Explaining Causation of Injury – An Australian Case Study

39

An Australian Case Study over Time

Kate Henning

Abstract

Legal and medical causation of injuries are not necessarily the same thing. This can become problematic when medical experts are called upon to comment on "causation" of injuries. Does this question relate to "legal causation" or "medical causation," and what does causation even mean?

Causation (the legal kind) is an active and developing area of the law with considerable judicial comment in the highest courts of Australia. The judgments being handed down are at the very least a new nuance on the old tests. The concept of proof of causation is being reviewed, refreshed, and finessed.

Plaintiffs must prove "causation" to succeed in a liability claim against a Defendant. Gaps in scientific or factual details of the cause may prevent a Plaintiff from establishing the link between a Defendant's breach and the Plaintiff's injury. If that link cannot be proven, then, at law, the claim must fail. Courts are less willing to plug gaps in scientific or factual knowledge than they once were.

This chapter explains causation from a legal perspective and provides an understanding of what lawyers are interested in when they question causation. Experts are often asked questions such as "whether the alleged injuries were caused by the accident." This chapter looks behind the assumptions in that question to allow consideration and determination of what is really being asked.

Introduction

Causation is a vital aspect of claims for damages arising from another person's negligence. Sometimes the answer to a question of causation is abundantly clear. Imagine a set of dominoes arranged in a line on their ends. If someone pushes the

K. Henning
Wallmans Lawyers, Adelaide, SA, Australia
e-mail: kate.henning@wallmans.com.au

R.G. Beran (ed.), *Legal and Forensic Medicine*,
DOI 10.1007/978-3-642-32338-6_121,

first one over, it is clear that action causes the following dominoes to also fall. Sometimes the answer to legal questions of causation can be as easy as lining dominoes up in a row. However, there are many circumstances where determination of causation is lot more complicated.

Working out "the cause" of a particular injury will depend on the reason and the expertise of the person making the enquiry. To a police officer, the cause of a fatal injury may be that a gun was fired. To a forensic scientist, the cause may be found in an analysis of where the bullet struck the person and the damage that resulted.

One of the problems is that "cause" has a specific legal meaning and also is in common use. The precision applied in the legal context is not mirrored in general use. Cause is also used in a variety of other fields. Scientists would be very unwilling to say that one thing was the cause of another thing. Scientists would talk of correlations. However, the media, in reporting the results of scientific research, will report those same scientific results as the "cause" of a particular illness rather than a correlation between a risk factor and an outcome. The legal standard for proving a causal link is not as high as scientific causation. However, it still requires a very careful analysis and consideration of whether there is sufficient evidence to substantiate the link. Even working out what the link is can be a difficult process.

In approaching questions of causation from either a legal or medical perspective, it is a matter of asking "why" something happened. In a legal context, "why" did this person suffer an injury and was it a result of something the Defendant did? In a scientific context, "why" do some people develop cancer?

This chapter discusses the way in which Australian Courts approach the issue of causation. Although "why" is a good starting point, the answer will depend on the type of issue the Court is dealing with – a criminal matter, a worker's compensation injury, a claim for personal injury in the context of a motor vehicle accident, a public liability claim, a dust diseases claim, or a claim in medical negligence – and whether there is legislation relevant to the assessment.

This chapter focuses on the common law approach to causation in Australia and looks at how the common law in Australia has been finessed since the beginning of the new millennium. These changes have occurred due to significant public concern that personal injury law was not properly reflecting liability. The Australian government sponsored a review of public liability, and consequential amendments were made to the relevant legislation in most Australian jurisdictions.

Background

When considering whether a claim for personal injury will succeed, it is necessary to establish whether or not the Defendant owed the Plaintiff a duty of care to minimize exposure to risks of injury and whether the Defendant breached that duty of care. Very generally speaking, people and organizations have an obligation to take reasonable action to prevent foreseeable injury to others. If they fail to take reasonable action to prevent an injury, then they will have breached their duty of care.

Assessment of breach of duty is another area of law which is complex, involved, often factually driven, and which is assessed under common law or under differing legislative regimes around Australia. For the purposes of this chapter, it is assumed that duty and breach of duty have already been established, and the remaining element to a Plaintiff's claim succeeding is only whether the breach of the duty caused the injury.

On many occasions, legal causation is relatively easy to establish and aligns with medical causation.

For example, a person is sitting in a stationary vehicle. Another vehicle hits their vehicle from behind. The person's head and neck are moved rapidly and violently as the car moves unexpectedly forward. As a result, the person sustains a neck injury. There is little doubt that the medical cause of the soft tissue injury to the neck (the rapid and unexpected movement of the vehicle) is going to align with the legal cause of the accident – the driver of the moving vehicle failing to keep a proper lookout and allowing their vehicle to collide with the rear of the first vehicle.

However, it is not always that easy. Even a "simple" public liability claim can have complicated issues of cause. For example, someone sues after they fall and sustain a fractured wrist.

There is no doubt that they fell and fractured their wrist. From a medical perspective, the cause of the broken wrist would be considered the fall. However, from a legal perspective, it is necessary to know why the person fell. That a fall is a reasonable explanation for the fractured wrist is not the primary enquiry into legal causation. The question for legal causation is "why did they fall" not why did the person fracture his or her wrist. There may be many potential causes of the fall that need to be investigated:

- Was the floor uneven?
- Was the surface slippery?
- Was the person particularly frail?
- Do they have any medical conditions that could have caused them to fall?
- Were they pushed?
- Did they jump from a height?
- Were they running?
- Were they not looking where they were walking?
- Was there a hazard?

That is a simple example. Questions of causation can be even more difficult when looking at issues of medical negligence claims, psychological injuries, and the competing causes of lung diseases in people who have been exposed to multiple carcinogens. Courts only look at causation when a claim comes to trial. Lawyers must look at causation as part of their assessment of potential claims (from both a Plaintiff and Defendant viewpoint) at an early date to ensure that the correct Defendant or Defendants are being pursued. In the example above, whether or not there was a hazard and who created that hazard would be major issues to be identified prior to issuing proceedings. Just because "something" caused an injury is not enough. The Plaintiff must be able to link that injury back to a breach of duty by a Defendant.

A Very Brief History of Civil Liability in Australia

Australia inherited the common law system in relation to civil liabilities from England. Civil liabilities were almost exclusively governed by common law precedent until growing discontent over ever-increasing and unaffordable insurance premiums meant that many recreational organizations and associations could not obtain liability cover. As a result, community groups were faced with the prospect of closing their doors. The Commonwealth Government commissioned a review of the law of negligence which, among other issues, considered causation ("The Ipp Review" so called because The Honorable David Ipp headed the review panel). The report from the review was published on 30 September 2002 (Ipp D, Cane P, Sheldon D and Macintosh I. *Review of the Law of Negligence Final Report*, Canberra: Canprint Communications Pty Ltd; 2002). The terms of reference for the review made it clear that liability in relation to personal injuries was to be limited, with the assumption that this would lead to fewer public liability claims, with lower amounts paid out and, therefore, lower insurance premiums. The report set out recommendations for how to achieve that aim. Most jurisdictions within Australia implemented legislative change as a result of concern about the unsustainable nature of civil liability claims and/or as a result of recommendations from the Ipp Review.

In terms of causation, the following legislation is in force around Australia:

Australian Capital Territory	*Civil Law (Wrongs Act) 2002 ss 45 and 46*
Commonwealth	*No legislation: common law*
New South Wales	*Civil Liability Act 2002 ss 5D and 5E*
Northern Territory	*No legislation: common law*
Queensland	*Civil Liability Act 2003 ss 11 and 12*
South Australia	*Civil Liability Act 1936 ss 34 and 35*
Tasmania	*Civil Liability Act* 2002 ss 13 and 14
Victoria	*Wrongs Act* 1958, ss 51 and 52
Western Australia	*Civil Liability Act 2001 ss 5C and 5D*

By and large, the legislative provisions are very similar, but each jurisdiction has added its own legislative style (to the provisions). As the provisions are not identical, it is necessary to consider jurisdictional differences when considering causation.

The answer to the question whether or not the legislative reforms resulted in a change to the law is emerging now that claims subject to the legislative reforms are reaching their final appeals.

Causation

Under common law, and the legislative reforms, the Plaintiff in a claim has and always has had the onus of establishing that injury, loss, or damage was caused by the Defendant's breach of duty. This means that the Plaintiff must establish on the

balance of probabilities that it was the Defendant's action or inaction that caused them to suffer the injury. The legislative reform clearly and succinctly restated this principle in very similar terms in all jurisdictions that implemented legislative reform early this millennium. The New South Wales legislation at Section 5E of the *Civil Liability Act* 2002 states "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."

This onus on the Plaintiff is certainly consistent with common law. However, having the principle legislated has resulted in a change of emphasis. The standard which Courts now require for Plaintiffs to prove causation has been increasing since the legislative reform. A greater emphasis is placed on the Plaintiff's onus or burden to prove the link between the Defendant's negligence and the Plaintiff's injury. Less emphasis is placed on the Defendant showing that there may be an alternate cause of the injury.

Prior to the legislative reform, the leading case on causation was *March v Stramare* (*March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12 (24 April 1991)). This case, decided by the High Court of Australia in 1991, held the position of the leading judgment on common law causation until at least 2009. It is still an important case. However, the importance of that decision in causation arguments has been diminishing in the last 2 years. Prior to *March v Stramare*, the common law test of causation was referred to as the "but for" test. "But for" the negligence of the Defendant, the Plaintiff would not have suffered injury.

***Case Summary: March v Stramare* (1991) 171 CLR 506**

March was intoxicated and driving at an excessive speed along a city street in the early hours of the morning near to the city markets. Stramare Pty Ltd's truck was parked *in the middle* of the road to unload fruit and vegetables for the market.

The truck's parking and hazard lights were on, and the street had reasonable street lighting. March's vehicle collided with the parked truck. March sued Stramare Pty Ltd. The High Court of Australia found that it was appropriate to take a "common sense" or intuitive approach to causation. Accordingly, in the absence of Stramare showing that the breach *did not* cause the Plaintiff's loss, Stramare was found to have caused March's injuries. March was also found to have contributed to his injuries to the extent of 70 %. Therefore, Stramare was held to have sufficiently "caused" the accident to be found legally responsible. However, March's contribution to the cause of the accident was greater as he was intoxicated, travelling at an excessive speed and not keeping a proper lookout.

The *March v Stramare* common sense approach to causation has recently come under review both due to changes to legislation and also as a result of development of the common law.

Recent judgments from the High Court and the New South Wales Court of Appeal indicate that instead of using a "common sense" approach, Courts are returning to the "but for" test and asking:

- *"If" the outcome would have been different if the Defendant had not breached its duty of care*
- *Requiring Plaintiffs to prove that the outcome would have been different*

This can be seen in the legislative reforms which require that causation can only be established if the Defendant's negligence was a "necessary condition" of the harm and restated the Plaintiff's onus of proof.

Adeels Palace v Mourbarak (*Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420; [2009] HCA 48 (10 November 2009)) was the first decision by the High Court to consider the legislative reforms. The High Court noted in its unanimous judgment that the formula set out in the New South Wales legislation was not the same as the common law formula for causation as described in *March v Stramare*.

Case Summary: Adeels Palace v Moubarak

Adeels Palace is a licensed entertainment venue in the suburbs of Sydney. Adeels Palace held a New Year's Eve party on 31 December 2002. About 2.30 am, things became heated on the dance floor when a woman accused another woman of brushing her hand with a cigarette. Quickly the disagreement involved friends and relatives, and soon punches, chairs, and plates were being thrown.

A man involved in the fight was hit in the face. He left Adeels Palace only to return soon after with a gun. He shot two men. Each of those men brought proceedings in the District Court of New South Wales against Adeels Palace (not the gunman). They claimed damages for personal injury. The allegation was that as a result of Adeels Palace failing to have sufficient security during the function, they each suffered injury due to the gunman entering the premises and shooting them.

The Court found that the absence of security personnel at Adeels Palace on the night the Plaintiffs were shot was not *a necessary condition* of them being shot. Even if there was insufficient security at Adeels Palace, the Court found that was not the cause of the Plaintiffs' injuries. Essentially, having security guards would not have prevented the gunman's irrational and unpredictable behavior.

Adeels Palace was decided pursuant to the NSW *Civil Liability Act* following the Ipp amendments which included the provision that "factual causation" must be proven by the Plaintiff. The Court therefore distinguished the decision from the common law position in *March v Stramare*.

The more recent decisions of the High Court in *Amaca v Ellis (Amaca Pty Ltd v Ellis; The State of South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis* (2010) 240 CLR 111; [2010] HCA 5 (3 March 2010)*)* and *Tabet v Gett*, (*Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 (21 April 2010)) which are discussed later, have moved the common law position much closer to the legislated position regarding factual causation. However, the exact nature of the legislated position is also being worked out. The High Court of Australia considered this issue in *Lithgow City Council v Jackson* (*Lithgow City Council v Jackson* (2011) 85 ALJR 1130; [2011] HCA 36 (28 September 2011)) and *Strong v Woolworths* (*Strong v Woolworths Ltd*(2012) 86 ALJR 267; [2012] HCA 5 (7 March 2012)). The New South Wales Court of Appeal considered the issue in *Allianz v Roads and Traffic Authority of New South Wales* (*Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales; Kelly v Roads and Traffic Authority of New South Wales* (2010) 57 MVR 80; [2010] NSWCA 328 (9 December 2010)).

Case Summary: Lithgow City Council v Jackson

The Plaintiff was an intoxicated pedestrian walking with two dogs in a public park in the very early hours of the morning. He was found in a drain with severe injuries. His injuries were accepted to be consistent with a fall. He could have fallen over a small wall before landing in the drain approximately 1.5 m below the wall.

The trial judge found that the Council breached its duty of care to the Plaintiff by failing to erect an inexpensive fence on the wall that would have prevented someone failing to see the low wall at night and accidentally falling over it. There was no direct evidence of how the Plaintiff came to be in the drain. The Plaintiff was unable to remember the incident and, therefore, could not give evidence about the circumstances. There were no witnesses other than those unknown people who found the Plaintiff, and ambulance officers who attended the scene to treat the Plaintiff. The High Court found that there was not sufficient evidence to conclude that the Plaintiff had discharged his onus of proof in establishing that he sustained his injuries as a result of a fall from the wall and not a fall from the sloping sides of the drain. No expert evidence was provided to indicate that the severity of the injuries could only have been caused by falling the 1.5 m from the low wall. It appeared equally plausible that the Plaintiff could have fallen from a different part of the drainage infrastructure and from an area where no breach of duty on behalf of the Council had been found. Therefore, the Plaintiff's claim failed as he failed to link the cause of his injuries to the breach of duty of care by the Council.

Case Summary: Strong v Woolworths

Ms. Strong was a lower limb amputee who visited a Big W store within a shopping complex. Ms. Strong used crutches to mobilize. When in the "sidewalk sale" area outside of Big W, one of Ms. Strong's crutches slipped when it was placed onto a potato chip. As a result, she fell and sustained injury. The store had clearly breached its duty of care to customers as there was no regular system of cleaning and inspection in place for the location of the fall. Accordingly, the area had not been inspected by cleaners at all on the day of the incident.

The Court considered whether the absence of a cleaning regime for the area *caused* Ms. Strong to fall, and her resultant injury. The Court asked if an appropriate cleaning regime had been in place whether this would have prevented the Ms. Strong's fall. The Court accepted that inspection by a cleaner every 15 (or 20) min would have been reasonable for the area. The question to be answered was whether the chip would have been detected and removed by cleaners prior to Ms. Strong's fall if cleaners had been attending every 15–20 min.

Ms. Strong provided no evidence as to how long the chip had been on the floor. Witnesses did not touch the chip to see whether it hot or cold at the time of the accident. Ms. Strong's claim was successful before a District Court Judge. Woolworths then appealed to the New South Wales Court of Appeal. The appeal was upheld as the Court was not satisfied that on the balance of probabilities that the chip would have been identified and removed prior to the Plaintiff's fall if the duty of care had not been breached. The Court's decision in this regard was partly reliant upon the fact that the fall occurred at the beginning of lunch which the Court assumes would be the most likely time for chips to be purchased from the food court and in the vicinity of the side walk sale area. Ms. Strong appealed to the High Court, and the High Court reinstated (in a 4–1 decision) the original judgment in favor of Ms. Strong. The majority of the High Court found that in the four and a half hour period between the last cleaning of the area that on the balance of probabilities, the chip would have fallen in the 4 h and 10 min before 12:10 pm rather than in the 20-min period between 12:10 pm and Ms. Strong's fall at 12:30 pm. It is unclear from the decision exactly what period of time from the last inspection Ms. Strong would not have been able to establish causation. For example, if the final inspection had been at 11:30 am (instead of 8 am) would that have altered the outcome?

Case Summary: Allianz v Roads and Traffic Authority of NSW (RTA)

Mr. Kelly was driving on a rural highway following a period of high rainfall. He encountered water over the road as he was driving. As a result, the car aquaplaned causing him to lose control of the vehicle, and ultimately his

vehicle collided with an oncoming truck. Mr. Kelly and one of his passengers were killed in the accident. Two other passengers sustained serious injuries.

Roads and Traffic Authority officers had placed a sign warning of the water over the road 924 m prior to the actual hazard. Ideally the sign should have been placed between 150 and 300 m prior to the hazard. Mr. Kelly's Compulsory Third Party insurer and his widow issued proceedings against the RTA alleging negligence.

While the question of breach of duty was also in dispute, the main issue was whether the failure of the RTA to place the warning sign in the ideal location *caused* the accident.

According to the Court of Appeal, the Plaintiffs had to show that if the sign had been placed between 150 m and 300 m from the location of the hazard, this would have resulted in Mr. Kelly altering his driving such that the accident would have been avoided.

The Court found that Mr. Kelly was clearly negligent in his driving of the vehicle. He had failed to see the water hazard which was visible from around 400 m prior to the hazard or, if he did see the hazard, had failed to take appropriate action to avoid it. In those circumstances, it was unlikely that Mr. Kelly would have seen or taken action if the warning sign had been placed closer to the hazard. That is, the placement of the sign would not have altered the outcome. Accordingly claims by the CTP insurer and Mr. Kelly's widow were dismissed despite the Road Traffic Authority placing the warning sign in the incorrect location.

Allianz v RTA can be contrasted with the decision in *March v Stramare*. In both cases, there was a negligent driver who had been involved in an accident. In this matter, there is no information to suggest that Mr. Kelly was anything more than inattentive (i.e., he was not intoxicated or under the influence of drugs). In *March v Stramare*, the driver was intoxicated and travelling at high speed. In both cases, the drivers collided with an obvious hazard that a reasonable driver would have seen and avoided. The vegetable truck in *March v Stramare* was parked in the middle of the road. However, it was the early hours of the morning, no significant traffic would be expected, and motorists are expected to drive to the conditions and to be prepared to negotiate unexpected obstacles. Hazard lights were in use to highlight the presence of the vehicle. However, Mr. March succeeded in his claim, while Mr. Kelly's widow and Allianz were unable to establish cause against the RTA.

An interesting aspect of the *Allianz v RTA* decision is that of the jurisdictions that have enacted legislative reform, some have included a provision requiring courts to consider what the injured person would have done if it had not been for the Defendant's negligence. The Australian Capital Territory and South Australia's legislation do not contain that provision. However, it is not at all clear that the outcome would have been different in *Allianz v RTA* if the

legislation had not included that provision or if the accident had occurred in South Australia or the Australian Capital Territory. The NSW Court of Appeal judgment mirrors the wording of that section; however, no particular emphasis is placed on that aspect of the legislative regime over the general requirement for Plaintiffs to prove factual causation (which means that the breach of duty was a necessary condition of the harm). Factual causation is common to all jurisdictions that have legislated reform in the area of causation.

It is certainly arguable that if *March v Stramare* was to be decided again today, with the new legislative provisions, Mr. March would fail to establish cause as his actions were likely to result in him being involved in an accident irrespective of whether or not the truck was in that location (e.g., by going through a red light or colliding with some other stationary object, such as Mr. Stramare's failure to note an obvious hazard ahead).

The common law has not stood still, while discussion about the legislative effect of causation has been occurring. Three recent High Court decisions have considered whether causation has been established under the common law.

Case Summary: Tabet v Gett

Ms. Tabet was 6 years old. She was usually treated by her grandfather and uncle who were general practitioners. She was referred to Dr. Mansour by her uncle in late December 1990 with 10 days of headaches and vomiting. She was admitted to hospital and while there developed chicken pox. No other abnormalities were detected, and she was discharged home. When her headaches and vomiting continued, she was admitted to hospital under Dr. Gett on 11 January 1991 (as Dr. Mansour was on leave), and a provisional diagnosis was made of chicken pox meningitis or encephalitis. At 11 am on 13 January 1991 (2 days after her admission), Ms. Tabet had an episode where her pupils were unequal and her right pupil was not reactive. As a result of that episode, Dr. Gett ordered a CT scan of Ms. Tabet's brain which was performed the next day. The CT scan revealed an extensive medulloblastoma. It was subsequently accepted at trial that the tumor had been growing for around 2 years. Ms. Tabet underwent surgery on 16 January 1991. She suffered permanent brain damage from the tumor and the surgery, and it was argued, as a result of the negligence of Dr. Mansour and Dr. Gett in failing to order the CT scan at an earlier point in time. As Ms. Tabet's alleged injury occurred prior to the legislative reforms following the Ipp Review, her claim was assessed at common law. Dr. Mansour was not found to have breached his duty of care and, accordingly, was not found liable by the trial judge.

However, Dr. Gett was found to have breached his duty of care to Ms. Tabet by failing to order a CT scan at the earliest opportunity. The question was whether Dr. Gett's breach of duty of care caused Ms. Tabet to suffer a more significant brain injury than would otherwise have been the case.

In this case, the medical experts were unable to say whether the delay had caused any difference in the brain injury ultimately suffered. The Trial Judge found that there would have been a 40 % chance of a better outcome if the CT scan had been performed earlier. The Court of Appeal found that there would have been a 15 % chance of a better outcome. The High Court indicated that as there was a less than a 50 % chance of a better outcome (on both the trial judge's finding and the finding of the Court of Appeal) if the CT scan had been ordered earlier, that causation had not been established. The High Court found that irrespective of whether the chance of a better outcome was 40 % or 15 %, the chance was less than 50 %, and therefore, on the balance of probabilities, Ms. Tabet failed to establish that her brain injury had been made worse by the delay.

The recent case of *Hirst v Sydney South West Area Health Service* also considered the issue of whether earlier investigation would have resulted in a better outcome for a patient. In that matter, the patient was an unborn fetus. It was found that the treating doctor failed to order an ultrasound that would have detected hydrocephalus and, accordingly, had breached his duty of care. The *Tabet v Gett* decision of the High Court was considered by the trial judge, and in this case, the trial judge was satisfied that causation had been established in this instance. The reason for the difference was that the experts in *Hirst* were in agreement that the Plaintiff more likely than not lost the opportunity of a better outcome because of the failure to order the ultrasound at the appropriate time. This contrasts with Ms. Tabet's claim where the experts said that it was possible that her condition would have been better if a CT scan had been ordered earlier but were unable to say that the possibility of a better outcome was more likely than not. Another medical negligence case considered a similar causation issue with the question of how the outcome would have been different if the Defendant had not breached his duty of care being the main issue. This time it was a decision of the Full Court of the South Australian Supreme Court.

***Case Summary: G v Down* (*G, P A & C, P v Down* (2009) 104 SASR 332; [2009] SASC 217 (28 July 2009))**

After the birth of her fourth child and significant complications including a back injury and depression, Ms. G decided she had completed her family and wished a permanent form of contraception. She consulted with Dr. Down about having a tubal ligation. Dr. Down advised Ms. G that there was a one in

2000 chance that the procedure would fail and she would fall pregnant. It was established in evidence at trial that the accepted rate of failure was between 1 in 500 and 1 in 1000 at that time. Dr. Down performed tubal ligation surgery on Ms. G in December 2001 (prior to legislative reforms). The procedure failed, and Ms. G became pregnant. Ms. G gave evidence that if she had been advised of the actual risk of failure, she would have enquired about other permanent forms of contraception including hysterectomy. Ms. G and her partner discussed termination of the pregnancy but ultimately did not proceed down that path. Both Ms. G and her partner suffered from depression. They alleged that this was as a result of the unplanned pregnancy. Ultimately their relationship broke down. Ms. G sued Dr. Down on the basis that he had breached his duty of care by providing her with inaccurate information about the risk of failure of the tubal ligation surgery. The Court accepted that Dr. Down had breached his duty of care. The issue was whether that breach resulted in Ms. G undertaking the procedure and subsequently becoming pregnant. The Court found that there was a 1 in 100 chance of failure for the contraceptive pill which was Ms. G's former method of contraception. If Dr. Down had correctly advised Ms. G that the risk of failure was 1 in 500 or 1 in 1000 for tubal ligation, the Court found that Ms. G still would have proceeded with tubal ligation as the odds of failure were much lower than the oral contraceptive. Accordingly, Dr. Down's breach of duty of care was not the cause of Ms. G's pregnancy and subsequent psychological injuries. This case highlights how legal and medical causation can be very different. Clearly the cause of the pregnancy from a medical point of view was that the tubal ligation failed to prevent a pregnancy. Although Ms. G originally alleged Dr. Down had negligently performed the surgery causing the failure, that allegation was abandoned during the trial. In assessing causation in this matter from a legal perspective, it was necessary to consider the information Dr. Down had given Ms. G and whether her decision would have been altered if she had received the correct information. The question was not whether she would have become pregnant if she had received the correct information and/or if she had chosen a different form of contraception. The sole issue was whether she would have done something differently if she had the correct information.

The analysis undertaken by the Court was very similar to the decision in *Allianz v RTA* where to establish causation the Plaintiffs had to show that the deceased driver, Mr. Kelly, would have done something differently if a sign had been in the correct location. However, *Allianz v RTA* was considered in the context of legislative reforms and in particular the New South Wales provisions on causation. *G v Down* was decided based on the common law, but the test of causation appears to be the same. It is noteworthy that *G v Down* is a South Australian case, and the legislative reform in South Australia did not contain the provision regarding assessment of how the

injured person's actions would have changed if the Defendant had not breached its duty of care. Ms. G sought leave to appeal to the High Court, but this was refused.

The High Court further considered the common law position on causation in the case of *Amaca v Ellis*.

Case Summary: Amaca Pty Ltd v Ellis

Mr. Cotton had been a smoker for 26 years. He had also been exposed to asbestos fibers during his employment. He died of lung cancer. His estate pursued a claim alleging that the exposure to asbestos caused him to develop lung cancer. As the exposure occurred many years ago, the common law tests of causation were considered rather than the legislative provisions.

Expert evidence indicated that the greatest risk factor for the development of lung cancer was smoking. Asbestos exposure was also a risk factor for the development of lung cancer.

There was insufficient evidence before the Court to support the contention that exposure to asbestos fibers *and* smoking had a greater risk than smoking alone. Accordingly, the Court questioned if the Plaintiff had not been exposed to asbestos during employment would he still have developed lung cancer?

Noting the gaps in the knowledge of the medical community, the Court found that it was possible that Mr. Cotton would have developed lung cancer in any event – even if he had not been exposed to asbestos. There was no demonstrated greater risk as a result of the independent exposure to asbestos than Mr. Cotton would have faced in any event. Therefore, the claim by the estate failed.

Case Summary: Amaca v Booth

In the case of *Amaca v Booth* (*Amaba Pty Ltd (Under NSW Administered Winding Up) v Booth; Amaca Pty Ltd (Under NSW Administered Winding Up) v Booth* (2010) 9 DDCR 488; [2010] NSWCA 344 *(10 December 2010)* and *Amaca Pty Ltd (Under NSW Administered Winding Up v Booth* (2011) 86 ALJR 172; [2011] HCA 53) for damages as a result of the development of a dust disease, causation issues were once again at the fore. The New South Wales Court of Appeal found that causation was proven on the basis of a causal scientific link between asbestos exposure and mesothelioma but also on the basis that proper warning signs would have changed the Plaintiff's behavior. In this case, it was accepted that the signs that provided warning of the danger were not sufficient to draw attention to them. The breach in this regard is failing to have sufficient warning signs to alert the Plaintiff to the danger. In this regard *Amaca v Booth* was decided based on the

common law, but the judicial consideration is extremely similar to the reasoning in cases considering causation issues which are subject to the legislative reform (such as *Allianz v RTA*).

Leave to appeal to the High Court was granted in *Amaca v Booth*. The issue on appeal was whether the "risk" from various exposures to asbestos provided the necessary causal link between the exposure and the development of mesothelioma (the same issue as in *Amaca v Ellis*). In this case, the Plaintiff was exposed to asbestos fibers early in his life when assisting his father to renovate his childhood home. The potential harmful effects of asbestos only became known at a later date. Therefore, only exposure after a certain date can be negligent because prior to that it was not a breach of duty of the manufacturer to supply the products because the harmful effects were not known. The Plaintiff was exposed after that date to asbestos fibers as part of his employment as a mechanic. He worked in that occupation for 30 years. In this case, the Plaintiff needed to prove that the specific exposures to asbestos fibers that occurred after the harmful effects became known caused (in a legal sense) the development of mesothelioma. Arguably the earlier exposure would have been capable of "causing" mesothelioma in isolation. The Plaintiff's risk was argued to have increased because of the additional exposure. Did that increase in risk equate to an increased likelihood on the balance of probabilities that the Plaintiff would, in fact, develop mesothelioma? The High Court found that, in this case, the Plaintiff's mesothelioma was on the balance of probabilities caused by his work-related exposure. As was the case with *Strong v Woolworths*, the High Court has taken the position that although the competing cause of the injury/disease cannot be totally excluded, that given the significantly greater time that there was a breach in both matters compared to the minimal time that there was no breach, it was appropriate to find that it was more probable than not that the breach caused the injury/disease.

A final issue to keep watching in the future is related to the case of *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (*Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145; [2011] FCAFC 128 (12 October 2011)). In this matter, Mr. Peterson had been taking Vioxx and suffered a myocardial infarction (MI). He brought a claim against the manufacturer alleging that Vioxx had caused him to suffer the MI. The Full Court of the Federal Court found that Mr. Peterson had not discharged his onus of proof in relation to causation. Mr. Peterson had multiple personal attributes that indicated he was at an increased risk of suffering an MI even without taking Vioxx. The Court found that there was insufficient evidence to support a finding that Mr. Peterson's MI was "caused" by Vioxx although it increased his risk to some extent. This is the same argument as in *Tabet*.

Peterson was the lead Plaintiff in a class action. However, the fact that he was unable to establish the link between Vioxx and his MI does not mean that

others will not be able to establish that link. Indeed, Mr. Peterson may appeal the decision to the High Court. It would be unexpected if this was the last that was heard about claims for damages arising from Vioxx use.

The New South Wales Court of Appeal has interpreted the evidentiary "onus" or "burden" on Plaintiffs under the *Civil Liability Act* provisions on causation to be high. This appears consistent with the development of the common law by the High Court in *Tabet* and *Amaca*.

Instead of using "common sense" to determine causation, Courts are now asking "if the Defendant had not breached its duty of care, how would this have altered the outcome?" Essentially, if the Defendant's breach was the missing piece of a puzzle, would the outcome have been clear in any event?

Summary

Since *March v Stramare*, courts used "common sense" to determine causation. In practice, this meant that once duty and breach were established, Plaintiffs often did not have much difficulty establishing causation and, therefore, liability.

While the steps in proving liability remain, there is a new nuance to the determination of causation. It is no longer sufficient for Plaintiffs to establish breach and then for causation to be effectively established unless the Defendant could show that the breach was not a cause or contributor to the injury. The hurdle for Plaintiffs to establish causation seems to have become higher in recent years as a result of both legislative reform and the development of the common law.

From the recent decisions of the higher courts around Australia, it seems that the following are appropriate both at common law and also pursuant to the legislative reforms:

- The Plaintiff bears the burden to prove causation (*legislative reform to civil liability, Strong v Woolworths, Tabet v Gett, Amaca v Ellis*).
- The question of how the outcome or the Plaintiff's actions would have been altered is a relevant factor in determining causation (*Allianz v RTA*; *Amaca v Booth*).
- If the Defendant had not breached its duty of care, the outcome would have been different (on the balance of probabilities) (*Adeels Palace v Moubarak, Strong v Woolworths*).
- In assessing whether a breach of duty leads to a particular injury in cases where there are multiple potential causes of injury that the link must be proven on the balance of probabilities (*Tabet v Gett, Amaca v Ellis, Lithgow v Jackson, G v Down, Amaca v Booth, Merck Sharp, and Dohme* (*Australia*) *v Peterson*).

When considering the "cause" of an injury in a personal injury setting, it is not just a matter of considering whether the injury is consistent with the description of the accident but necessary to consider how the Defendant's alleged negligence contributed to that injury and whether it would have occurred in any event.

Where cause is in dispute, parties need to carefully consider how causation will be proven at trial;

Expert evidence is likely to be required where causation is in issue to establish how the outcome would have been different if the Defendant had not breached its duty of care.

For experts providing opinions on causation, it is important to understand the alleged breach of duty and how that is alleged to have caused the injury. Experts who are not sure what breach of duty is alleged should seek clarification from the instructing solicitor.

Ready Reckoner

Areas of Concern

Causation is a current area of concern for Plaintiffs in establishing liability in personal injury claims. The legislative changes enacted early in the new millennium have only recently been interpreted by the highest courts as final appeals were heard. The interpretation of causation is likely to have reached a point of relative stability. However, the specific factual circumstances including the allegations of breach of duty will continue to be the main driving force in determinations of causation. Generally, it is worth remembering that, consistent with the common law that has existed for most of the twentieth century, there are three major steps in establishing liability:

- The Defendant owed a duty of care to the Plaintiff.
- The Defendant breached that duty of care.
- The breach of duty *caused* the Plaintiff to suffer injury, loss, and/or damage.

It seems that a greater focus is currently being placed on the final step than was previously the case.

Response

Often, where causation is in issue, independent expert evidence is likely to be required to assist the court in determining whether causation is established on the balance of probabilities. Independent medical experts may be asked to comment on causation. They need to be careful in expressing a view in this regard and to be sure that they understand what question is being asked as "cause" does not have the same meaning in law and medicine. It also will take different matters into consideration depending on the nature of the circumstances of injury.

Independent experts should carefully consider their opinion when asked to comment on the "cause" of an injury. This deceptively simple question may have a significant bearing on the outcome of the matter and is not always as simple as it seems. If in doubt, contact should be made with the instructing solicitor to clarify what is being asked. Often it will be useful to refer to the Court documents to

understand the allegations of breach of duty and then to assess how the alleged breach(es) may have led to the injury.

Generally, either at common law or under the various legislative schemes, the court will be considering whether the breach of duty was a "necessary condition" of the injury. In assessing this, experts should consider whether there are other causes that could also have resulted in the same injury. It is no longer (and arguably never was) sufficient to say that the injury is "consistent" with the stated cause. Analysis of causation needs to go further than that.

Cross-References

- ▶ Asbestos-Related Diseases – Their Aetiology and Medico-legal Issues: An Overview
- ▶ Expert Evidence – the Decision Maker's Perspective
- ▶ Law and the Medical-Man: The Challenges of an Expanding Interface
- ▶ Law of Evidence: Main Principles
- ▶ Medical Liability: Comparing "Civil Law" and "Common Law"

References

Further Readings

Fleming J. Fleming's The Law of Torts. In: Sappideen C, Vines P, editors. 10th ed. Australia: Pyrmont: Thomson Reuters (Professional); 2011.

Stewart P, Stuhmcke A. Australian principles of tort law. 2nd ed. Sydney: The Federation Press; 2009.

Walmsley SC, Abadee A, Zipser B. Professional liability in Australia. Sydney: Lawbook Co; 2007.