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Précis Paper

Has your negligence caused loss?

An insight into professional negligence claims and the often overlooked requirement for a plaintiff to effectively establish causation.

Discussion Includes

- A Professional Negligence Claim - Causation
- Hindsight evidence
- The Kambouris Case – Factual causation
- The Hudson Case – Scope of liability
- Solicitor professional liability claims
- The best way to keep a claim out of court

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Video Title

1. In this edition of BenchTV, Paul Kozub (Principal, Gilchrist Connell) and Tony Reynolds (Claims Solicitor, Lawcover) discuss the requirements for both factual causation and scope of liability in light of two recent decisions in which causation was not established in professional negligence claims against solicitors.

A Professional Negligence Claim - Causation

2. To succeed in a claim for professional negligence against any professional the claimant must prove three basic elements:
   (i) the existence of contractual obligations and/or a duty of care;
   (ii) breach of that obligation; and
   (iii) that the breach was the cause of the loss to the claimant.
3. Often the biggest hurdle to overcome in a professional negligence claim is whether the breach caused the loss. Causation means that the loss which has been sustained by the claimant has actually been caused by the breach of duty. That is, whether or not the conduct of the wrongdoer (the solicitor) has actually caused the loss that is complained of. The common law test of causation is now codified in section 5 of the *Civil Liability Act 2002* (NSW). This legislation is largely reflected in equivalent state jurisdictions (see *Wrongs Act 1958* (Vic)).
4. To establish causation in a professional negligence claim, s 5D(1) of *the Civil Liability Act 2002* (NSW) must be satisfied. The claimant always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation as well (s 5E).
5. Pursuant to s 5D(1), a plaintiff needs to establish:
   (a) factual causation: has the conduct caused the loss; but for the conduct of the wrongdoer would that loss have been sustained. The claimant has to prove on the balance of probabilities that it was more probable than not that the loss would have not been sustained; and
   (b) that the scope of the solicitor's liability should extend to the harm caused.
6. The following two cases are a useful reminder that often, in a professional negligence claim, the biggest hurdle to overcome is whether the breach actually caused the loss.

Hindsight evidence

7. In NSW you can not give evidence in hindsight unless that evidence is contrary to your interests. Pursuant to section 5D(3)(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".

8. This is not the law in Victoria.

The Kambouris Case – Factual Causation

9. In *Kambouris v Kiatos* [2017] VSCA 133, the Victorian Court of Appeal upheld a finding that the plaintiff had failed to establish causation in her claim against her former solicitor, notwithstanding it was conceded at trial that the solicitor had failed to inform the plaintiff of her legal rights and breached his obligation.
10. The plaintiff had guaranteed certain loans owed by a borrower to a bank. The plaintiff erroneously believed she had been indemnified for that guarantee by a third party. The borrower ultimately defaulted and the bank called upon the guarantee, which resulted in the selling of properties owned by the plaintiff. The plaintiff sued the solicitor alleging that he failed to inform her that the agreement with a third party (the solicitor's wife) to indemnify her for any liability (to the bank) had not been signed. The plaintiff alleged she would not have entered into the guarantee if she had known that the supporting security had not been put in place. The plaintiff claimed recovery of loss equivalent to the value of the sold properties.
11. The Court held that even though the solicitor did not inform the plaintiff that the indemnity was not signed, the negligent omission was found not to be causative of the plaintiff's loss because she would have ultimately signed the guarantee in any event. That is, the plaintiff failed on factual causation because the Court was not satisfied that if properly advised - if there would have been no omission- she would not have entered into the transaction as she asserted.

The Hudson Case - Scope of liability

12. If factual causation is established, a claimant must also go on to satisfy s 5D(1)(b) of the *Civil Liability Act 2002* (NSW) which states 'that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused'. In *Hudson Investment Group Limited v Atanaskovic* [2014] NSWCA 255, the court was required to consider whether or not, and why, responsibility for the harm should be imposed on the negligent party pursuant to s5D(4). Regard might be had to common sense, logic or policy considerations, as was contemplated by the High Court in *March v Stramere* [1991] HCA 12.
13. It was held that the plaintiff failed to satisfy the 'scope of liability' requirement because the Court found that the plaintiff's claimed loss that was a consequence of its own unreasonable actions. Namely, that while it was arguable that the entitlement deed was ambiguous and had perhaps not been drawn in accordance with instructions, there were other provisions within the entitlement deed which the plaintiff had not availed itself of, and if they had, they would not have sustained loss. The court held that it was their own conduct that had been the cause or the result of the adverse outcome. In those

circumstances, there was 'no reason in common sense, logic or policy' (per Mason CJ in *March v Stramare* at [27]) for imposing liability on the solicitors.

Solicitor professional liability claims

14. The vast majority of claims arise due to a lack of communication on the part of the solicitor to the client
15. The solicitor needs to make sure that the client has a clear understanding of what the solicitor is retained to do at the start of the matter and as it progresses. The solicitor also needs to create reasonable expectations on the part of the client to give them reasonable ranges of outcomes, timeframes, and costings. Managing clients' expectations should be done both written and orally.
16. Written documents act as an aide memoire at the time and also corroborate evidence as to what occurred if there's a factual dispute as to whether or not a discussion took place.
17. Solicitors have multiple retainers and clients which mean recalling events with clarity and precision can be difficult. Courts are mindful of this.

The best way to keep a claim out of court

18. It is in the interests of both the insurer that the matter settles before hearing. It is also in the interests of the profession as Lawcover premiums are coming down.
19. Encourage early written notification to Lawcover and contact Lawcover in writing by writing a letter or over the website. Lawcover then open file and allocate a solicitor.
20. If the solicitor has been prudent enough to make a detailed file note of the position, it is usually the case that the handing over of those file notes might have the outcome of convincing the claimant or the claimant's solicitor that the claim may be without merit.
21. As a defence solicitor I:
    (a) Confer with the solicitor and find out their version of event or their factual recollection;
    (b) I look at the documents and prepare a chronology to determine the causative implication of certain events.

    Sometimes adverse events have actually occurred prior to the brief being retained. The loss has already been occasioned long before the wrongful conduct. To put it in a causation context: But for the wrongful conduct, it has not caused the loss because the loss has already occurred.
22. In *Fox v Percy* [2003] HCA 22, at [31]:

    > …in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of

events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

BIOGRAPHY

Paul Kozub

Principal, Gilchrist Connell, Sydney

Paul has extensive experience in professional indemnity and acts for solicitors, valuers, engineers, surveyors, architects, accountants and real estate agents. He regularly acts for occupiers in defending public liability claims as well as defendants in product liability litigation. In addition to dealing with litigious disputes, Paul is a qualified mediator and seeks to utilise alternative dispute resolution processes such as mediation, informal discussion, conciliation and neutral evaluation to resolve claims as appropriate. Paul advises on policy wording and indemnity issues for insurers.

Tony Reynolds

Claims Solicitor, Lawcover, Sydney

Tony has over 20 years' experience in professional indemnity and directors' and officers' liability claims, including 7 years as Professional Liability Claims Manager at QBE Insurance. In this position Tony was responsible for leading a claims team and managing a significant claims portfolio. Tony has acted in claims against virtually all professional groups, including engineers, architects, surveyors, accountants, solicitors, insurance brokers and property valuers. He joined Lawcover in 2008.

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Cases

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March v Stramare [1991] HCA 12

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Legislation

Civil Liability Act 2002 (NSW).

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