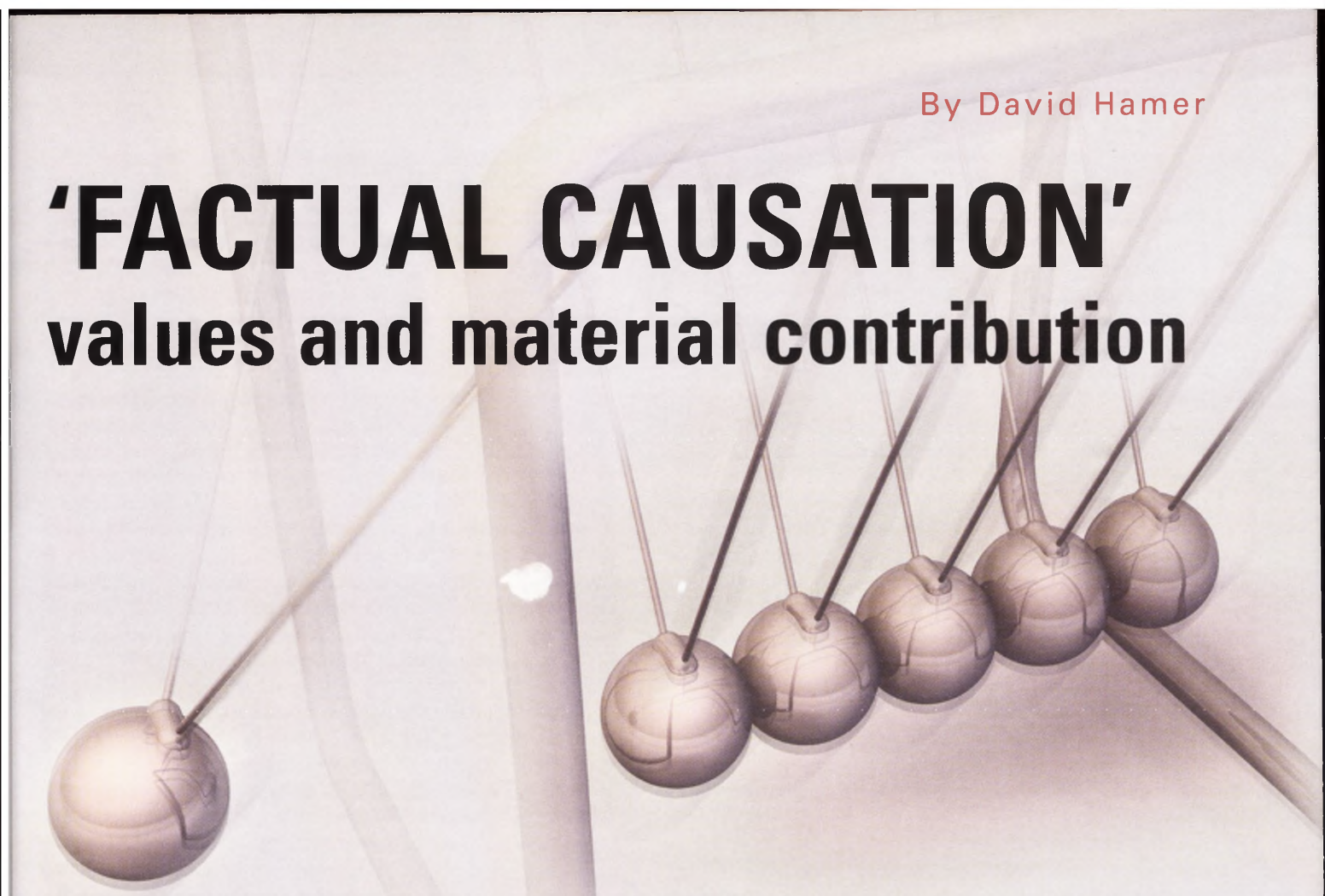
By David Hamer

'FACTUAL CAUSATION'
values and material contribution



Causation is a crucial element in all negligence claims. Under s5D(1) of the *Civil Liability Act* 2002 (NSW) (CLA), the plaintiff must prove both that 'the negligence was a necessary condition of the occurrence of the harm', and that 'it is appropriate for the scope of the negligent person's liability to extend to the harm so caused'.

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It may appear that the scope of liability is the more problematic element. In requiring the court to assess 'whether or not and why responsibility for the harm should be imposed on the negligent party' (s5D(4)), the CLA clearly involves value judgement. The first element of 'factual causation', by contrast, seems value-free. At common law, Mason CJ rejected the view that 'value judgement has, or should have, no part to play in resolving causation as an issue of fact',[1] but the CLA appears to have adopted this fact-value dichotomy.[2] It is only in 'exceptional case[s]' that values play a role, persuading a court to find factual causation despite the fact that it 'cannot be established' (s5D(2)).

Contrary to appearances, however, determining 'factual causation' is not straightforward. It is a constructive interpretive exercise from which value judgements are difficult to eradicate. In determining factual causation, courts ask whether the defendant's breach has made a 'material contribution' to the plaintiff's harm. And the question is not only whether an inclusive 'material contribution' principle operates in exceptional cases. An exclusive principle appears to operate in unexceptional cases.

FACTUAL CAUSATION

The factual causation and scope of liability elements can be illustrated by reference to the recent decision in *Stephens v Giovenco*.[3] A handyman was electrocuted and killed while working on the owner's disused water-heater. The plaintiff brought an action against the owner on the basis that he had recently learnt that the water-heater was still live but had failed to have it disconnected. Clearly the owner's failure was a necessary condition for the electrocution: if the water-heater had been disconnected, there would have been no electrocution.

The plaintiff also brought an action against a plumber. He had disconnected the water a few years earlier and knew that the water-heater was still connected to the electricity, but had failed to inform the owner. It was less clear that this failure was a necessary condition for the electrocution. After all, the owner did later learn that the water-heater was live, but still failed to have it disconnected. The NSW Court of Appeal nevertheless found that, had the plumber warned the owner at this earlier stage, he probably would have had the electricity disconnected.[4]

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SCOPE OF LIABILITY

Factual causation was established, but it was not clear that the electrocution was within the scope of each defendant's liability. The handyman knew that the water-heater was live when he worked on it and got electrocuted. In common law terms, did this constitute voluntary human conduct,[5] breaking the chain of causation? This issue had to be determined separately for each defendant. With regards to the plumber, each appeal judge took a different line. Allsop P considered that the chain was broken, the harm was beyond the plumber's scope of liability, because the handyman 'undertook acts in the full knowledge and appreciation of the risk of live electricity in the vessel'.[6] However, Hodgson JA thought that this was not enough; the handyman's working on the water-heater 'was not an act of which the electrocution ... was an intended consequence or a foreseen and accepted consequence'.[7] Tobias JA took a slightly different line again, and considered that the chain of causation was broken by the owner's failure to have the electricity disconnected from the water-heater, even though he knew that the handyman was doing work on it. This inaction was 'the most immediate temporal cause'.[8]

The court agreed that the owner's failure to have the electricity disconnected remained the cause of the electrocution. Allsop P distinguished the situation of the plumber's failure to warn. The owner's later failure to have the electricity disconnected had closer proximity with the electrocution in 'time and relationship'.[9] Allsop P noted that the range of different views on the scope of liability was not surprising. After all, the CLA's scope of liability calls for 'normative choice'[10] that 'is contestable ... as, to a degree, all value judgements are'.[11]

CONSTRUCTING AND COMPARING THE COUNTERFACTUAL

Value judgements are not confined to the scope of liability element. They appear unavoidable in some factual causation determinations.

'Factual causation' is not a purely historical question. As well as determining what happened following the breach, the court must construct a counterfactual account of what would have happened had there been no breach, and then compare the historical and hypothetical versions of events. Neither the construction nor the comparison is entirely straightforward, or free from value judgement.

This is illustrated by two recent High Court judgments. *Roads and Traffic Authority v Royal*[12] arose out of a collision between the plaintiff and the defendant as the plaintiff crossed the Pacific Highway near Wauchope, NSW. The Road and Traffic Authority (RTA) was joined on the basis that poor road design contributed to the accident. The crossing was a recognised 'black spot' and it was argued that the cross-intersection should have been replaced by a staggered T-intersection. A majority of the NSW Court of Appeal held that the RTA was liable. The poor road design was a factual cause of the accident:

> '... the facts to be hypothesised are of a staggered T-intersection with [the plaintiff] gradually entering the left-hand lane, doing so well to the left of [the defendant] ... It is not possible to assume that the vehicles so positioned would then have collided. In a "but for" sense, the defective design therefore materially contributed to the accident.'[13]

On further appeal, however, a majority of the High Court responded, 'that is only to say that there would not have been a cross-intersection collision if there had not been a cross-intersection. It does not say that there would not have been a collision between drivers as careless as the defendant and the plaintiff...'[14] The danger with the cross-intersection was poor visibility, but, on the facts, that did not cause this accident.[15] The plaintiff and defendant could see each other, but the plaintiff still sought to cross, and the defendant failed to avoid the collision. In constructing the counterfactual, the High Court majority held the driving competence of the plaintiff and the defendant to be at such a low level that there would have been an accident anyway. And in drawing the comparison, it disregarded the fact that the hypothetical accident was of a different kind to that which actually occurred.

Clearly, judgement is involved in constructing the counterfactual and comparing it with the actual course of events. But the Court of Appeal's reasoning appears less creative and more persuasive than that of the High Court majority. The staggered T-intersection was not recommended with this kind of accident in mind. This accident did not result from poor visibility. Nevertheless, the staggered T-intersection would probably have had the incidental benefit of preventing this accident.

Royal was not covered by the CLA. However, another recent High Court decision, *Adeels Palace Pty Ltd v Moubarak*,[16] was covered by the CLA, and values again played a role. The two plaintiffs, Moubarak and Najem, were shot at a New Year's Eve function held at the defendant's restaurant. A fight had broken out between several customers attending the party. One customer left the premises, returned with a gun, and shot the plaintiffs. They argued that the lack of security personnel on the door allowed the shooting to occur. The High Court rejected this argument.

> 'Security personnel may have been able to deter or prevent re-entry by the drunk or the obstreperous would-be patron willing to throw a punch. There was, however, no basis... for concluding that security staff at the entrance to the restaurant would have deterred or prevented the re-entry to the premises of a man armed with a gun...'[17]

That finding is difficult to dispute. But it does not follow that security personnel on the door would not have prevented the plaintiffs from being shot. Moubarak would probably still have been targeted, as he had previously punched the gunman. Najem, however, was a random victim trying to escape. Security personnel at the door, although not preventing the gunman from re-entering, would have delayed re-entry and caused a commotion, and this would have disrupted the chain of events. It seems likely that someone other than Najem would have been the random target.

The High Court appears to reject this view on the grounds of proof. Greater security only '*might* have delayed the gunman's entry'.[18] That 'someone else might have been shot'

instead of Najem was only a 'possibility'.[19] But there was evidence, seemingly accepted by the High Court, that 'a security person confronting the gunman at the entrance to the restaurant "would have at least altered the chain of events and thereby likely altered the outcome"'.[20] The High Court's rejection of this conclusion instead appears based on values, not facts. Security personnel might have saved Najem, but someone else probably would have taken his place. Indeed, the situation may have been aggravated, and the number of casualties increased. In this case, it appears inappropriate to identify the absence of security personnel as the cause of the shooting.

MULTIPLE NECESSARY CONDITIONS AND MATERIAL CONTRIBUTION

Royal and *Adeels Palace* both required the court to weigh up the relative contributions of more than one causal factor. In *Royal*, in addition to the RTA's poor intersection design there was the poor driving of the plaintiff and defendant. In *Adeels Palace*, as well as the defendant's poor security there was the gunman's murderous behaviour. McHugh J in *Henville v Walker*[21] explains how such cases should be approached. 'If the defendant's breach has "materially contributed" to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage.'[22]

It is sometimes suggested that any contribution greater than *de minimis* will be material.[23] But the High Court recently refused to endorse this view,[24] and *Royal* and *Adeels Palace* appear to involve a positive threshold of materiality. In *Adeels Palace*, the court held that 'a "but for" causal connection between absence of security and injury to either plaintiff was not established ... It was not shown that absence of security materially contributed to either plaintiff being injured.'[25] In *Royal*, the majority held that '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'.[26]

MATERIAL CONTRIBUTION TO RISK

In *Royal* and *Adeels Palace*, the notion of 'material contribution' appeared to mark a threshold which, if not reached, would *exclude* a potential factual cause. But the term is used widely and inconsistently. Plaintiffs sometimes seek to use 'material contribution' *inclusively*, to assist recognition of the defendant's breach as a factual cause. Where there is a dearth of evidence, the plaintiff argues that the defendant's material contribution to risk should be construed as a material causal contribution. The High Court has recently shown little enthusiasm for this inclusive principle.

The Court of Appeal in *Royal* used the risk principle to recognise the cross-intersection as a cause of the accident. This design '*did materially contribute to its occurrence*, by creating a heightened risk of such an accident'.[27] The High Court majority noted that this reasoning may derive support from Dixon J's observation that 'breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach'.[28] However, the majority in *Royal* swiftly added that '[t]here was ample material in the behaviour of the drivers to create a "sufficient reason to the contrary"'.[29]

In a separate judgment, Kiefel J questioned the foundation of the risk principle. '[A]uthority does not accept the possibility of risk of injury as sufficient to prove causation. It requires that the risk eventuate... [T]he question is whether it *did* cause or materially contribute to the injury actually suffered'.[30] The risk principle appears to relax the orthodox proof requirement. If the defendant's breach only made a slight contribution to the risk of the harm, then there would be only a slight probability that the harm would not have occurred without the breach. And yet, ordinarily the plaintiff must prove causation on the balance of probabilities. *Royal* was decided at common law; however, the potential inconsistency of the risk principle with the civil standard of proof is clear under the CLA. Section 5E provides: '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'.

In *Adeels Palace*, Moubarak invoked the risk principle. It was argued that the absence of security personnel 'resulted in >>

a material increase in an existing risk of injury to [him] from violent acts of other patrons and so materially contributed to the injuries suffered by him'.[31] While contrary to the usual proof requirement, the High Court considered whether the risk principle could gain support from the 'exceptional case' provision, s5D(2). Factual causation may be found even though it 'cannot be established'. But, as the court noted, this provision requires that "'established principles" countenance departure from the "but for" test of causation'.[32] And the High Court held that to find causation on the basis that 'security personnel ... *might* have been able to ... prevent injury ... would not accord with established principles'.[33]

The High Court has recently reaffirmed its rejection of the risk principle in *Amaca Pty Ltd v Ellis*.[34] The deceased died from lung cancer. There were two possible risk factors: the defendants' negligent asbestos exposure and the plaintiff's history of smoking. There was evidence that the two risk factors operated synergistically and were more than the sum of their parts.[35] But the asbestos exposures had been relatively light, and 'the relative risk of [the deceased] developing his cancer from exposure to respirable asbestos fibres (whether alone or in combination with smoking) was much lower than the relative risk of his smoking as he did'.[36] The defendants' relative contribution to risk was held to provide an insufficient basis for inferring causation. 'Knowing that inhaling asbestos *can* cause cancer does not entail that in this case it probably *did* ... that inference was not to be drawn in this case.'[37]

The High Court reached this conclusion despite the plaintiff's reliance on the synergistic operation of asbestos and smoking. The plaintiff argued that, in view of this, asbestos exposure, although a slighter risk factor, still had causal impact on the deceased's cancer. This argument recently received the support of Lord Phillips in *Sienkiewicz v Greif (UK) Ltd*.[38] But, as we have seen, the High Court in *Royal* and *Adeels Palace* has taken a more stringent view of factual causation, giving material contribution an exclusive operation. Even where the defendant's breach had some causal impact, it may not receive recognition as factual causation. Where accompanied by far stronger risk factors, the defendant's breach may not reach the threshold of materiality.

The contrast between English and Australian approaches to risk causation extends beyond synergistic risk cases. While the High Court has shown reluctance to *infer* causation from the defendant's contribution to risk, the House of Lords in a narrow class of case has held, *as a matter of law*, that any material contribution to risk will be treated as causal. In a series of cases beginning with *Fairchild v Glenhaven Funeral Services Ltd*,[39] it has held that where a plaintiff develops mesothelioma, any defendant that has exposed the plaintiff to asbestos will be deemed to have caused the mesothelioma.

In *Adeels Palace*, the High Court noted the possibility that the *Fairchild* principle could be accommodated by the 'exceptional case' provision, s5D(2).[40] However, the court has not yet expressly considered whether to adopt the *Fairchild* principle. The facts of *Adeels Palace* were distinguished from *Fairchild*,[41] and while *Ellis* involved asbestos exposure, the plaintiff did not invoke *Fairchild*.[42] But given the High Court's rejection of the risk principle in *Adeels Palace* and *Royal*, there appears little reason to imagine it would embrace the *Fairchild* variation. The High Court may find added reason to hesitate, given views recently expressed in the highest UK courts. *Fairchild* illustrates the 'danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed'.[43] The 'law tampers with the "but for" test ... at its peril'.[44]

CONCLUSION

Causation in the CLA has two elements: factual causation and scope of liability. Contrary to appearances, value judgement is not confined to scope of liability but also plays a role in determining factual causation. It is inherent in the question, has the defendant's breach made a *material* contribution to the plaintiff's harm? Plaintiffs sometimes seek to invoke an inclusive notion of material contribution, whereby the defendant's contribution to the risk of harm is treated as a causal contribution. Such a relaxation in orthodox proof requirements could be accommodated within the 'exceptional case' provision of s5D(2), but courts have recently declined to do so. Instead, the High Court appears to be using 'material contribution' as an exclusive principle, establishing a threshold of contribution below which potential factual causes will not gain recognition. However, little is settled in this difficult area of law. The High Court will have the opportunity to consider some of these issues again in the near future,[45] and the possibility that another layer of complexity will be added cannot be ruled out. ■

Notes: **1** *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 522. **2** *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 [43]; *Stephens v Giovenco* [2011] NSWCA 53 [5]. **3** [2011] NSWCA 53. **4** For example, *Ibid* [109] (Hodgson JA). **5** For example, *Haber v Walker* [1963] VR 339, 358 (Smith J). **6** [2011] NSWCA 53 [14]. **7** *Ibid* [115]. **8** *Ibid* [138]. **9** *Ibid* [33]. **10** *Ibid* [20]. **11** *Ibid*. **12** (2008) 245 ALR 653. **13** *Ibid* [15] quoting the majority in *Royal v Smurthwaite* (2007) 47 MVR 401 at 420 [97]. **14** (2008) 245 ALR 653 [33]. **15** *Ibid* [25]. **16** (2009) 239 CLR 420. **17** *Ibid* [47]. **18** *Ibid* [50]. **19** *Ibid*. **20** *Ibid* [49]. **21** (2001) 206 CLR 459. **22** *Ibid* [106]. **23** For example, *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, 621. **24** *Amaca Pty Ltd v Ellis* (2010) 263 ALR 576 [67]-[68]. **25** (2009) 239 CLR 420 [58]. **26** (2008) 245 ALR 653 [25]. **27** *Royal v Smurthwaite* (2007) 47 MVR 401 [85]. **28** *Betts v Whittingslowe* (1945) 71 CLR 637, 649. **29** *RTA v Royal* (2008) 245 ALR 653 [31]. **30** *Ibid* [144]. **31** (2009) 239 CLR 420 [10]. **32** *Ibid* [54]. **33** *Ibid* [56] (emphasis in original). The risk principle was applied in *North Sydney Council v Binks* (2007) 163 LGERA 94, but was subsequently rejected in *Flounders v Millar* [2007] NSWCA 238 [36]; affirmed in *Gett v Tabet* (2009) 254 ALR 504 [254]. **34** (2010) 263 ALR 576. **35** *Ibid* [21]. **36** *Ibid* [64]. **37** *Ibid* [68]. **38** [2011] UKSC 10 [75] per Lord Phillips, applying *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. **39** [2003] 1 AC 32; *Barker v Corus UK Ltd* [2006] 2 AC 572; *Sienkiewicz*; see also *Compensation Act* 2006 (UK) s3. **40** (2009) 239 CLR 420 at [57]. **41** *Ibid*. **42** (2010) 263 ALR 576 [12]. **43** *Gregg v Scott* [2005] 2 AC 176 [172] (Lord Phillips). **44** *Sienkiewicz* [186] (Lord Brown); see also at [167] (Lady Hale). **45** *Strong v Woolworths Limited* [2011] HCATrans 131 (13 May 2011) (special leave granted).

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