CAUSATION UNDER IPP LEGISLATION

By Richard Douglas SC

Legislation enacted in the states and territories following the Ipp Report[1] included provisions addressing proof of causation in any cause of action for breach of a duty to exercise reasonable care.[2]

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The NSW legislation is representative, and has been the subject of most of the curial address since enactment. For convenience, therefore, this article refers to the NSW provisions:

'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 determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.'

The point of this article is to touch upon the key issues that have arisen in the case law construing these provisions.

PRE-ENACTMENT JURISPRUDENCE

The common law jurisprudence pertaining to causation can be summarised as follows:

- The plaintiff, as the moving party, at all times bears the persuasive onus of proof. This is subject to the usual rules in relation to shifting of evidentiary onus where a particular level of *prima facie* proof has been attained.[3]
- Proof requires only a finding that event A was *a* material contributory cause, not necessarily *the* cause or the sole cause of result B. A possible contributory cause does not suffice[4] (the *post hoc propter hoc* fallacy[5]).
- Mere proof that event B followed event A is insufficient.[6]
- Causation is a question of fact, to be decided by application of common sense to the facts of the case.[7]
- Such application of common sense, however, must give way to the purpose of the enquiry as to causation.[8]
- In adjudicating causation, the 'but for' test of causation is an important but not essential consideration. Normative (or policy, or scope of liability) considerations may also be required.[9]
- An intervening act, whether by the plaintiff or a third party, may break the chain of causation, but only where it was unequivocally an independent act undertaken with full knowledge of the relevant facts.[10] In the case of an act of the plaintiff, this ordinarily entails consideration of the reasonableness of the response to a problem created by the defendant in breach.[11]
- In more difficult cases where breach of duty is proved, but where science or other expert learning does not enable proof that one or more of multiple defendants caused damage, normative considerations are critical.[12]
- A subjective test of causation is apt in determining whether apposite (but absent) warning or accurate advice to the plaintiff would have avoided injury suffered.[13]
- Evidence is admissible, but of little weight, from the plaintiff as to what he or she would have done if so appositely warned or advised.[14]

In *Tabet v Gett*,[15] Kiefel J wrote: >>

Proof requires only a finding that event A was *a* material contributing cause, not necessarily *the* cause or the sole cause of result B.

'[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).' [footnotes deleted]

Despite provision to the contrary being expressed in some of the Ipp statutes,[16] ss5D and 5E and their interstate equivalents have substantially codified the law in relation to proof of causation in duty of care cases.

But these provisions can only be understood through the focus of, and are informed in application by the above common law principles.

In the case of s5D, however:[17]

'What its statutory content is and the extent of any continuity with developing common law concepts awaits judicial elucidation.'

APPLICATION

Two points ought to be noted.

First, the provisions apply only to causes of action where breach of a duty to exercise reasonable care is alleged, whether the foundation for that cause of action is in contract, tort or pursuant to statute 'or otherwise.'[18]

Thus, for example, in the event that a cause of action is based upon breach of a contractual term of a prescriptive nature, ss5D and 5E have no role to play, the common law being determinative of the outcome.[19]

Second, the provisions apply irrespective of whether the damage is relief sought for economic loss, property damage or personal injury. That ensues from the statutory definition of 'harm'.[20]

PRIMARY TEST FOR CAUSATION

On the face of s5D(1), each of its elements need be established by the plaintiff in order to prove a causal nexus between breach and damage. The decisions to date underscore this construction.

The decision in *Adeels Palace Pty Ltd v Moubarak*[21] is well known to practitioners. That case concerned a plaintiff criminally injured by a fellow patron in a restaurant. The High Court wrote:

'[45] Next it is necessary to observe that the *first of the two elements identified in s5D(1) (factual causation) is determined by the "but for" test: but for the negligent act or omission, would the harm have occurred?*

...

[53] In the present case, in contrast, the "but for" test of factual causation was not established. It was not shown to be more probable than not that, but for the absence of security personnel (whether at the door or even on the floor of the restaurant), the shootings would not have taken place. That is, the absence of security personnel at Adeels Palace on the night the plaintiffs were shot was not a necessary condition of their being shot.

...

[55] At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation. It must also be recognised that before the *Civil Liability Act* and equivalent provisions were enacted, it had been recognised that the "but for" test was not always a *sufficient* test of causation. But *as s5D(1) shows, the "but for" test is now to be (and has hitherto been seen to be) a necessary test of causation in all but the undefined group of exceptional cases contemplated by s5D(2).*'

[emphasis added, footnotes deleted]

Adeels was applied by the NSW Court of Appeal in *Woolworths Ltd v Strong*[22] and *Zanner v Zanner*.[23] On 13 May 2011, the High Court (French CJ and Heydon J) granted special leave to appeal in *Woolworths*. Thus the High Court will consider these provisions again soon.

The 'but for' test in s5D(1)(a) is easy enough to understand. That said, its application and the difficulty or inability in controlling the conduct of third parties has proved troublesome for plaintiffs.[24]

What of the application of 'scope of liability' test in s5D(1)(b)? One is assisted in that endeavour by the content of s5D(4).

Recent examples of the application of the 'scope of liability' test are to be found in *Zanner*[25] and *Stephens v Giovenco*.[26]

Zanner concerned a plaintiff who was injured when struck by a motor vehicle being manoeuvred in the family's

carport by her 11-year-old defendant son. Although he had successfully negotiated the task on a number of previous occasions, on the subject occasion his foot slipped from the brake and on to the accelerator, causing the vehicle to surge forward.

Causation was proved, albeit accompanied by a finding of 80 per cent contributory negligence. After concluding that s5D(1) did not exclude the concept of 'material contribution' and increase in risk, Allsop P wrote, concerning s5D(1)(b):[27]

'[12] *There is no suggestion that the application of common sense is in any way foreign to the task in ss5D(1)(b), (2) and (4). Indeed it would be an odd interpretation of a law of the Parliament that excluded such a consideration from an evaluation of this kind against the background of the common law and, in particular, in the light of the contents of the Ipp Report.* This case does not demand any great agonising over the application of ss5D(1)(b) and (4). All relevant considerations that inform the content of the appropriate scope of the negligent person's liability and responsibility point to a positive conclusion as to causation and liability here. Injury to the mother was entirely foreseeable should negligence occur. *The scope of the risk of harm protected by the duty and created by the breach included injury to the mother. The injury was not coincidental to the breach. It was the direct and immediate consequence of the negligence.* The son in the car ran over his mother. The content of the duty and the attenuated standard of care were directed to the exercise of care to avoid injury to the mother in the very manner that occurred. *There was no intervening act of a third party or of an abnormal event. The only other causal factor was the negligence of the person (the mother) to whom the duty was owed.* There is no reason why the appropriate apportionment of respective responsibility is not best allocated through contributory negligence. Common sense would attribute the mother's injury to the negligence of her son, as well as to her own negligence in putting herself in that position.' [emphasis added]

EXCEPTIONAL CASE

The 'exceptional case' is addressed by s5D(2).

In *Adeels*,[28] the High Court addressed s5D(2). The court wrote:

'[56] Even if the presence of security personnel at the door of the restaurant *might* have deterred or prevented the person who shot the plaintiffs from returning to the restaurant, and even if security personnel on the floor of the restaurant *might* have been able to intervene in the incident that broke into fighting in time to prevent injury to anyone, neither is reason enough to conclude that this is an "exceptional case" where responsibility for the harm suffered by the plaintiffs should be imposed on Adeels Palace. To impose that responsibility would not accord with established principles. >>

> The absence of security personnel ... on the night the plaintiffs were shot was not a necessary condition of their being shot.

'[57] It may be that s5D(2) was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd*,[29] where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s5D(2) would be engaged in such a case need not be decided now. The present cases are very different. No analogy can be drawn with cases like *Fairchild*. Rather, it would be contrary to established principles to hold Adeels Palace responsible in negligence if not providing security was *not* a necessary condition of the occurrence of the harm but providing security *might* have deterred or prevented its occurrence, or might have resulted in harm being suffered by someone other than, or in addition to, the plaintiffs. As in *Modbury*,[30] the event which caused the plaintiffs' injuries was deliberate criminal wrongdoing, and the wrongdoing occurred despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That being so, it should not be accepted that negligence which was not a *necessary* condition of the injury that resulted from a third person's criminal wrongdoing was a cause of that injury. Accordingly, the submission that the plaintiffs' injuries in these cases were caused by the failure of Adeels Palace to take steps that *might* have made their occurrence less likely, should be rejected.' [emphasis added]

In *French v QBE Insurance (Australia) Limited*[31] it was concluded that the *Fairchild* principle had no application in a case in which it was proved against only one of the defendants that the 'but for' test had been satisfied.

Section 5D(2) will require appellate elucidation to assess its reach outside asbestos litigation. Thus far, it seems unlikely it will be of any frequent successful deployment. A wider construction may ensue to make up for necessary proof of 'but for' causation under s5D(1).

SUBJECTIVE RESPONSE

Section 5D(3)(a) enacts the common law. Section 5D(3)(b), however, renders inadmissible evidence from a plaintiff on a non-breach hypothesis.

The latter provision was addressed in *Neal v Ambulance Service of New South Wales*.[32] The issue there was whether the plaintiff would have accepted medical treatment had reasonable care required that he be offered it, thereby aiding his recovery from prior injury.

The NSW Court of Appeal made the following useful comments in relation to mode of proof:[33]

'[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 feel less well; my state of inebriation was also diminishing; I began to worry about the pain in my head..."'

PERSUASIVE ONUS

Section 5E enacts the common law as it has come to be construed.[34]

In *Woolworths*,[35] it was held that s5E did not displace pre-enactment key jurisprudence facilitating proof:

'[55] *Shoeys Pty Ltd v Allan* (1991) Aust Torts Reports paras 81-104 bore some factual similarities to the present case, in that a storekeeper was held liable when a customer slipped in the fruit and vegetable section of the shop on some dropped vegetable matter, in circumstances where the shop had no real system for locating and removing spillages. Mr Maconachie contended that the type of reasoning by which this Court upheld the finding of liability in *Shoeys* could not now be justified, because of s5E.

...

[60] I do not agree that s5E shows that the type of reasoning in *Shoeys* case is no longer open. It was uncontentious in *Shoeys* that it was the plaintiff's task to prove causation of damage (68,940 col 2 per Mahoney J, 68,944 col 1 per Handley JA, with whom Priestley JA agreed). Section 5E makes no difference to that. But it was, and still is, possible for a plaintiff to satisfy its onus of proving causation if the court can infer that it is more likely than not that the failure to exercise reasonable care and skill was a necessary condition of the particular harm that the plaintiff suffered. In *Shoeys* there was no evidence of precisely what the plaintiff had slipped on, merely that it caused "a wet spot" on the heel of her shoe, and that there were some type of green leaves like cauliflower or cabbage on the floor near where the plaintiff fell. Nor

was there any evidence of how long the substance on which the plaintiff slipped had been there. It was purely a question of the inferences open, on the facts of that case, whether the plaintiff had discharged her onus of proof of causation. As Ipp JA showed in *Flounders v Millar* [2007] NSWCA 238 at [30]-[35], this is an acceptable method of establishing causation of damage under the common law.

...

[62] I see nothing in s5E that prevents such a method of reasoning from continuing to be adopted. ...'

CONCLUSION

The Ipp Report authors and the enacting legislatures plainly intended that the Ipp legislation causation provisions should constitute a template for judicial adjudication, and one essentially (s5D(3)(b) aside) reflecting the common law.

The jury remains out as to whether that intention has been realised.

Certainly the enactment of these provisions has amplified the focus of the profession and the judiciary upon necessary proof of causation. ■

Notes: **1** D A Ipp (Chairman), Review of the Law of Negligence Report, 2 October 2002. **2** *Civil Liability Act* 2002 (NSW) ss5D, 5E; *Wrongs Act* 1959 (Vic) ss51, 52; *Civil Liability Act* 2003 (Qld) ss11, 12; *Civil Liability Act* 1936 (SA) ss34, 35; *Civil Liability Act* 2002 (WA) ss5C, 5D; *Civil Liability Act* 2002 (Tas) ss13, 14; *Civil Law (Wrongs) Act* 2002 (ACT) ss45, 46. **3** *Gold Ribbon (Accountants) Pty Ltd (in Liq) v Sheers* [2006] QCA 335 at [277], [278]. **4** *Amaca Pty Ltd v Ellis* [2010] HCA 5 at [70]. **5** *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [62]. **6** 'After this because of this': one thing happening is not necessarily due to another thing happening. **7** *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515. **8** *Travel Compensation Fund v Tambree* [2005] HCA 69 at [45], [46]. **9** *Tabet v Gett* [2010] HCA 12 at [112]. **10** *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 55. **11** *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7. **12** *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. **13** *Chappel v Hart* (1998) 195 CLR 232 at 247, 272-3. **14** *Rosenberg v Percival* (2001) 205 CLR 434 at 163, 87-89, 221. **15** [2010] HCA 12. **16** Qld Act s7(5). **17** *Zanner v Zanner* [2010] NSWCA 343 at [11]. **18** NSW Act s5A. As in most states, there are also certain excluded causes of action, but these are beyond the scope of this article. **19** *French v QBE Insurance (Australia) Limited* [2011] QSC 105 at [125]. **20** NSW Act s5. **21** [2009] HCA 48. **22** [2010] NSWCA 282. **23** [2010] NSWCA 343. **24** *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335; *State Rail Authority of NSW v Chu* [2008] NSWCA 14; *Jovanovski v Billbergia Pty Ltd* [2011] NSWCA 135. **25** *Zanner* at [12]. **26** [2011] NSWCA 53 at [12]. **27** *Zanner* at [12]. **28** *Adeels Palace v Moubarak*. **29** *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32. **30** *Modbury* (2000) 205 CLR 254 at 292-3. **31** *French v QBE Insurance (Australia) Ltd.* **32** *Neal v Ambulance Service of NSW* [2008] NSWCA 346. **33** *Neal v Ambulance Service of NSW*. **34** *Roads and Traffic Authority v Royal* [2008] HCA 19 at [33], [139]. **35** *Woolworths Ltd v Strong* [2010] NSWCA 282.

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