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CAUSATION AND LOSS OF CHANCE

Introduction

This article examines the approach taken by the courts to the issues of causation and assessment of the loss of the chance in claims against solicitors, where solicitors are held to have breached their duties and plaintiffs assert that they have lost the opportunity, by reason of that breach, of pursuing their claims to court or to a settlement. Typically, such cases arise where the solicitor's default has caused a claim (whether for personal injury or otherwise) to become statute barred, although the principles extend to many other types of claims.

General principles

The classic and often quoted statement of general principle comes from *Kitchen v Royal Air Force Association*[1], where the court held that:

> 'When a plaintiff loses his original cause of action by the negligence of his solicitor ... He has lost the monetary compensation for his personal injuries which he would have received at the time when he would have received it but for the solicitor's negligence ... a court which seeks to put him back to the "same position" must assess, as best it can, whether or not the cause of action would have yielded a judgment or a settlement, and, if so, how much the plaintiff would have received and when ... [the court] is to determine what the plaintiff has by that negligence lost.'

The above statement contemplates a two step process. Firstly, the court must determine whether or not the cause of action would have yielded a judgment or a settlement. This is part of the test of causation. Secondly, if satisfied that the cause of action would have yielded a judgment or a settlement, the court must determine how much the plaintiff would have received and when. This part of the process is the assessment of the value of the lost chance.

The statement of principle in *Kitchen*, has been approved by the High Court in *Johnson v Perez*[2], and in *Nikolaou v Papasavas, Phillips & Co*[3], and has been applied in a myriad of professional negligence cases since then.

Causation

The approach of the courts is to distinguish between actual and hypothetical circumstances, in determining causation. An example of an actual circumstance could be that the solicitor's breach led to an action not being commenced prior to the expiration of the limitation period. On the other hand, an example of a hypothetical circumstance could be whether the plaintiff would have recovered damages from the court, if a personal injury claim had been pursued but for the solicitor's negligence.

The High Court has held in *Malec v J C Hutton Pty Limited*[4], that in dealing with causation, a plaintiff is required to establish known material facts on the balance of probabilities. However, when dealing with future probabilities or past or future hypothetical situations, the court will

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[1] [1958] 1 WLR 563

[2] (1988) 166 CLR 351

[3] (1988) 166 CLR 394

[4] (1990) HCA 20; 169 CLR 638

approach the question of causation in a different way, by reference to the probability of the event occurring. The court said:

> 'The probability may be very high – 99.9% - or very low – 0.1%. But unless the chance is so low as to be regarded as speculative – say less than 1% - or so high as to be practically certain – say over 99% - the court will take that chance into account in assessing the damages.'[5]

In *Sellars v Adelaide Petroleum NL*[6], the High Court held that in order for the plaintiff to establish causation in a hypothetical case, the plaintiff needed to show on the balance of probabilities that:

> 'Some loss or damage was sustained, by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value).'

The High Court went on to say that the value is:

> 'Ascertained by reference to the degree of probabilities or possibilities'.

In *Commonwealth v Amann Aviation Pty Limited*[7], Justice Deane reflected upon the distinction between actual and hypothetical circumstances and the approach that ought to be taken to the issue of causation in each circumstance, in the following manner:

> 'The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: which relevantly represents the position in which the plaintiff would have been if the wrongful act ... had not occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act'.[8]

And later:

> 'The fact that, in determining what has actually occurred in the past, a court acts on the basis that a more than fifty percent probability is certain and a less than fifty percent probability is irrelevant does not provide any acceptable reason for adopting a similar approach to determining what will happen in the future or what would have happened in the hypothetical situation that something which has occurred had not. The determination of future and hypothetical events is more likely to involve unavoidable speculation than the determination of what had actually happened in the past and the approach that a fifty percent probability represents a dividing line between certainty and non-existence or irrelevance would inevitably lead to injustice and a degree of absurdity if applied to the hypothetical or the future.'[9]

Justice Deane also commented that:

> 'A plaintiff whose action against a third party has become statute barred by reason of a defendant solicitor's breach of contract may recover damages by reference to the court's assessment of what the chance of success in the action against the third party would have been even though that assessment is fifty percent or less.'[10]

Quite apart from the above, it is trite to say that there is a further aspect to the question of causation in lost chance cases, namely whether the plaintiff would have pursued the lost cause of action in any event, absent any breach by the solicitor. That matter is to be established by the plaintiff on the balance of probabilities.

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[5] Ibid at [7]

[6] (1994) HCA 4; 179 CLR 332

[7] [1991] 174 CLR 64

[8] Ibid at [2]

[9] Ibid [8]

[10] Ibid at [4]

Loss of chance

Once the court has dealt with the causation issues and assuming satisfied that causation is established, the court must go on to assess the value of the lost chance. In the terminology of the *Kitchen* decision, the court must assess how much the plaintiff would have received and when. The usual approach is to apply a discount to the assessment of damages at full value, the damages being assessed as at the date that the lost cause of action would, in the ordinary course, have come to trial or been settled. If the court determines that the plaintiff had a 70% chance of recovering damages at full value at that time, the court will discount the damages by 30% (looked at another way, the court might say that the plaintiff likely would have recovered 70% of full value by way of a settlement, in which case it would again discount by 30%).

What flows from the High Court decisions referred to above, is that the discount to reflect the value of the lost cause of action, can be 50% or more. The plaintiff will still recover damages even if the prospects of successfully recovering damages was only say 30% (or if the court believes the plaintiff would have settled for 30% of full value). It is important to bear in mind the High Court's reasoning in *Malec* and *Amann* discussed above, to understand why it is that a plaintiff can still recover damages in a situation where the discount to reflect the value of the lost chance, exceeds 50%.

Of course there will be some cases (it is suggested a relatively small number) where the court is not satisfied that the lost cause of action had some value (or had just a negligible value), in which case the plaintiff will fail to establish causation under the hypothetical circumstances test. Although the High Court in *Malec* suggested that something with a probability of less than 1% would be negligible or speculative, we do not think that should be read as a general statement of principle. Each case will turn on its own facts.

Application to cases

The large majority of cases that have gone to trial involving allegations of loss of opportunity by reason of the negligence of solicitors, will have applied the causation and lost chance assessment principles discussed above. Typically, damages are assessed at full value as at the 'notional trial date', and then discounted to reflect the prospects of success and other exigencies of litigation. Some of the more notable decisions in which we have been involved, include:

- *Leitch v Reynolds*[11] - Court of Appeal upheld the trial judge's award of damages assessed at 45% of full value, on the basis that that reflected a likely settlement value if the cause of action had not been lost;
- *Shekhani v Ardino*[12] - plaintiff failed at first instance notwithstanding admission of breach of duty by the solicitor, on the basis that he did not establish that the hypothetical circumstance was an opportunity that had some value (the court did not believe that the plaintiff would have recovered any damages or a settlement). This case is currently on appeal;
- *Bradstreet v Hamze*[13] - Court of Appeal upheld trial judge's decision that, notwithstanding admission of breach of duty by the solicitor, the plaintiff failed to establish on the balance of probabilities, that he would have pursued the lost cause of action if advised appropriately.

Conclusion

We have endeavoured to summarise above the approach of the courts to the issues of causation and assessment of the value of the lost chance, in claims against solicitors for the

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[11] *Leitch & ors v Reynolds* [2005] NSWCA 259

[12] *Jowhar Shekhani v Rocco Ardino* [2008] NSWDC, proceedings 739 of 2007; per Gibb DCJ

[13] *Bradstreet v Hamze* [2007] NSWDC 54; *Hamze v Bradstreet* [2008] NSWCA 191

loss of the opportunity of pursuing a cause of action. Whilst there are some conventional tests of causation that are applied, arguably the most difficult and controversial is the test that is applied to hypothetical circumstances, which seems to rule out only a very small number of negligible value or speculative cases. Assuming that causation is found in favour of the plaintiff, the courts will then assess damages by reference to the degree of probability of recovering a verdict or settlement, and that degree of probability can in some cases be something less than 50% of full value. It is submitted that in these types of cases, assuming a breach of duty is established, the claim against the solicitor is only likely to be defeated where it can be shown that the lost cause of action had no value or only a negligible value, or where the plaintiff fails to establish that he or she would have pursued the lost cause of action, or where as a mathematical exercise, the plaintiff's rights to alternative remedies (such as workers compensation benefits) are more valuable than the right to damages for the loss of the cause of action.

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