Defendants have to prove causation too

By Andrew Stone

When I first heard that this issue of *Precedent* was to be devoted to causation, I suggested that the journal should contain some sort of health warning. For plaintiffs' lawyers, reading about developments on the legal question of causation over the past decade is likely to induce suicidal thoughts. I fear that the balance of this issue will contain depressingly grim news about the renewed judicial enthusiasm for downing plaintiffs for failing to prove causation. (Since providing these musings I have contributed just such a depressing article.)

I do have a dim and distant memory of easier times, when judges would infer that any breach of duty of care was likely causative of the injuries sustained. Such days are now gone, and in the past they shall remain. You need only look at the various '*violent attack by third party*' cases to see just how problematic causation can be.

In *Modbury Triangle*,[1] *Coca Cola Amatil v Pareezer*[2] and *Adeels Palace*[3] (one beating and two shootings), one of the grounds on which the plaintiff lost in each case was that they could not prove that any breach of duty of care on the part of the defendant was causative of the harm suffered. (See separate article in this issue.)

Enough of the depressing news. Let me give some small cause to smile. When it comes to contributory negligence, it is the defendant who has to prove that the contributorily negligent conduct of the plaintiff was causative of the injury sustained.

I sometimes suspect that claims officers and defendants' solicitors hold a drinking game where they sit around developing fanciful allegations of contributory negligence. This is the only explanation I can come up with for an allegation that the rear seat passenger is contributorily negligent in failing to advise, warn or direct the adult driver (who is also owner of the vehicle) to slow down. What is overlooked entirely with such pleadings is the need for the defendant to prove causation.

To make out such an allegation of contributory negligence, the onus is on the defendant/insurer to prove that if any such warning had been given, the defendant (often intoxicated) would have listened to such direction and would have acted in accordance with it *and* that the accident would thus have been avoided. Unless the insurer can make good its onus on causation, the allegation of contributory negligence will fail.

A recent decision of the NSW Court of Appeal highlights the need for a defendant to prove causation. In *Varga v Galea*,[4] the plaintiff was injured on a building site. An independent contractor, he was working at height on a scissor lift, pouring concrete through a hose. As a consequence of negligent operation of a boom, to which the hose was attached, the plaintiff was flipped out of the lift. The trial judge deducted 25 per cent for failure to wear a safety harness.

The Court of Appeal noted that there was no expert evidence concerning a safety harness or how it might have operated to avoid injury. The Court of Appeal described the lay evidence about whether a safety harness could have been attached to the scissor lift as '*confusing*',[5] and concluded that whether a safety harness might have prevented injury was '*a matter of speculation*'.[6]

The Court held that even though it might seem a matter of '*common sense*' that a harness would prevent injury to a person at risk of falling from a height, evidence was still required of the '*reasonable practicality*' of the safety measure proposed.[7] The plaintiff's appeal against the finding of 25 per cent contributory negligence was allowed.

There is nothing particularly noteworthy about the facts of the case – that is not my point. Rather, it is simply worth keeping in mind that there is an onus on the defendant to prove causation in relation to allegations of contributory negligence. If it is alleged that the plaintiff should have done something that would have helped them to avoid sustaining injury, the defendant has to *prove* that doing that something would in fact have made a difference.

Where liability is admitted, the plaintiff should not be going first with expert evidence on contributory negligence. Insist that the defendant go first and run a keen eye over any expert evidence that the insurer adduces as to whether it discharges the defendant's onus to prove both a breach of the plaintiff's duty to take reasonable care for his or her own safety, *and* that any such breach was causative of harm. ■

Notes: **1** *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61. **2** *Coca Cola Amatil (NSW) Pty Ltd v Pareezer & Ors* [2006] NSWCA 45. **3** *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48. **4** *Varga v Galea* [2011] NSWCA 76. **5** Per McColl JA, Beazley JA and Handley AJA agreeing (at 28). **6** *Ibid*, at 29. **7** *Ibid*, at 30.

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