Ben Zipser, NSW

Causation: general principles

Proving causation can be relatively straightforward, or fraught with difficulty. This article aims to set out a framework and general principles for considering the question of causation.

Photo: Janine McIlwraith

INTRODUCTION

A plaintiff seeking to recover damages for loss suffered as a result of a defendant's wrongdoing must establish that their loss was caused by that wrongdoing. In many cases the causation question is simple. For example, where a defendant carelessly collides with the plaintiff's motor vehicle and the plaintiff suffers a head injury in the accident, it is clear that the plaintiff's head injury was caused by the defendant's wrongdoing. In other cases the causation question is more difficult, such as:

- where the plaintiff's exposure to asbestos dust in the defendant's workplace (being one of a number of workplaces in which the plaintiff was exposed to asbestos dust) contributes to the plaintiff contracting mesothelioma; or
- where a doctor's negligent delay in diagnosing cancer in a patient results in a loss of a chance of recovery; or
- where a defendant's careless statement is *an* operating factor (but not *the* operating factor) inducing the plaintiff to make a decision resulting in financial loss.

This article sets out a framework and general principles for considering the question of causation in the above, and other, cases.

Ben Zipser is a barrister at Selborne Chambers in Sydney.
PHONE (02) 9231 4560 **EMAIL** bzipser@selbornechambers.com.au

CAUSATION IN NEGLIGENCE CLAIMS

General rule

The High Court has stated that whether a breach of duty is held to be a cause of a plaintiff's injury or loss for which the 'defendant is in law responsible' (in this article sometimes referred to as a 'legal cause') 'is essentially a question of fact to be resolved as a matter of commonsense' and one in which 'value judgments and policy considerations necessarily intrude'.[1]

The 'but for' test is a useful indicator of whether causation is established in a particular case. Where the plaintiff's injury or loss would not have occurred but for the defendant's breach of duty, the defendant's breach of duty will in

most cases be held to be a legal cause of the plaintiff's injury or loss. Conversely, where the plaintiff's injury or loss would have occurred in any event, despite the defendant's breach of duty, the defendant's breach of duty will in most cases be held not to be a legal cause of the plaintiff's injury or loss.

However, the 'but for' test is not an exclusive criterion of causation. The 'application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury'.[2] Specifically, the 'but for' test is both under-inclusive and over-inclusive. It is under-inclusive:

- where the defendant's act or omission 'materially contributed' to the plaintiff's injury or loss, but was not a necessary condition for the injury or loss;
- where the plaintiff lost the chance of gaining a benefit or avoiding a loss; and
- where the plaintiff's injury or loss followed two sufficient causes.

The 'but for' test is over-inclusive:

- where, in light of an intervening event between the defendant's act or omission and the plaintiff's injury or loss, the defendant's act or omission is no longer held to be a legal cause of the injury or loss; and
- where, although the plaintiff's injury or loss would not have occurred but for the defendant's act or omission, the connection between the defendant's act or omisson and the plaintiff's injury or loss is such that as a matter of commonsense the former should not be regarded as a legal cause of the latter.

It is worth considering the circumstances in which the 'but for' test is under-inclusive and over-inclusive in more detail.

'But for' test under-inclusive (1) – material contribution

The High Court has stated that an act or omission that 'materially contributes' to the plaintiff's injury or loss is a legal cause of the injury or loss.[3] It is necessary to understand the meaning of 'materially contributes'. The term has arisen in three situations.

1. The first situation in which the term has arisen is in cases where a plaintiff has contracted a disease caused by cumulative exposures, in circumstances where one exposure (or set of exposures) arises from the defendant's breach of duty, but the plaintiff cannot establish that he or she would not have contracted the disease but for the defendant's breach of duty.

   A leading case is *McGhee v National Coal Board*.[4] The plaintiff, who worked in a job that exposed him to coal dust, developed dermatitis from the coal dust. The precise mechanism of causation of the dermatitis was unknown. However, the expert evidence stated that the provision of showers by the employer to remove the coal dust from the worker's skin after work would have materially reduced the risk of contracting dermatitis. The House of Lords held that the plaintiff was entitled to succeed against the employer.

> "Different views exist as to whether the test for causation in breach of contract is different to that in negligence."

   This decision supports the principle, now accepted in Australia, that where a plaintiff's disease is caused by cumulative exposures (for example, an accumulation of fibres or dust entering the lung) and an employer is responsible for one exposure, the employer is liable if the exposure 'probably materially contributed' to the contraction of the disease, even though the plaintiff cannot establish on the balance of probabilities that the exposure was a necessary condition for the disease.[5]

   However, where the epidemiological evidence indicates that a disease is caused by a single exposure (for example, a single fibre or particle entering the lung), then only the employer responsible for that fibre or particle is liable to the plaintiff. Where the plaintiff is employed by two or more employers, and the plaintiff cannot establish which employer caused the injury or cannot provide evidence to the court to draw an inference, the plaintiff fails on causation.[6]

2. The second situation in which the term 'materially contributes' has arisen is in cases of negligent statements inducing plaintiffs to act to their detriment. In *Gould v Vaggelas*,[7] the vendors of a business made misrepresentations to prospective purchasers about the profitability of the business. The High Court considered whether the trial judge erred in finding that the purchasers relied on the misrepresentation in deciding to purchase the business. Wilson J observed: 'The representation need not be the sole inducement. It is sufficient so long as it plays some part, even if only a minor part, in contributing to the formation of the contract.'[8]

3. The third situation in which the term 'materially contributes' may arise is where the defendant's breach of duty contributes to the extent of harm suffered by the plaintiff, or aggravates the plaintiff's condition. For example, in personal injury cases the defendant's breach of duty sometimes contributes to, or aggravates, a pre-existing condition of the plaintiff. In these cases, the defendant is liable only for the additional injury or harm caused by his or her breach of duty. ▶

NO WIN / NO FEE
ECONOMIC
LOSS
REPORTS

We are a specialised company with highly qualified accounting and other professional consultants with significant litigation experience at all levels.

- Consultants with over 30 years experience
- Rapid reporting service
- No Win / No Fee – subject to our acceptance of your instructions

Let us assist you today

Economic Loss Reports & Forensic Accountant's Reports for Claims of all types

- Insurance Claim reports
- Commercial Evaluations
- Family Law Asset Assessments
- Loss of Business Income
- Business Valuations
- Financial and Other Investigations

PERSONAL INJURY SUPPORT PTY LIMITED

Contact us for further information
Sydney 9221 2579
Parramatta 9630 1155

No Win / No Fee
Family / Commercial

'But for' test under-inclusive (2) – loss of chance

In some cases, the plaintiff cannot prove on the balance of probabilities that, but for the defendant's breach of duty, they suffered injury or loss, but seeks to argue that, as a result of a defendant's breach of duty, they lost the chance of gaining a benefit or avoiding an injury. The following propositions can be stated:

- A breach of contract resulting in the loss of a promised chance is an actual loss for which damages will be awarded, depending on the degree to which success was likely had the plaintiff been given the chance that the contract promised.[9]
- Where a plaintiff suffers a loss of a commercial opportunity because of breach of contract, negligence or contravention of s52 of the *Trade Practices Act 1974* (Cth), and providing they can establish that they sustained some loss or damage, they are entitled to damages, the level of which will depend on the court's assessment of the opportunity's prospects of success had it been pursued.[10] In most cases, the plaintiff can establish that they have sustained some loss or advantage by demonstrating that the contravening conduct caused the loss of a commercial opportunity that had some value.[11]
- Where a plaintiff suffers a loss of a chance of avoiding physical injury as a result of the defendant's negligence but cannot establish that, but for the defendant's negligence he or she would have avoided the injury, views are divided as to whether the plaintiff can recover for the lost chance. In the High Court, Kirby J[12] and Callinan J[13] have expressed a view in favour of recovery, while Gaudron J has expressed a view against.[14] In *Gavalas v Singh*,[15] the Victorian Court of Appeal preferred the former view. The defendant doctor failed to detect a tumour in his patient for a period of time, as

a result of which the patient lost a chance of avoiding a disability. The Court of Appeal held that the patient was entitled to damages for the lost chance.

'But for' test under-inclusive (3) – loss resulting from two sufficient causes

Where the plaintiff's loss results from two or more events, each of which was sufficient without the other to cause the injury – for example, where an explosion occurs as a result of two people with lighted candles simultaneously approaching a leaking gas pipe - a court would probably hold that each factor was a cause of the plaintiff's loss, even though neither was a necessary condition.

'But for' test over-inclusive (1) – intervening causes

Where multiple necessary conditions combine to cause the plaintiff's loss, each necessary condition subsequent to the initial necessary condition is an 'intervening cause' or, in Latin, a novus actus interveniens. In some cases, an intervening cause is held to 'break the chain of causation' between an earlier necessary condition and the whole, or a part of, the loss suffered by the plaintiff, such that the earlier necessary condition is not held to be a legal cause of the whole or that part of the plaintiff's loss.

Two principles assist in determining when an intervening cause or event will be held to break the chain of causation.

1. First, the question is to be resolved as a matter of common sense and experience. In *Medlin v State Government Insurance Commission*,[16] where there was an intervening act or decision between the defendant's breach of duty and the plaintiff's loss or damage, the High Court stated:
   'If, in such a case, it can be seen that the necessary causal connection would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omissions is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage.'
2. Second, an intervening cause or event will not break the chain of causation if it was a reasonably foreseeable consequence of the initial tortfeasor's negligence, but it may break the chain of causation if it was not reasonably foreseeable.

"The "but for" test can be over-inclusive or under-inclusive in certain factual situations."

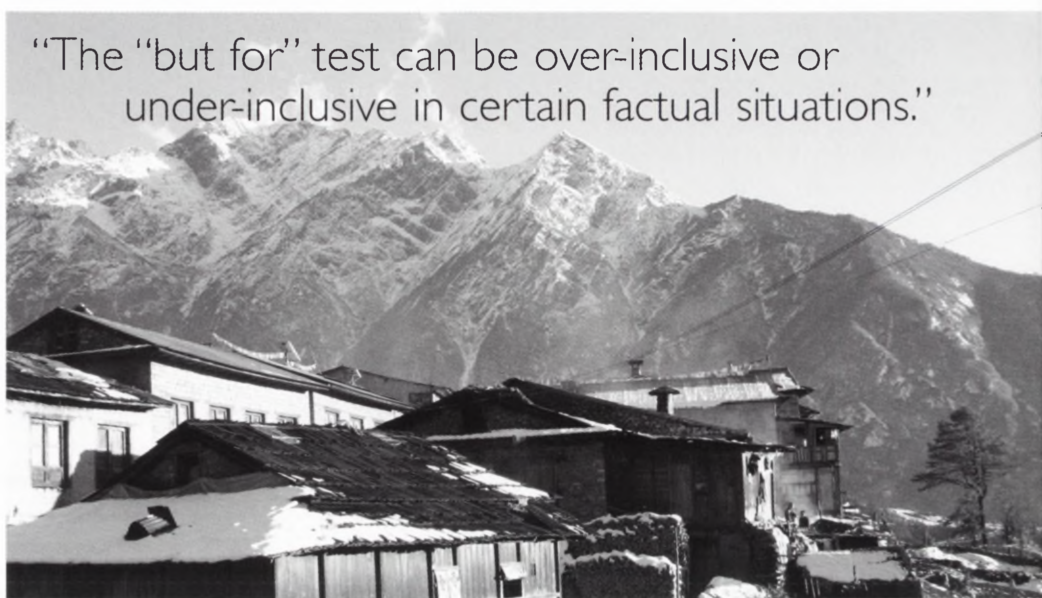

Photo: Janine McIlwraith

A case which establishes and demonstrates this point is *Mahony v J Kruschich (Demolitions) Pty Ltd*.[17] The plaintiff was admitted to hospital with injuries allegedly caused by the employer's negligence and was treated by a medical practitioner. The plaintiff alleged that he suffered additional injury and incapacity as a result of the doctor's negligence. The High Court, in considering whether the employer could be liable to the plaintiff for the additional damage caused by the doctor's alleged negligence, considered the concept of intervening acts. The High Court stated that the chain of causation will not be broken where the intervening act is reasonably foreseeable by the first tortfeasor, and that the exacerbation of an injury by medical treatment may easily be regarded as a reasonably foreseeable consequence of the first tortfeasor's conduct. But if the intervening medical treatment was 'inexcusably bad', 'completely outside the bounds of what any reputable medical practitioner might prescribe', or 'so obviously unnecessary or improper that it is in the nature of a gratuitous aggravation of the injury', the exacerbation of a plaintiff's condition should properly be regarded as resulting solely from the grossly negligent medical treatment or advice.[18]

Intervening conduct may also be by the plaintiff. Where the plaintiff behaves unreasonably in the circumstances, and the unreasonable behaviour is a cause of part, or all, of his or her loss, such conduct may break the chain of causation.[19]

'But for' test over-inclusive (2) – causal events with insufficient connection to constitute legal cause

There are circumstances where, although the plaintiff's injury or loss would not have occurred but for the ▶

defendant's breach of duty, as a matter of common sense the latter should not be regarded as a legal cause of the former. In *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, Lord Hoffmann provided the following example:

> 'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee ... On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct.'[20]

NEGLIGENT MISSTATEMENTS AND CAUSATION

The question of causation often arises in cases involving negligent misstatements. The following propositions can be stated:

If the plaintiff cannot establish that they relied on the defendant's negligent misstatement, they fail on causation. If 'the evidence suggests that the acts or omissions of the defendant would have made no difference to the plaintiff's course of action, the defendant has not caused the harm which the plaintiff has suffered'.[21]

Where the plaintiff claims to have suffered loss as a result of the defendant's failure to advise or warn, they must establish that they would have heeded the advice or warning if given. In *Gore v Montague Mining Pty Ltd*,[22] the plaintiff claimed that they suffered loss as a result of their solicitor's failure to advise of a matter. The full court of the federal court, reversing the finding of the trial judge, held that there was insufficient evidence as to what the plaintiff would have done had they been advised of the matter. On this basis, they failed to discharge the onus of proof on causation.[23]

In some jurisdictions around Australia legislation has recently been introduced to prevent plaintiffs in negligent misstatement cases from giving evidence as to what they would have done had the negligent statement not been made.[24]

In jurisdictions where such evidence is still admissible, courts 'ought to be, and no doubt are, cautious in accepting mere assertions of reliance as essentially self-serving ... and will usually attempt to assess that prospect by reference to objective criteria'.[25]

CAUSATION IN CONTRACT AND TRADE PRACTICES ACT CLAIMS

Contract claims

Different views have been expressed as to whether the test for causation in cases involving breach of contract is different to the test for causation in cases involving negligence. In *Alexander v Cambridge Credit Corp Ltd*,[26] McHugh JA appears to make no distinction between the tests for causation for the two causes of action. However, in *Hawthorne v Thiess Contractors Pty Ltd*,[27] Thomas JA, in considering whether the defendant's breach of contract was a cause of the plaintiff's loss, stated that 'liability should be found in contract cases only if the defendant's acts can be regarded as of equal or close to equal potency with the other causes'.[28]

Trade Practices Act claims

Where a plaintiff seeks damages from a defendant for contravening s52 of the *Trade Practices Act* 1974 (Cth), the claim is made under s82 of the Act. Section 82 provides that a person who suffers loss or damage 'by conduct of another person' in contravention of a provision of Part V of the Act may recover the amount of that loss. In *Wardley Australia Ltd v Western Australia*,[29] Mason CJ, Dawson, Gaudron and McHugh JJ explained in respect of s82:

> 'The statutory cause of action arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. One might have expected "by means of", "by reason of", "in consequence of" or "as a result of". But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this court in *March v Stramare (E & MH) Pty Ltd*,[30] except in so far as that concept is modified or supplemented expressly or impliedly by provisions of the Act.'

In *Henville v Walker*,[31] Gaudron J stated that in the case of a misrepresentation that constitutes a contravention of s52, there is nothing in the *Trade Practices Act* to suggest that an approach other than the common law, practical or common sense concept of causation should be taken.[32] However, McHugh J left open the possibility that in some cases a different approach should be taken.[33] **PL**

Endnotes: **1** See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 515; and *Chappel v Hart* (1998) 195 CLR 232 at 242 and 269. **2** *March v E & M H Stramare Pty Ltd* at 516. **3** See *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417; *Chappel v Hart* (1998) 195 CLR 232 at 244. **4** [1973] 1 WLR 1. **5** See *E M Baldwin & Son Pty Ltd v Plane* (1999) Aust Torts Reports 81-499 at 65,642. **6** See *Wilsher v Essex Area Health Authority* [1988] AC 1074. **7** (1985) 157 CLR 215. **8** At 236. More recently, see *Henville v Walker* (2001) 75 ALJR 1410 at [60] per Gaudron J and [106]-[107] per McHugh J. **9** See *Sellars v Adelaide Petroleum* (1994) 179 CLR 332 at 349. **10** See *Sellars v Adelaide Petroleum* (at 355). **11** Ibid. **12** See *Chappel v Hart* (1998) 195 CLR 232 at 274. **13** See Naxakis v Western General Hospital (1999) 197 CLR 269 at 312-13. **14** See *Naxakis v Western General Hospital* at 277-81. **15** (2001) 3 VR 404. **16** (1995) 182 CLR 1 at 6. **17** (1985) 156 CLR 522. **18** At 528-30. **19** See *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 517; Kyriacou v Hughes (1984) Aust Torts Reports 80-646; and *Sherson & Associates Pty Ltd v Bailey* (2001) Aust Torts Reports 81-591 at [77]. **20** [1997] AC 191 at 213. Some Australian cases that demonstrate this principle are *Mallesons Stephen Jaques v Trenorth Ltd* [1999] 1 VR 727; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310; *Aghajanian v Stanley Thompson Valuers Pty Ltd* [1999] NSWSC 1154; and *Trust Co Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237. **21** See *Chappel v Hart* (1998) 195 CLR 232 at 246 per McHugh J. **22** [2001] ANZ Conv R 8. **23** [2002] NSWCA 68. See also *Gore v Kanakis*. **24** See for example s5D of Civil Liability Act 2002 (NSW). **25** Hanave Pty Ltd v LFOT Pty Ltd at 42,793; see also *Chappel v Hart* at 246. **26** (1987) 9 NSWLR 310. **27** [2001] QCA 223 at [11]. **28** See also Jones v Persal & Co [2000] QCA 386 at [53] per White J. **29** (1992) 175 CLR 514 at 525. **30** (1991) 171 CLR 506. **31** (2001) 75 ALJR 1410. **32** Ibid., at [61]. **33** Ibid., at [96].