



# Causation still a thorny issue

By Ben Zipser

**F**or the tort of negligence, as well as a number of other causes of action, the plaintiff, in order to obtain damages, must satisfy the court that his or her injury or loss was caused by the defendant's wrongdoing. Law reports and judgment databases are littered with cases where, although establishing one or both of wrongdoing by the defendant and the suffering of injury or loss by the plaintiff, the plaintiff failed to satisfy the court that the injury or loss was caused by the wrongdoing.<sup>1</sup>

In many instances, the causation question is straightforward. For example, where the driver of a motor vehicle carelessly knocks over and injures a pedestrian, the pedestrian's injuries were caused by the driver's breach of duty. In other instances, the question is more difficult. Further, in 2002 and 2003 Civil Liability legislation was introduced in all state and territory jurisdictions in Australia which, among other things, codified the test for causation in matters where the legislation applies (the Causation Provisions). In the last few years a number of intermediate appellate court and High Court decisions have considered the meaning of these provisions and their interaction with existing common law.

The purpose of this edition of *Precedent* is to explore issues concerning causation in civil claims

for damages. Richard Douglas in "Causation under Ipp Legislation" looks at the Causation Provisions in the Civil Liability legislation. The article provides a useful overview of the principal issues which have arisen concerning the provisions, and the cases in which they have occurred. Jason Downing considers in more detail the provision which excludes admissibility of statements made by plaintiffs after suffering harm about what they would have done if the defendant had not been negligent.

Anna Walsh looks at matters in recent medical negligence cases, such as the role of statistical evidence, causation in failure to warn cases, and recent cases in which the plaintiff failed to establish causation. Tanya Segelov examines issues in recent dust disease cases, including the use of epidemiological evidence in lung cancer cases and, in mesothelioma cases, the courts' current approach where the plaintiff worker has had exposures to asbestos at several different work places, and a determination must be made as to whether there is a sufficient causal link between the exposure at the defendant's work place and the plaintiff's contraction of mesothelioma.

In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 the High Court stated that, where the defendant's wrongful conduct 'materially contributed' to the plaintiff's injury or loss, this may provide a sufficient causal link in negligence cases. Following *March v E & MH Stramare Pty Ltd*, two questions arise: the meaning of "material contribution" and the circumstances in which the "material contribution" test can be used to establish causation. Following the introduction of the Civil Liability

legislation, a further issue is the role of material contribution in the Causation Provisions. These and related matters are considered by David Hamer in "Factual Causation: Values and Material Contribution", and by Bill Madden and Tina Cockburn in "Establishing Causation in Difficult Cases: Can Material Contribution Bridge the Gap?"

The edition includes an article by Andrew Stone on causation in cases where the plaintiff, attacked and injured by a third party on the defendant's land, tries to recover damages from the defendant as occupier, one from Andrew Morrison on multiple causation and the evidentiary onus, and case notes from Ian Newbrun and Tracey Carver on recent cases which raise topical causation issues.

In 1992 John Fleming wrote in the 8th edition of *The Law of Torts* that "causation has plagued courts and scholars more than any other topic in the law of torts". Over two decades later, causation in some groups of cases remains a complex and uncertain issue. More broadly, in all civil claims for damages causation remains an important issue which practitioners should not overlook or underprepare in their current and future cases. ■

**Note: 1** Recent cases considered in this edition of *Precedent* include *Roads and Traffic Authority v Royal* [2008] HCA 19; *Neal v Ambulance Service of NSW* [2008] NSWCA 346; *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; *Woolworths Ltd v Strong* [2010] NSWCA 282; and *Amaca Pty Ltd v Ellis* [2010] HCA 5.

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