Section 5D of *Civil Liability Act 2002* (NSW): Causation

Seminar Presentation by Tony Bowen, Barrister

22 March 2017

Introduction

1. To succeed in an action in negligence a plaintiff must establish causation. That is, in addition to proving that the defendant owed the plaintiff a duty of care and that there was a breach of that duty by the defendant, a plaintiff must prove that the defendant's breach caused the plaintiff some loss or damage.

2. The advent of the *Civil Liability Act 2002* (NSW) ("CLA") in 2002 has altered the landscape for the concept of causation, however the extent of the change is open to question. The former common law test of causation is no longer the relevant test and s5D of the CLA deals exclusively with the issue of causation. I sense there is at least some perception in our profession the CLA has made causation a more challenging obstacle for the plaintiff pursuing an action in negligence. I will attempt to explore in this paper whether the advent of the CLA has made for a more demanding test. I will also discuss some recent cases which suggest s5D is an area where the law is evolving.

Causation the concept

3. What is causation? Causation in the plain sense is not a uniquely legal concept. The dictionary defines it thus:

" *the action of causing something. The relationship between cause and effect*."

4. This common definition is related to and features in the legal definition of causation, which we understand provides a means of connecting conduct with a resulting effect of injury. Importantly however the conduct the subject of the inquiry can be understood as involving legal duty. As such the courts have emphasised over the years that causation at law should not be confused with an empirical or technical approach to causation. So much was identified by the High Court in *March v Stramare [1991]* 17R CLR 506 where Mason CJ said:

"*Legal concept of causation differs from philosophical and scientific notions of causation. That is because questions of cause and consequence are not the same for the law as philosophy and science. In philosophy and science the concept of causation has developed in the context of explaining phenomena by reference to the relationship between the conditions and occurrences. In law, on the other hand problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.*"

5. So we can see causation as a legal concept, although an evaluation of the facts, is not divorced from the legal framework of liability and apportionment of culpability. Causation at law is not so much a question of what caused the plaintiff's loss but what specific conduct (i.e. an act or omission) of the defendant caused that loss.

Common Law

6. At its simplest, a cause of action in negligence is only complete if the plaintiff can prove on the balance of probabilities that some negligence on the part of the defendant caused injury or damage. The common law of negligence required determination of causation for the purpose of attributing legal responsibility. This involved two questions. A question of fact as to how the harm occurred (**factual causation)** and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person (**scope of liability)**.[1]

7. In the more recent decision of the High Court in *Wallace v Kam*[2] the court commented the distinct nature of these two questions has tended to be overlooked in the articulation of the common law. There may be a good reason for this. Often resolution of factual causation will leave little work for the scope of liability question. Think of an example whereby the driver of a vehicle negligently disobeys a traffic signal causing an accident. A factual dispute over whether the traffic signal was red or green resolved adverse to the defendant driver will not raise any troubling issue for the court as to whether the driver should bear responsibility for the accident.

8. At common law factual causation was often described as the "*but for*" test and the factual cause of the plaintiff's loss would be found if it was a necessary condition of the loss. The *conditio sine qua non*? Would the plaintiff's loss have occurred but for the defendant's negligence? This has been described as a negative criterion of causation, designed to eliminate factors which made no

[1] *Chapman v Hearse* (1961) 106 CLR 112.
[2] [2013] HCA 19.

difference to the outcome.[3] A well known case to illustrate the principle is *Barnett v Chelsea & Kensington Hospital*[4]. A night watchman began to feel ill 3 hours after drinking a cup of tea. He presented himself to the hospital casualty department but was advised to go home to bed and call his doctor. As it turned out the unfortunate man had been poisoned with Arsenic and died some hours later. The court held the negligent advice from the hospital was not the cause of the man's death because even if he had been admitted to Hospital he still would have died.

9. However, there were limitations with the "*but for"* test in circumstances of multiple acts or events leading up to an injury that could potentially lead to adverse outcomes. This view was taken up by the high court in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. This decision reflected the view that whether an event could be regarded as causative of particular harm was a question of fact incapable of reduction to a single formula such as the "*but for"* test. The court expressed reservations about the "*but for"* test describing it in the circumstances as inadequate or troublesome in factual scenarios where multiple acts or events had led to the plaintiff's injury and that the question of causation in law was to be resolved as a matter of *common sense* and experience.

10. In *March v E & MH Stramare Pty Ltd* the court adopted what came to be known as the *common sense* approach whereby the cause of a particular occurrence is to be determined by applying common sense to the facts of each case, with the

[3] *Fleming on Torts* (10th Ed) [9.40] p.228.
[4] [1969] 1 QB 428.

question to be asked whether a particular act or omission could fairly and properly be considered a cause of the accident. Significantly the court emphasised the "*but for*" test was not replaced but rather included in the *common sense* approach. Moreover the common sense approach gave due recognition to the role of value judgments in determining causation in fact and relevantly for our discussion on s5D(1)(b) of the CLA it has been held applying the common sense approach to causation for attribution of legal liability depends upon the scope and purpose of the duty of care that is owed.

11. The common sense approach to causation was the subject of some criticism and there was a sense that it was perceived as too readily facilitating findings of causation. Supporters of the common sense approach argued that it gave full expression to the evaluative nature of the fact finding exercise. That said the common sense approach to causation was peculiar to the Australian jurisdiction when it came to common law countries and of course was replaced by the enactment of s5D of the CLA.

Civil Liability Act 2002

12. The CLA applies to all proceedings commenced after 6 December 2002.

13. Sections 5D & 5E is as follows:

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (**"factual causation"**), and
(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**"scope of liability"**).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

14. It is interesting to note that the Ipp Report into tort law reform that saw the introduction of the CLA specifically indicated that s5D accorded with the common law. The Report cited the need for a suitable framework in which to resolve individual cases which would encourage explicit articulation of reasons by judges for imposing or not imposing liability. The report described s5D as helpful legislative guidance and the origins of s5D can be traced to the judgment of McHugh J in *March v Stramare (at 535 – 6)*.

15. Essentially 5D contains a two-pronged test of causation determined by reference to "*particular harm*", which it might be noted is a term not adopted in ss5B and 5C which refer to "*risk of harm*". Be that as it may s5D can be regarded as a statutory formulation not limited by a requirement that the relevant causal relationship be the sole cause of "*particular harm*" but rather contemplates multiple causes, including material contribution[5].

16. The factual aspect is concerned with whether the negligent conduct in question played a part in bringing about the harm that is the subject of the claim, in the sense that it was a "*necessary condition*" of the occurrence of the harm. However the answer to the question in the affirmative is not enough to justify the imposition of liability for negligence and the Ipp report observed that the ultimate question to be answered in relation to a negligence claim was not a factual one of which the negligent conduct played a part in bringing about the harm but rather a normative one.[6] That is, whether the defendant ought to be held liable to pay the damages for that harm. The two limbs are encapsulated in s5D(1)(a) **factual causation** and (b) **scope of liability**. The scope of liability aspect is whether the defendant should be held liable for any of the harmful consequences of an act of negligence.

Factual Causation s5D(1)(a)

[5] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [20]-[28].
[6] Normative: meaning derived from a standard or norm usually of behaviour.

17. The leading cases on s5D(1)(a) will be familiar to you all. The first of these being *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420. In that case the plaintiff was attending a function centre in Western Sydney on New Year's eve. There was no security at the venue. A fight broke out on the dance floor following which an assailant returned to the restaurant with a firearm and shot the plaintiff. The plaintiff alleged that the defendant breached its duty of care in permitting the assailant to enter the premises with a firearm and that this breach was causative of his injuries. Specifically, it was argued the failure to have security at the premises was negligent and causative as security would have prevented the gunman from returning to the venue.

18. The High Court did not agree and in so doing gave detailed consideration of s5D(1). The court accepted that factual causation was determined by the but for test as a necessary test of causation in all but the exceptional cases contemplated by s5D(2). Simply put the plaintiff must show a factual connection between the negligence (the relevant breach of duty) and the occurrence of the particular harm which ensues. The court did not accept in this instance that it was more probable than not that security personnel could have prevented the irrational actions of an armed assailant and the plaintiff had failed to prove factual causation.

19. In *Strong v Woolworths* (2012) 246 CLR 182 the plaintiff slipped on a chip in an area of a shopping centre that had not been inspected for 4.5 hours. The court upheld the finding of negligence against the occupier. The court identified some limitations with the but for test in that it could produce anomalous results, in

particular in cases where there was more than one sufficient condition of the plaintiff's harm and moreover did not address policy considerations bound up in the attribution of legal responsibility for harm.

20. The High Court in *Strong v Woolworths* considered what was required by "*necessary condition*". A necessary condition is a condition that must be present for the occurrence of the harm. The court noted there may be more than one set of conditions necessary for the occurrence of a particular harm however the defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the factual causation test as the defendant's conduct may be described as contributing to the occurrence of the harm.

21. Other decisions of the court have emphasised determination of causation should not obscure the distinctions between factual causation and scope of liability. In the decision of *Wallace v Kam* (2013) 250 CLR 375 the High Court held determination of factual causation under s5D(1)(a) was entirely factual. The court cited the lower court decision that evaluation of factual causation should not incorporate policy or value judgments as part of the consideration as these are matters for the second part of s5D(1)(b) being the scope of liability analysis. Determination that negligence was a necessary condition of the occurrence of the harm is a determination that the harm that in in fact occurred would not have occurred absent the negligence.

22. Nonetheless the courts have also accepted that notwithstanding s5D(1)(a) determination of factual causation will not be a value-free activity undertaken without reference to context[7].

Scope of Liability

23. The second aspect to satisfy causation is that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused. This has been described as the normative enquiry.

24. In many cases the scope of liability question will not pose a significant issue. This is because it is easily recognisable that it is appropriate for the scope of liability to extend to the harm suffered: *Strong v Woolworths*. Examples might be a driver's duty to their passenger or pedestrians; or an employer's duty to their workers. It is more in the cases involving professional or specialised services that the scope of liability requirement may feature.

25. The decision in *Stephens v Giovenco* [2011] NSWCA 53 is illustrative. In that matter the owner of premises retained Mr Stephens, a plumber, to install a new hot water system at the premises. In so doing Mr Stephens disconnected the water supply to a faulty solar hot water system that was no longer in use at the premises. The plumber disconnected the water supply but did not disconnect the electricity supply to the solar hot water system. Some years later the owner of the premises retained a handyman to undertake some work at the premises and in the course of doing that work the handyman in fact discovered that the solar hot water system was still connected to the electrical supply.

[7] *Paul v Cooke* (2013) 85 NSWLR 167.

Subsequently, the handyman performed some work on the solar hot water system and unfortunately was electrocuted and killed in the process.

26. The court accepted the plumber did a owe a duty to the handyman in failing to advise the owner to have the power disconnected such that s5D(1)(a) was satisfied however the court did not accept that it was appropriate pursuant to s5D(1)(b) to extend the scope of liability of the plumber to the death of the handyman as the scope and nature of the risk were related to persons unaware of the electrical power remaining connected which was not the case with the handyman, who was aware the service was connected.

27. In *Wallace v Kam* (2013) 250 CLR 375 the plaintiff underwent neurosurgery. Prior to the surgery he was not advised of the possibility of nerve damage and a more serious risk of paralysis. The surgical procedure was unsuccessful with the plaintiff suffering nerve damage. The plaintiff sued the neurosurgeon on the basis that had he been advised of the risk of paralysis he would not have undergone the surgery notwithstanding it was actually the risk of nerve damage that came to pass. The court held the plaintiff had failed in establishing causation.

28. The High Court held that the plaintiff had succeeded in establishing factual causation in that he would not have undergone the treatment if all material risks (nerve damage and paralysis) had been disclosed to him. However the plaintiff had failed to persuade the court the scope of liability requirement had been satisfied as his evidence was that if he had only been advised of the potential of nerve damage he still would have undergone the procedure. The High Court

held it was not appropriate to extend the scope of the neurosurgeon's liability to the physical injuries sustained by the plaintiff in circumstances where he would have chosen to undergo the procedure had he been warned only of the risk that in fact materialised. The court found that the distinct nature of the material risk about which the doctor failed to warn should not extend to compensation for the materialisation of a risk he would have been prepared to accept.

29. The case highlights that even in circumstances where the but for test is satisfied for factual causation the plaintiff can fail in an action for negligence where the court holds it is not appropriate to extend the scope of liability. The court observed that while value judgments attend the operation of s5D(1)(b) the drawing a conclusion that a consequence of posited liability would be unjust, absurd or unacceptable is relevant to the conclusion of the appropriateness of the scope of liability question. The court emphasised that the relationship between the content of the duty owed and the nature of the risk the subject of the duty and what harm occurred is important. Caution needed to be exercised when the facts placed the plaintiff at the time, confronted by a risk unrelated to that involved in the duty that was breached.

30. Importantly the court also commented on the role s5D(4) as part of the normative inquiry, holding s5D(4) made it incumbent on the court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. What is required in such a case is the

identification and articulation of an evaluative judgment by reference to the purposes and policy of the relevant part of the law.

31. In the decision of *Paul v Cooke* (2013) 85 NSWLR 167 the plaintiff was examined by a radiologist in 2003 who failed to identify a cerebral aneurism. Subsequent investigations in 2006 identified the aneurism and the plaintiff underwent surgery for which there was a risk of an adverse outcome of between 1-2%. During the operation the aneurism ruptured and the plaintiff suffered a stroke. The plaintiff argued that had the diagnosis been made earlier she would have undergone a different form of surgery which although different had a similar chance of an adverse outcome as the 2006 surgery. The court accepted there that factual causation had been made out however as a procedure with a similar risk of adverse outcome would have been undertaken in the event of earlier diagnosis it was not appropriate to extend the scope of liability to the plaintiff's harm pursuant to s5D(1)(b). The court followed the decision in *Wallace v Kam* that the scope of liability does not normally extend beyond the liability of an occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. As a radiologist it was not part of Dr Cooke's duty to avoid the risk of intracranial rupture.

32. See also the Court of Appeal's decision in *Hudson Group v Atanaskovic*[8] where the solicitors were found negligent in drafting a commercial deed because it did not fully reflect the client's instructions however the court accepted that if the deed had been properly drafted the benefit the client wished to achieve could

[8] [2014] NSWCA 255

have been recovered however there were also a number of protections in the deed the client could have availed itself of which would have enabled it to avoid the losses. In the circumstances the court held that it was not appropriate for the solicitor's liability to extend to the losses claimed by the plaintiff and in so doing applied the reasoning adopted in *March v Stramare* that the extent of liability is to be found by asking the one question: is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it but otherwise not.

33. These decisions serve to emphasise that in the more unusual cases, particularly those involving professional negligence the scope of liability argument can be an important line of defence in response to an action in negligence.

Exceptional Cases

34. Section 5D(2) also contains provision for establishing causation in the exceptional case. Section 5D(2) provides that where the negligence cannot be established as a necessary condition of the occurrence of the harm the court must consider whether or not and why responsibility for the harm should be imposed on the negligent party.

35. The purpose of s5D(2) is to deal with circumstances where the harm is brought about by the cumulative operation of two or more factors where it is not possible to determine the relative contribution of the various factors to total harm[9]. The other situation is where the negligence of successive defendants was capable of causing the harm that resulted but was impossible to determine

[9] *Bonnington Castings v Wardlaw* [1956] AC 613.

which of the defendants in fact caused the harm. A good example might be the asbestos cases where an afflicted worker has been employed with a number of employees using asbestos over their working life.

36. In the case of *Carangelo v The State of NSW* [2016] NSWCA 126 the plaintiff, a former employee of the NSW Police Force argued the commissioner failed to take reasonable precautions against the risk of his suffering psychiatric injury at two significant points in the course of his police career. The plaintiff argued that if he had been provided pastoral care and referred to a psychiatrist he would not have suffered the psychiatric injury he ultimately did. The evidence identified, however, that the plaintiff had experienced many stressful and traumatic incidents over the 25 years that he had served as a police officer. The court was not satisfied the negligent failure of the defendant to refer the plaintiff for psychiatric treatment was causative of his injuries. The plaintiff argued that this was an exceptional case for the purpose of s5D(2).

37. The court accepted that negligent conduct which cannot be shown to be a necessary condition of the harm may in accordance with established principles be accepted as establishing factual causation subject to the normative considerations outlined in s5D(2). Specifically s5D(2) requires determination of whether a matter is an exceptional case be in accordance with established principles. The court accepted that the but for criteria in causation can be troublesome in different situations where multiple acts or events lead to the plaintiff's injury and that it was sufficient in some circumstances for the plaintiff to prove that negligence to the defendant caused or materially contributed to

the injury. The court however indicated the evidence was clear the psychiatric injury was caused by various stressors to which the plaintiff had been exposed over many years and s5D(2) could not be called in aid simply because there was no evidence to support a contention as to the causation of the injury. As such the court did not accept it was an exceptional case such that the responsibility for harm suffered by the plaintiff should be imposed on the defendant.

38. It was also observed in *Adeels Palace Pty Ltd v Moubarak* that determination of whether s5D(2) is engaged must depend on whether and to what extent the established principles countenance departure from the but for test. In *Strong v Woolworths* the court commented that negligent conduct that materially contributed to the plaintiff's harm but which could not be shown to be a necessary condition of its occurrence may in accordance with established principles be accepted as establishing factual causation.

Factual Causation - What Would the Plaintiff Have Done if the Negligent Person Had Not Been Negligent - s5D(3)

39. This section deals with the circumstance whereby the plaintiff addresses the requirement of s5D(1)(a) factual causation by giving evidence as to what they would have done if the defendant had not been negligent. This is often the feature of cases involving a failure to warn. Essentially the test is a subjective one, with s5D(3)(a) providing that the test in the circumstances is to be determined subjectively and in light of all relevant circumstances.[10] However, critically, s5D(3)(b) provides an important qualification on this, holding any such

[10] Neal v Ambulance Service [2008] NSWCA 346.

evidence by the plaintiff as to what they would have done if the negligent person had not been negligent to be **inadmissible** unless it is contrary to the plaintiff's interest. This reflects the court's caution in accepting evidence from the plaintiff through the prism of hindsight or general caution about accepting the plaintiff's own evidence on causation. The section does not operate to preclude evidence of third party's where it may be relevant.[11]

Section 5E

40. Section 5E confirms that the plaintiff carries the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. That the plaintiff bears the onus of establishing causation pursuant to the balance of probabilities, of course does not mark any departure from the previous common law position. What the court might look for in terms of balance of probabilities is outlined in s140 of the *Evidence Act 1995* (NSW) and is also subject to the decision in *Briginshaw v Briginshaw* (1938) *60 CLR 366* where it was identified that on the probabilities means that a tribunal of fact must be actually persuaded that the fact in question occurred. Dixon J held the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independent of any belief in its reality. See also *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.

[11] *Lynn International Pty Limited v Marcolongo* [2011] NSWCA 303.

41. I draw your attention to s5E because discharging the onus on the balance of probabilities is a critical requirement that the plaintiff must establish. There are a number of different ways that the requirement of causation can be established on the balance of probabilities see for example in the slipping cases of *Shoeys v Allan* (1991) Aust Torts Reports 81-104. While it might be said that the balance of probabilities is a relatively undemanding test nonetheless it is an onus that rests on the plaintiff that must be discharged in order to make out causation.

Conclusion

42. The advent of the CLA and s5D has marked significant change in terms of clarifying the court's treatment of the issue of causation into a two-step process subject to the exceptional case provision in s5D(2) and the qualifications outlined in s5D(3) and (4). It is perhaps interesting then to observe that the changes in terms of outcome may not be as great as might be commonly regarded in relation to the test of causation under the CLA as opposed to the common law. Nonetheless the emphasis on the requirements of factual causation as per s5D(1)(a) may have served to highlight the need to address causation clearly in determination of liability. Thus the intent disclosed in the Ipp report may well have been achieved. In regards to the scope of liability requirement of s5D(1)(b) in many instances this will often be little more than a formality in cases where well recognised duties are owed by defendants for example motor vehicle drivers, occupiers or employers. However in cases involving the provision of professional services it is important to keep in mind a

finding of causation will require satisfaction of the scope of liability requirement in addition to just proving factual causation.

Thank you.

Tony Bowen
Barrister
Edmund Barton Chambers
22 March 2017