelihood is that Hudson would have succeeded in claiming from Hardboards, a party to the Entitlement Deed, the whole or at least a substantial part of the value of the Entitlement Deed. Ultimately however, the court found that causation had not been established, based on s.5D(1)(b) and the relevant scope of liability (discussed further below).

Adeels Palace Pty Limited v Moubarak [2009] HCA 48 is a leading authority on factual causation under the Act. The case concerned whether a reception centre owned by Adeels Palace, had an obligation to entrants to prevent an irate gunman from entering the premises and opening fire. The High Court found that the reception centre was not liable for the gunman's actions, because the danger could not reasonably be contemplated or avoided. On the issue of causation, the Court noted that:

'... recognising that changing any of the circumstances in which the shootings occurred might have made a difference does not prove factual causation. Providing security at the entrance of the restaurant might have delayed the gunman's entry; it might have meant that, if Mr Bou Najem was a random victim, as seemed to be the case, someone else might have been shot and not him.

³ *March v Stramare*, [19]

⁴ *March v Stramare*, [27]

⁵ *Hudson*, [103]

But neither plaintiff proved factual causation by pointing to possibilities that might have eventuated if circumstances had been different.’⁶

Accordingly, the High Court held that the ‘but for’ test of factual causation was not established in this case. The court was not satisfied that it was more probable than not that, but for the absence of security personnel, the shootings would not have taken place. In other words, absence of security personnel at the restaurant on the night the plaintiffs were shot was not a necessary condition of their being shot.

This case also considered s.5D(2), which makes provision for what is described as an ‘exceptional case’, and effectively bestows a discretion on the courts to consider whether or not (and why) responsibility for the harm should be imposed. The court ultimately determined that there were no grounds to depart from the result reached by applying the ‘but for’ test in this case. It took the view that demonstrating what ‘might’ have happened if there were additional security personnel present was not a sufficient basis to invoke the exceptional circumstances discretion.

In *Wallace v Kam* [2013] HCA 19, the High Court was required to consider the question of factual causation in the context of what the injured person, in this case a patient of a neurosurgeon, would have done if warned of a material risk. The case highlights three factual causation scenarios specific to the question of failure to warn in medical negligence cases, namely:

- where a patient who suffers loss, if warned of that possibility, still would have proceeded despite the warning, factual causation is not established;
- where a patient would have chosen not to proceed if warned of a material risk, factual causation is satisfied; and
- where a patient, if warned of the risk, would have decided not to proceed with treatment at that time, but would have deferred it to a later time, factual causation is satisfied because on the balance of probabilities the injury would not have been sustained if the treatment had taken place at that later time.

Scope of liability

Section 5D(1)(b) of the Act adopts the common law principles, as defined by *March v Stramare*, insofar as they relate to scope of liability. In that case the court said (at [23] to [25]):

‘Once it is recognised that foreseeability is not the exclusive test of remoteness and that policy-based rules, disguised as causation principles, are also being used to limit responsibility for occasioning damage, the rationalisation of the rules concerning remoteness of damage requires an approach which incorporates the issue of foreseeability but also enables other policy factors to be articulated and examined. One such approach, and the one I favour, is the ‘scope of the risk’ test....

Damage will be a consequence of the risk if it is the kind of damage which should have been reasonably foreseen. However, the precise damage need not have been foreseen. It is sufficient if damage of the kind which occurred could have been foreseen in a general way...But the ‘scope of the risk’ test enables more than foreseeability of damage to be considered. As Fleming points out, it also enables allowance to:

be made to such other pertinent factors as the purpose of the legal rule violated by the defendant, analogies drawn from accepted patterns of past decisions, general community notions regarding the allocation of past decisions, general community notions regarding the allocation of ‘blame’ as well as supervening considerations of judicial policy bearing on accident prevention, loss distribution and insurance.

Thus, the ‘scope of the risk’ test enables relevant policy factors to be articulated and justified in a way which is not possible when responsibility is limited by reference to commonsense notions of causation or to more specific criteria such as ‘novus actus interveniens’, ‘sole cause’ or ‘real cause’, all of which conceal unexpressed value judgments.’

When s.5D(1) and (2) are read together, it is clear that legal causation may be established in cases when there is factual causation, and in (exceptional) cases where factual causation is

⁶ *Adeels Palace* [50]

not established.⁷ However, it is not sufficient for the plaintiff in a negligence case to establish breach and loss which would not have been suffered 'but for' the breach. That said, it is a precondition of establishing scope of liability that the plaintiff first demonstrate factual causation.

Applying this rationale, the NSW Court of Appeal in *Paul v Cooke* [2013] NSWCA 311 found that a radiologist's three-year delay in detecting an aneurysm was not causative of the intra-operative rupture and consequential loss and damage suffered by the plaintiff. The plaintiff said that the delayed diagnosis created a risk of spontaneous rupture. This was accepted by the court, but it was considered inappropriate to vest in Dr Cooke the liability for the intra-operative rupture as alleged, in circumstances where the late diagnosis did not in fact cause a spontaneous rupture. The doctor's liability was 'limited' to preventing that spontaneous rupture and it was not appropriate to say that he had a duty to avoid the risk of an intra-operative rupture. There was sufficient evidence before the court to show that even if the operation had occurred at an earlier time, there was still a risk that the aneurysm would have ruptured in the course of the operation. The court also considered that it was 'far from irrelevant' that there existed a weak causal connection, and considered that this in fact lent itself to a finding that it was 'inappropriate' to hold Dr Cooke liable in negligence.

In considering the test under s.5D(1)(b), according to *Wallace v Kam*, the court needs to 'consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.' To do this, the court needs to have regard to the purposes and policy of the relevant part of the law.⁸ The High Court decided that there were policy considerations that informed the imposition of a particular duty, which could operate to deny liability for particular harm caused by negligence.⁹ The court embarked on an analysis of whether there were policy reasons for excluding medical practitioners from liability. The court ultimately decided that there was no liability in a case where the patient, despite being informed of the inherent risks, was willing to proceed with the treatment. While *Wallace v Kam* assists in determining factual causation in medical negligence cases, it is the discussion on the 'scope of liability' and policy considerations for limiting liability in particular circumstances that, in our view, is more widely applicable to other types of cases.

In *Hudson*, the court concluded that the plaintiff failed to take 'the very measures' that the Entitlement Deed provided. The court found that there was difficulty in holding the solicitors negligent for the drafting of the Entitlement Deed, when the document itself contained the appropriate mechanisms that would have prevented the loss.¹⁰ On that basis, it was considered inappropriate for the scope of the solicitors' liability to extend to the loss claimed.

Not unlike *Wallace v Kam*, the High Court in *Strong v Woolworths* [2012] HCA 5 (**Strong**) seemed to suggest that the purpose of s.5D(1)(b) is to curtail anomalous outcomes in cases where the 'but for' test is satisfied. The language of s.5D(4) supports this, by allowing the courts to have regard to what is recognised as 'policy reasons' for not imposing the liability, and requiring consideration of whether or not and why the liability should be imposed. The court in *Strong* noted that:

'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.'

Onus of proof

Section 5E of the Act provides:

'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.'

⁷ *Paul v Cooke* [2013] NSWCA 311, [85]

⁸ *Wallace v Kam*, [23]

⁹ *Wallace v Kam*, [27]

¹⁰ *Hudson*, [127]

While it remains the subject of ongoing judicial consideration, as a matter of practicality, s.5E is thought to refer to the legal onus, as opposed to the evidentiary onus of proof, which would shift throughout the life of a trial, depending on the evidence being led.

In *Gett v Tabet* [2009] NSWCA 76, a medical malpractice case dealing with a failure to arrange a CT scan at an earlier time, which could have prevented neurological injury, the Court of Appeal dealt with the question of the onus of proof. While not specifically referring to the provisions of the Act, it was Ms Tabet's position that once she had demonstrated that 'the damage that occurred was the damage for which the duty was called into existence to prevent', the onus shifted to Dr Gett to rebut the legal causation principle by showing that the injury, in this case brain damage, still would have occurred. The Court of Appeal rejected that submission, noting that a material increase in risk was not to be equated with a material contribution to the injury, and that it was for the plaintiff to establish that it was more probable than not that the risk created by the defendant would not have materialised but for the breach of duty.

Conclusion

The causation provisions of the Act did not alter the dual common law approach laid down by the High Court – namely an evaluation of factual causation and an enquiry into scope of liability by applying relevant policy factors and a value judgment. Where the law changed was in reinstating the 'but for' test of factual causation in place of a 'common sense approach'. Arguably this has led to greater certainty as to whether the initial causation gateway is met, whilst preserving the ability of the courts to determine that the causal link is not satisfied in particular cases, notwithstanding that the first hurdle has been negotiated successfully.

While the courts in the cases discussed above agree that factual causation enquiries are just that – factual, and scope of liability issues are legal questions, it remains unclear whether and to what extent there exists a dichotomy between these two concepts.

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