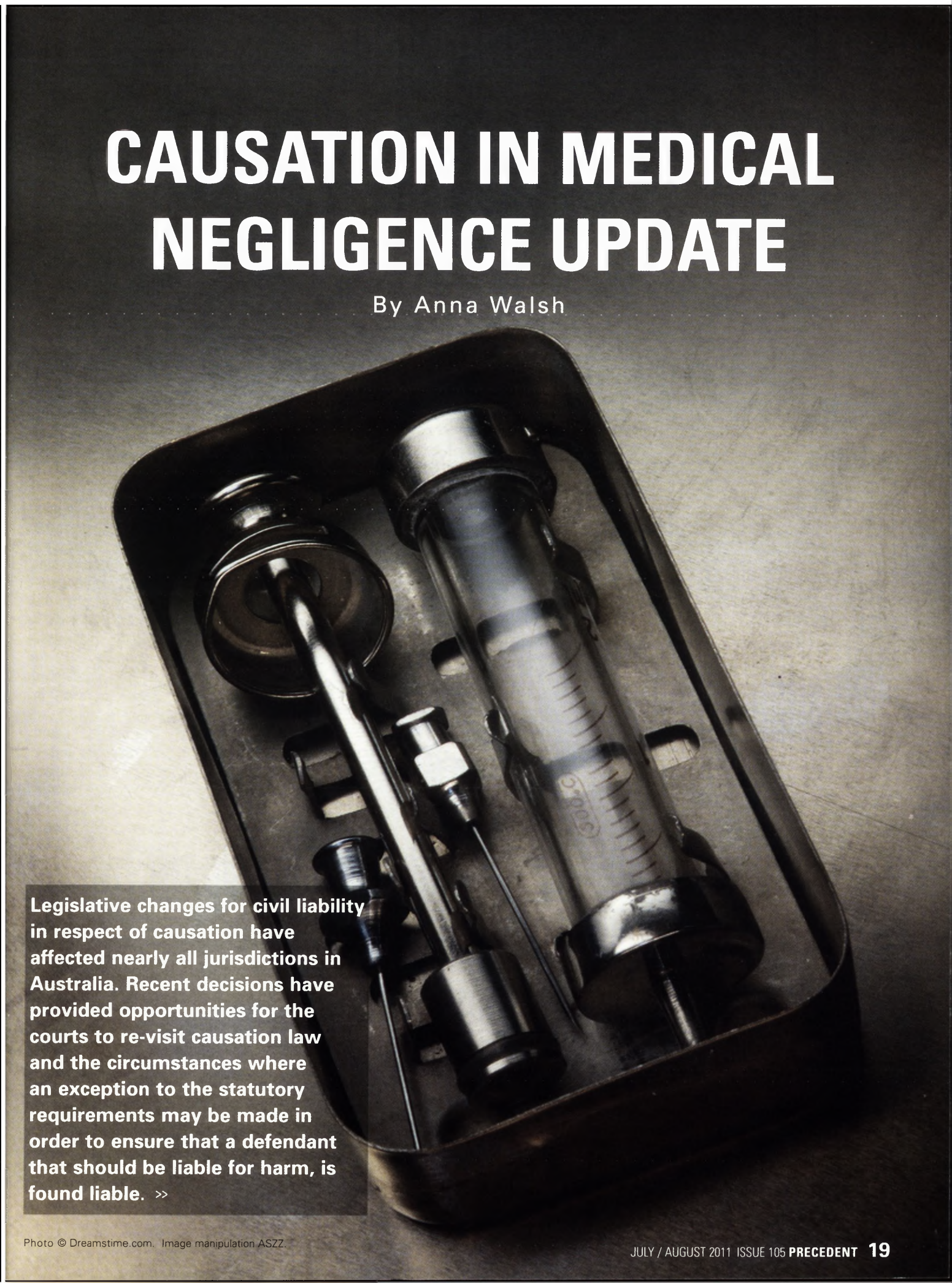
CAUSATION IN MEDICAL NEGLIGENCE UPDATE

By Anna Walsh



Legislative changes for civil liability in respect of causation have affected nearly all jurisdictions in Australia. Recent decisions have provided opportunities for the courts to re-visit causation law and the circumstances where an exception to the statutory requirements may be made in order to ensure that a defendant that should be liable for harm, is found liable. >>

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This article focuses on recent decisions in medical negligence cases where causation has been considered and discusses why the plaintiffs succeeded or failed in respect of proving legal causation; whether there are any changes to the traditional common law approach to causation; and what established principles are sufficient to constitute an 'exceptional' case where factual causation, or the old 'but for' test, cannot be made out.

In NSW, and in jurisdictions that have adopted similar causation provisions in their civil liability legislation,[1] proving causation in a personal injury claim requires a plaintiff to satisfy s5D(1) of the *Civil Liability Act* 2002 (NSW) (the Act). Section 5D(1)(a) of the Act requires the negligence to be a necessary condition for the harm occurring (factual causation) and s5D(1)(b) of the Act requires the court to consider the scope of liability such that it is appropriate that the defendant's liability extends to the harm so caused (scope of liability). If factual causation cannot be proved, then under s5D(2) of the Act, the fallback position is to argue that an exception applies to make the defendant liable for the harm they caused. The only statutory guidance as to the circumstances where an exception may apply is that the court must look at relevant matters, such as whether or not and why responsibility for the harm should be imposed on the negligent party.[2] In doing this task, it must rely upon 'established principles'.

FACTUAL CAUSATION

Failing to address factual causation through adequate expert evidence can be fatal in a medical negligence case. Recent case law has seen the plaintiff fail in circumstances where there is a strong case on breach of duty of care, but the plaintiff has not directed their experts to properly consider and explain why the negligence is a necessary condition of the harm suffered (as opposed to merely supporting the contention that the negligence increased the risk of the harm occurring).

Two recent NSW cases highlight this point. The 2010 decision of the NSW District Court in *Clothier v Dr Fenn & Greater Southern Area Health Service*[3] involved the causation of psychological sequelae secondary to a physical injury. Here, the plaintiff suffered hyponatremia following participation in an ocean boat race. She was treated by a race doctor and then taken to hospital where she suffered significant neurological deterioration. During this time, the hospital erroneously administered to her saline mixed with dextrose which was contraindicated and, on the expert evidence, would have made her cerebral oedema worse. The plaintiff went into a coma and was airlifted to a tertiary hospital for treatment. Fortunately for her (and of great factual importance in the case), the plaintiff did not suffer any long-term physical injuries. She did, however, suffer psychological sequelae of post-traumatic stress disorder and major depression, which she alleged were caused by the medical emergency.

The hospital did not serve any expert medical evidence on liability. The plaintiff submitted that but for the hospital's negligence, her condition could have been brought under control rapidly and she would have been spared the psychological distress of thinking her death was imminent, that she was helpless to prevent it and that she would never see her children again. The plaintiff's expert evidence, however, was that but for the negligence of the hospital, she would still have required transfer and treatment to a tertiary hospital. Williams DCJ found the expert evidence wanting and insufficient to discharge the requirements of factual causation as per s5D(1)(a) of the Act, as the negligence was not a necessary condition for the psychological harm.

As to whether this was an exceptional case under s5D(2) of the Act, Williams DCJ referred to comments made by Davies J in the case of *Jovanovski v Billbergia Pty Ltd.*[4] His Honour noted that exceptional cases arise 'because of the inadequacy of the state of scientific knowledge, a plaintiff is unable to attribute the harm suffered'[5] to the defendant but where it was nonetheless appropriate that the defendant be held liable because the negligence increased the risk of the harm eventuating.

In *Clothier*, there was no evidence that the finding against factual causation was the result of an evidentiary gap caused by lack of knowledge by experts, but rather an evidentiary gap caused by the appropriate evidence not being put before the court. Accordingly, the causal connection between the plaintiff's psychological harm and hospital's negligent act was not established by either direct evidence or evidence from which a reasonable inference could be drawn. The case did not meet the criteria for being an exceptional case.[6]

A similar lack of supportive opinion from medical experts on causation arose in the 2008 NSW Supreme Court decision of *Melchior and Ors v Sydney Adventist Hospital Ltd and Anor.*[7] In this death claim, the plaintiff alleged that her husband died as a result of a failure by a surgeon and hospital to administer an anticoagulant at the time of surgery or, alternatively, for seven to 10 days following surgery to repair his Achilles tendon. The deceased died from a pulmonary embolism 27 days after he was discharged from hospital.

The plaintiff argued that the risk of developing a clot would have been reduced by the administration of the anticoagulant while the deceased was in hospital. Unfortunately, there was no expert medical evidence to support this contention; rather, the weight of the expert evidence was that giving the anticoagulant at the time of the operation would not have prevented the development of the fatal pulmonary embolism 27 days later. Any breach, therefore, was not a necessary condition of the harm. In the alternative, the plaintiff argued that the failure to administer the anticoagulant increased the risk of developing a clot, which was the very eventuality that the anticoagulant was designed to avoid. As the particular risk had been increased by the defendant's conduct and had eventuated, the plaintiff argued that legal causation was established. The plaintiff relied upon the statement of causation principle in *Chappel v Hart*[8] per McHugh J, 'that the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury'[9] and that '*If a wrongful act or omission*

results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring'.[10]

The medical evidence, however, was unable to establish the mechanism by which the clot formed. The trial judge found that the plaintiff had to establish that the failure to post-operatively administer the anticoagulant for seven to 10 days created or increased the risk that the deceased would die as a result of a fatal pulmonary embolism. There was nothing in the medical literature or in the oral evidence that supported this proposition, with the evidence at its highest supporting an argument that administering the drug might have prevented the development of a fatal pulmonary embolism. The trial judge noted:

> '[E]vidence as to possibility does not establish factual causation nor does it prove any basis whereby the court could assess the degree of contribution or the degree of increased risk to which the deceased was exposed. Mere possibility is not sufficient to establish factual causation.'[11]

Accordingly, the court found that the plaintiff's submission that causation had been made out was based upon speculation and not inference because it was not known when the clot formed and when it broke off and this was not something that was capable of being known.[12] The plaintiff did not make submissions on the interpretation of s5D(1) of the Act, nor did they submit that, despite this evidentiary gap, the case was an exceptional case under s5D(2). In any case, the trial judge found that this case failed to meet the requirements of an exceptional case where causation can be established without factual causation being made out, and was not the sort of exceptional case where those considerations would operate.[13]

EVALUATIVE JUDGMENT IN PROVING CAUSATION

Experts in medical negligence cases regularly rely upon statistics when discussing causation in negligence. These types of cases often involve an expert opining on whether a negligent act or omission increased the risk of harm occurring, or caused the plaintiff to lose the chance of a better medical outcome.

The use of statistical evidence and the necessity to show that the harm 'comes home' in delayed diagnosis of cancer cases was discussed in the 2008 case of *O'Gorman v Sydney South West Area Health Service*.[14] This case involved a failure by a radiologist to properly interpret a mammogram leading to an 11-month delay in diagnosing breast cancer. In this case, the trial judge found that the plaintiff's risk of metastatic spread of tumours but for the negligence was 38 per cent, but that with the negligence, there was an increase in the risk of developing metastatic tumours of 10 per cent.[15]

The plaintiff argued that the delay materially increased the risk of the tumours developing and that that very risk eventuated. Accordingly, legal causation was established, based on principles such as those cited in cases such as *Chappel v Hart*[16] and *Naxakis v Western General Hospital & Anor*.[17] In these cases, it was held that the court 'is entitled to conclude that the act or omission caused the injury in question, unless the defendant establishes that the conduct had no effect at all, or that the risk would have eventuated and resulted in the damage in question in any event'.[18] The plaintiff in *O'Gorman* was successful.

On appeal the following year on various issues, the Court of Appeal reviewed the approach to causation and the role of statistical evidence, inference and the use of evaluative judgement to establish legal causation.[19] The Court of Appeal confirmed the common law approach that although an increased risk of injury caused by negligence may well give rise to a possibility of causation, of itself it is insufficient to establish a material contribution to an injury. The plaintiff must prove, on the balance of probabilities, that the risk eventuates or 'comes home' and is therefore causally connected to the negligence.[20] Here, although on the statistics the risk of developing tumours was increased by the delay and the plaintiff was brought closer to the point where statistically there was a likelihood of a tumour developing, it could not be said with certainty that the plaintiff would not have developed the tumours in any event because she was part of the unlucky 38 per cent of people who develop metastatic spread despite early diagnosis and treatment. There was no specific expert evidence on this very point to assist the court.

Despite this, the court noted that ss5D(2) and 5D(3) of the Act *'enshrines evaluative judgements in a determination that* >>

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negligence caused particular harm'.[21] Accordingly, evaluative judgement was sufficient in this case to allow for a finding that on the balance of probabilities, the increased risk of 10 per cent materially contributed to and so caused the development of the plaintiff's metastatic tumours.[22]

FAILURE TO WARN

The difficulty in proving causation in failure to warn cases was highlighted in the 2010 NSW Supreme Court case of *Wallace v Ramsay Health Care Ltd.*[23] As was noted in the High Court case of *Rosenberg v Percival*,[24] cases involving failure to warn a patient of a material risk encounter difficulties of causation that do not arise in cases of a negligent physical act causing injury. Accordingly, failure to warn the patient of a risk can never amount in the same sense to the cause of the injury, and usually arises where the performance of the physical cause of the injury was not negligent.[25]

In *Wallace*, the plaintiff underwent a posterior lumbar interbody spinal fusion for ongoing and disabling severe back pain. He suffered a post-operative complication of bilateral femoral neurapraxia and underwent a second round of surgery. His condition deteriorated following that surgery and he became an incomplete quadriplegic. The plaintiff's case was that the defendant failed to warn him of the specific risk of bilateral femoral neurapraxia in addition to a number of catastrophic risks associated with the possibility of adverse consequences. If so warned of all these risks, the plaintiff alleged that he would not have undergone surgery and therefore would have avoided harm.[26]

The court held that the only relevant warning that the plaintiff had to prove should have been given, and was not in fact given, was that of leg weakness following the surgery as this was the only risk that materialised.[27] The legal cause of the condition of the plaintiff could never be the failure to warn of some other risk that did not materialise. The failure to warn of a risk that would have led the plaintiff to decline the surgery is not relatively causative of harm suffered if the surgery proceeds, unless that actual risk materialises. The court found as a fact that the plaintiff's bilateral femoral neuropraxia was a transient condition and had resolved. The plaintiff's condition became worse following the surgery due to a number of factors, none of which were related to the surgeries in question. Accordingly, the plaintiff failed to establish factual causation as any negligence on the part of the defendant in failing to warn the plaintiff of material risks was not a necessary condition of the occurrence of harm actually suffered by the plaintiff, as he still would have consented to the surgery.[28]

HYPOTHETICAL CAUSATION

In 2010, the NSW Court of Appeal, in *Hawkesbury District Health Service Ltd & Anor v Patricia Chaker*,[29] confirmed the need for a plaintiff to step through the sequence of events that would have occurred, but for the alleged negligence, in order to prove hypothetical causation in a failure to warn case. Here, the plaintiff was initially successful in the NSW District Court[30] in proving that the defendant doctor was negligent in failing to give her advice and information about the risk of complications with varicose vein surgery. Prior to the surgery, the plaintiff underwent an ultrasound that revealed that she was suffering from vascular incompetence at the left groin and pelvic reflux. Following the varicose vein surgery by the defendant doctor, the plaintiff developed a rare side-effect of lymphoedema. The defendant referred the plaintiff to a vascular surgeon. Unfortunately, the lymphoedema was permanent, leaving the plaintiff with a chronic and disabling condition.

The trial judge found that the defendant doctor had failed to advise the plaintiff that the operation might cause lymphoedema and failed to refer her to a vascular surgeon for treatment of the pelvic reflux prior to performing the surgery. Despite there being no positive expert evidence, save for literature that suggested that the likelihood of developing lymphoedema was very low, the trial judge found that causation was established. On appeal, the Court was critical of various failures by the trial judge to identify the advice that the defendant doctor ought to have given, what she should have told the plaintiff about the risk of lymphoedema, the advice and options that would have been given to the plaintiff had she been referred for a second opinion prior to the surgery, and the hypothetical series of events that would have occurred had the advice been given and certain actions taken by the defendant doctor. The appeal was allowed and the matter remitted back to the Supreme Court for a hearing on liability only.[31]

Chaker confirms the process of assessing hypothetical causation and the need to compare what actually happened to the hypothetical of what should have happened without which the effect of the negligence cannot be judged. As was stated by Justice Kiefel J in the High Court medical negligence case of *Tabet v Gett*:[32]

> 'The issue whether damage has been caused by a negligent act invites a comparison between a plaintiff's present position and what would have been the position in the absence of the defendant's negligence. Such an inquiry directs attention to all the circumstances pertaining to the plaintiff's condition at the time he or she sought the

medical treatment which was not properly provided. The question of whether harm or damage has been suffered is bound up in the question of causation.' [footnotes omitted]

CONCLUSION

Recent medical negligence decisions highlight that traditional common law principles regarding causation of damage in medical negligence cases appear untouched by the statutory provisions on causation. It is not sufficient that the plaintiff approach the task of proving causation as just a matter of common sense,[33] to assume that the 'but for' test, although important, is not an initial, positive requirement,[34] or that merely establishing that the negligence increased the risk of the harm occurring also establishes legal causation. The 'but for' test is, in fact, a necessary requirement and where it cannot be proved the plaintiff must apply to have the case classified as an exceptional case. The class of medical negligence cases where the exception may apply because factual causation cannot be made out to the required standard is not clear, but may include those where science or medicine cannot answer the question of whether the increased risk of injury occasioned by the defendant's negligence is causally related to negligence. Further case law is required to provide guidance as to what makes an exceptional case. A plaintiff lawyer must ensure that they and their experts have properly considered whether the negligence is a necessary condition of the harm caused and, if this cannot be proved, be confident that the case is one where on general principles, the court can be persuaded to apply the exception under s5D(2) of the Act. ■

Notes: **1** Section 51 *Wrongs Act* 1958 (Vic); s5C *Civil Liability Act* 2002 (WA); s13, *Civil Liability Act* 2002 (Tas); s34 *Civil Liability Act* 1936 (SA); s11, *Civil Liability Act* 2003 (QLD); s45 *Civil Law (Wrongs) Act* 2002 (ACT). **2** Section 5D(2) *Civil Liability Act* 2002 (NSW). **3** [2010] NSWDC 96. **4** [2010] NSWSC 211. **5** *Ibid,* at 71. **6** *Ibid,* at 70. **7** [2008] NSWSC 1282. **8** [1988] HCA 55 at 27. **9** *Ibid,* at 27. **10** *Ibid.* **11** [2008] NSWSC 1282 at [155]. **12** [2008] NSWSC 1282 at [130]. **13** *Ibid,* at [157]. **14** [2008] NSWSC 1127. **15** *Ibid,* at [150]. **16** (1998) 195 CLR 232. **17** (1999) 197 CLR 269. **18** *Ibid,* at 279 (per Gaudron J). **19** *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153. **20** *Ibid,* at 24. **21** *Ibid,* per Giles JA at [41]. **22** *Ibid,* at [42]. **23** [2010] NSWSC 518. **24** [2001] HCA 18. **25** *Ibid,* per Gummow J at [84]. **26** [2010] NSWSC 518 at 35. **27** *Ibid,* at 88. **28** *Ibid,* per Harrison J at 94 and 97. **29** [2010] NSWCA 320. **30** *Chaker v Hawkesbury District Health Service Ltd & Anor* (Unreported, District Court of New South Wales, Delaney DCJ, 13 May 2009). **31** The matter has not yet been heard on liability. **32** [2010] HCA 12 at [140]. **33** *March v E & MH Stramare Pty Ltd* [1991] HCA 12. **34** *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413.

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