Establishing causation in difficult cases

Can material contribution bridge the gap?

By Bill Madden and Tina Cockburn

Lawyers who have had to grapple with issues relating to proof of causation under the common law of tort will be familiar with the challenges of establishing causation in cases where there are several causes of the plaintiff's harm but, due to an 'evidentiary gap', it is not possible to prove on the balance of probabilities that the defendant's breach was a cause of the plaintiff's damage.

To address these causation challenges, the concept of material contribution was developed in conjunction with the 'common sense and experience test', with a view to arriving at a 'just and fair' solution 'having regard to the infinitely variable circumstances that may arise when addressing causation',[1] by bridging this evidentiary gap and enabling an inference of factual causation to be drawn in appropriate cases.

Given that the High Court has recently granted leave to appeal from the case of *Woolworths Limited v Strong*,[2] an opportunity has arisen for the Court to provide guidance as to the extent to which the notion of material contribution has a role to play in deciding difficult causation cases.

BONNINGTON CASTINGS EXPLAINED

The leading decision, *Bonnington Castings Limited v Wardlaw*[3] was recently explained by the High Court in *Amaca Pty Ltd v Ellis; The State of South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis*,[4] as follows:

'[67] The issue in *Bonnington Castings* was whether exposure to silica dust from poorly maintained equipment

caused or contributed to the pursuer's pneumoconiosis, when other (and much larger) quantities of silica dust were produced by other activities at the pursuer's workplace. Those other activities were conducted without breach of duty. As Lord Reid rightly pointed out, the question in the case was not what was the most probable source of the pursuer's disease: dust from one source or the other. The question was whether dust from the poorly maintained equipment was a cause of his disease when the medical evidence was that pneumoconiosis is caused by a gradual accumulation of silica particles inhaled over a period of years.' [footnotes omitted]

HIGH COURT APPROACHES

Various High Court and other appellate decisions have touched on the role of material contribution as a test of causation in a variety of factual contexts over the past 20 years. For example, in *March v E & MH Stramare Pty Ltd*,[5] the High Court commented on the concept of material contribution in the context of a motor vehicle accident where there were successive negligent acts by different persons:

'[16] Nonetheless, the law's recognition that concurrent or successive tortious acts may each amount to a cause of the injuries sustained by a plaintiff is reflected in the proposition that it is for the plaintiff to establish that his or her injuries are "caused or materially contributed to" by the defendant's wrongful conduct…'

In *Roads and Traffic Authority v Royal*,[6] the High Court was required to consider whether highway construction and design made a material contribution to a collision, in addition to any negligence on the part of the two drivers. The court found:

'[25] The problem or danger or risk was that where two vehicles were approaching in adjoining lanes, one might obscure the other. That did not happen in this case. It was clear from the evidence of the defendant, the evidence of Mr Relf (driving behind the defendant) and the evidence of Mr Hubbard (driving behind the plaintiff), that the defendant's vehicle was not obscured from the plaintiff's view by another vehicle. In short, even if it could be said that the appellant's breach of duty "did materially contribute" to the occurrence of *an* accident, "by creating a heightened risk of such an accident" due to the obscuring effect of one vehicle on another in an adjoining lane, it made no contribution to the occurrence of *this* accident.' [footnotes omitted]

The challenges associated with developing a 'general or overarching principle that could be applied in all cases'[7] were highlighted in the NSW Court of Appeal decision of *Sydney South West Area Health Service v Stamoulis*.[8] In that case, there was a negligent failure to perform an ultrasound which would have detected a tumour and led to prompt diagnosis and treatment, rather than a 10-month delay, resulting in the risk of the plaintiff's breast cancer metastasising during the period of delay increasing by approximately 10 per cent. Ipp JA found that where a defendant has exposed the plaintiff to a material risk of injury and this risk eventuates, it still remains necessary for the plaintiff to positively prove causation in fact on the balance of probabilities.[9] His Honour affirmed the test espoused in *TC by his tutor Sabatino v The State of New South Wales & Ors*[10] by Mason P, as follows:[11]

'[59] A defendant who exposes a plaintiff to a risk of injury or who, by omission, fails to take reasonable steps to avoid or minimise that risk, is not liable unless the risk comes home in the sense that the court is ultimately satisfied on the balance of probability that the defendant's breach caused or materially contributed to the harm actually suffered.'

Applying this test to the facts of *Stamoulis*, Ipp JA concluded:[12]

'[150] Assume that epidemiological evidence shows that [there] is a 99 per cent chance that no metastasis will result from a detected and treated tumour (and the prospect that metastasis would occur in any event is 1 per cent). In my view, that evidence alone would establish causation where there was a failure to detect a tumour and metastasis followed.

[151] The statistical position in the present case is that in March 2006 the prospect of metastasis not occurring (had the tumour been detected and treated) was 62 per cent. I have found that that evidence establishes, at the least, a strong possibility that, had the tumour been detected in March 2006, no metastasis would have occurred. The question is whether the increased epidemiological risk >>

of Mrs O'Gorman experiencing metastasis because of the failure to detect the tumour is sufficient to convert the strong possibility into a probability.

[152] In my view, that question must be answered in the affirmative. This is essentially an evaluative decision based on common sense. I can express the reasoning behind my conclusion no better than by paraphrasing Mahoney JA's remarks in *Fernandez v Tubemakers of Australia Ltd* (at 200). I consider that the evidence showed that the connection between the appellant's negligence and the subsequent tumours that metastasised was sufficiently close to warrant a reasonable mind concluding on a balance of probabilities that the appellant's negligence was the actual cause of the tumours that metastasised.'

AMACA V ELLIS: UNANIMOUS HIGH COURT

Most recently, in *Amaca v Ellis*, a unanimous High Court held that the plaintiff, a smoker, had failed to establish that the defendants' actions in exposing him to asbestos had caused his lung cancer. The plaintiff failed to establish causation due to the 'the basic and unpalatable fact' that there was 'no scientific or medical examination' evidence which could establish with any certainty the cause of his lung cancer.[13] No inference of causation could be drawn[14] – '[k]nowing that inhaling asbestos *can* cause cancer does not entail that in this case it probably *did*.'[15] The court agreed:[16]

'[70] Observing that a small percentage of cases of cancer were probably caused by exposure to asbestos does not identify whether an individual is one of that group. And given the small size of the percentage, the observation does not, without more, support the drawing of an inference in a particular case. The paradox, if there be one, arises from the limits of knowledge about what causes cancer.'

Although there was some discussion of the material contribution to harm test, the Court held that this did not arise for consideration in the circumstances of the case because 'questions of material contribution arise only if a connection between Mr Cotton's inhaling asbestos and his developing cancer was established'[17] and this connection had not been established. Further, as the case was presented on the basis that the 'exposure to asbestos had caused or contributed to (in the sense of being a necessary condition for) his developing lung cancer,' it was 'neither necessary nor appropriate to consider' issues relating to material contribution to risk and other issues canvassed in the *Fairchild*[18] line of cases.[19] The Court said:

'[68] The issue in *Bonnington Castings* was whether one source of an injurious substance contributed to a gradual accumulation of dust that resulted in disease. The issue here is whether one substance that *can* cause injury *did* cause injury. Or, to adopt and adapt what Starke J said in *Adelaide Stevedoring Co Ltd v Forst*, was Mr Cotton's cancer "intimately connected with and contributed to" by his exposure to asbestos? Questions of material contribution arise only if a connection between Mr Cotton's inhaling asbestos and his developing cancer was established. Knowing that inhaling asbestos *can* cause cancer does not entail that in this case it probably *did*. For the reasons given earlier, that inference was not to be drawn in this case. Questions of what is a material contribution do not arise.'[20]

A ROLE FOR MATERIAL CONTRIBUTION IN A POST-*CIVIL LIABILITY ACT* ENVIRONMENT?

In relation to onus of proof, the established rule that the plaintiff must prove causation on the balance of probabilities has subsequently been affirmed in the civil liability legislation.[21] This requires the plaintiff to show that 'the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm'.[22]

To provide guidance as to whether and why responsibility for harm should be imposed on the negligent party and whether the harm should be left to lie where it fell,[23] the *Review of the Law of Negligence Report* (the 'Ipp Report') made recommendation 29, which concerns onus of proof and identification of the two elements of causation.[24] That recommendation has been enacted in most states and territories, with some variations across jurisdictions.[25]

For example, the *Civil Liability Act* 2002 (NSW) relevantly provides:

'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.

...

(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.'

It can be seen that the legislation creates two categories, which may usefully be described as 'ordinary' cases and 'exceptional'[26] cases. For ordinary cases, the test of factual causation requires that the negligence[27] was a necessary condition of the occurrence of the harm,[28] which is essentially a restatement of the common law 'but for' test.[29] In exceptional cases, to determine 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 (among other relevant things) 'whether or not and why responsibility for the harm should be imposed on the negligent party'.[30] Such determination is to be made 'in accordance with established principles'.[31]

As outlined above, earlier cases have established that there may be exceptional cases where it may not be appropriate to

apply the 'necessary condition of the occurrence of the harm' test, particularly where there is an evidentiary gap due to the plaintiff's inability to prove on the balance of probabilities that the defendant's breach caused the damage. These gaps may arise in medical negligence cases, as the nature of modern medical practice often gives rise to a number of causes that can contribute to the plaintiff's harm, and continuing advancements in scientific knowledge provide further and more detailed explanations of particular medical occurrences.[32]

The Ipp Report identified and considered two particular situations in which evidentiary gaps often arise.[33] The first example is where the 'harm which is brought about by the *cumulative* operation of two or more factors, but which is indivisible in the sense that it is not possible to determine the relative contribution of the various factors to the total harm suffered'.[34] The Panel concluded that, in such cases at common law, 'any of the contributory factors can be treated as a cause of the total harm suffered, provided it made a "material contribution" to the harm'.[35] The second example is where a person's negligence has been a 'necessary condition of harm' 'even though some other person's conduct was also a necessary condition of that harm'; that is, where 'both joint and concurrent tortfeasors materially contribute to the harm resulting from their respective conduct'.[36] The Panel concluded that, in this category of case, it may be sufficient to establish causation if it is established on the balance of probabilities that the defendant's negligent conduct 'materially increased the risk' to the plaintiff of suffering the harm which was occasioned.[37]

Following this consideration, the Panel expressed the view that 'in certain circumstances, it may be appropriate to "bridge the evidentiary gap" by allowing proof that negligent conduct materially contributed to harm or the risk of harm to satisfy the requirement of proof of factual causation'.[38]

Recommendation 29 addresses this issue by acknowledging that the determination of causation in such cases is a 'normative issue that depends ultimately on a value judgement about how the costs of injuries and death should be allocated',[39] and that the criteria for making this determination were best 'left for common law development'.[40]

The extent to which there is a continuing role for material contribution to bridge the evidentiary gap in exceptional cases and enable an inference to be drawn to establish causation in a post civil liability legislation environment remains to be fully considered by the courts. In relation to ordinary cases, in *Woolworths Limited v Strong*,[41] Campbell JA said that s5D(1) excluded notions of 'material contribution' and increase in risk:

> '[47] When causation was decided according to the common law, it was held that a defendant having materially increased the risk of an injury of a particular type occurring is not the same as the defendant having materially contributed to (and thus, according to the common law, caused) a particular injury of that type that has occurred: *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 316 per Mason P.
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> [48] Now, apart from the 'exceptional case' that s5D(2) recognises, s5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words 'comprises the following elements' in the chapeau to s5D(1). 'Material contribution', and notions of increase in risk, have no role to play in s5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within s5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether s5D(1) is satisfied in any particular case.'

Following this decision, in *Peter Steven Benic v State of New South Wales*,[42] Garling J commented:

> '[516] I feel constrained to express with great respect my profound disagreement with the *obiter dicta* of the Court of Appeal when it recently expressed the view that the statutory requirement of s5D for "factual causation" and "scope of liability" do not include the common law concepts of material contribution or increase in risk....'

Subsequently, in *Zanner v Zanner*,[43] a decision of the Court of Appeal of NSW, Allsop P revisited the issue as to the potential impact of s5D on the role of material contribution:

> '[11] In *Woolworths Limited v Strong* [2010] NSWCA 282 at [48] Campbell JA (with whom Handley AJA and >>

> Harrison J agreed) said that s5D(1) excluded notions of "material contribution" and increase in risk. To the extent that his Honour was referring only to factors or circumstances from which a negative "but for" answer was given, so much is clear. However, the notion of cause at common law can incorporate 'materially contributed to' in a way which would satisfy the "but for" test. Some factors which are only contributing factors can give a positive "but for" answer. Both the driver who goes through the red light and the driver with whom he collides who is not paying attention contribute to the accident. If either episode of neglect had not occurred the accident would not have occurred. The facts of *Henville v Walker* [2001] HCA 52; 206 CLR 459 provide another example. However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the "but for" test) such as in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 are taken up by s5D(2) which, though referring to "an exceptional case", is to be assessed "in accordance with established principle".'

Special leave to appeal *Woolworths Limited v Strong* to the High Court has recently been granted.[44] It is hoped that the High Court will take the opportunity to provide clarification as to the extent to which there remains a role for the material contribution test of causation following the enactment of the civil liability legislation. ■

Notes: **1** *Queen Elizabeth Hospital v Curtis* [2008] SASC 344 at [29], [30]-[34] per Gray J. **2** [2010] NSWCA 282. **3** [1956] UKHL 1; [1956] AC 613. **4** [2010] HCA 5. **5** [1991] HCA 12; (1991) 171 CLR 506. **6** [2008] HCA 19. **7** *Queen Elizabeth Hospital v Curtis*, [29]. **8** [2009] NSWCA 153. It should be noted that although this case was decided by applying the civil liability legislation tests of causation, it is considered in this context to illustrate the challenges faced by the courts in articulating and applying the 'material contribution to harm' and 'material increase in risk' tests. **9** *Ibid* at [122]-[141] per Ipp JA. **10** [2001] NSWCA 380. **11** Cited by Ipp JA in *Stamoulis* at [122]. His Honour also relied upon *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 315-16 (at [122]). **12** See also Giles JA at [42]-[43]: '*on the balance of probabilities the increase in risk materially contributed to, and so caused, the development of metastatic tumours.*' **13** At [70]. **14** *Ibid.* **15** *Ibid* at [68]. **16** *Ibid*, per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. **17** *Ibid* at [68]. **18** The *Fairchild* line of cases include *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32; *McGhee v National Coal Board* [1972] 3 All ER 1008; and *Barker v Corus UK Ltd* [2006] 2 AC 572. **19** [2010] HCA 5. **20** The High Court has recently granted leave to appeal in *Amaca Pty Limited (Under NSW Administered Winding Up) v Booth & Anor; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth & Anor* [2011] HCATrans 152 (10 June 2011). This case will provide the High Court with another opportunity to clarify and state the law in this area. **21** *Civil Law (Wrongs) Act* 2002 (ACT), s46; *Civil Liability Act* 2002 (NSW), s5E; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) (no equivalent provision); *Civil Liability Act* 2003 (Qld), s12; *Civil Liability Act* 2003 (SA), s35; *Civil Liability Act* 2002 (Tas), s14; *Wrongs Act* 1958 (Vic), s52; *Civil Liability Act* 2002 (WA), s5D. **22** *Tabet and Gett* [2010] HCA 12 at [111] per Kiefel J. **23** Law of Negligence Review Panel, *Review of the Law of Negligence, Final Report* (Commonwealth, 2002) [7.49]. **24** *Ibid* [7.25]-[7.49]. **25** *Civil Law (Wrongs) Act* 2002 (ACT), s45; *Civil Liability Act* 2002 (NSW), s5D; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) (no equivalent provision); *Civil Liability Act* 2003 (Qld), s1; *Civil Liability Act* 1936 (SA), s34; *Civil Liability Act* 2002 (Tas), s13; *Wrongs Act* 1958 (Vic), s51; *Civil Liability Act* 2002 (WA), s5C. **26** The term 'exceptional' is not universally adopted in the legislation. For example, s51(2) *Wrongs Act* 1958 (Vic) adopts the term 'appropriate'. **27** Defined in s5 *Civil Liability Act* 2002 (NSW) as the failure to exercise reasonable care and skill. **28** Section 5D(1)(a) *Civil Liability Act* 2002 (NSW). **29** For a consideration, see *Finch v Rogers* [2004] NSWSC 39 at [147]-[148]; *McDonald v Sydney South West Area Health Service* [2005] NSWSC 924 at [53]. **30** Section 5D(2) *Civil Liability Act* 2002 (NSW). **31** *Ibid.* **32** See for example, *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269; and *Rosenberg v Percival* (2001) 205 CLR 434. **33** See [7.24]-[7.40] 'evidentiary gaps'. **34** At [7.28]-[7.29]. **35** *Ibid* [7.28]. **36** *Ibid* [7.29]. **37** *Ibid* [7.30]. **38** *Ibid* [7.31]. **39** *Ibid* [7.33]. **40** *Ibid* [7.33]. **41** With Handley AJA and Harrison J agreeing. **42** [2010] NSWSC 1039. **43** [2010] NSWCA 343. **44** *Strong v Woolworths Ltd T/as Big W & Anor* [2011] HCATrans 131.

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