

Has your negligence caused a loss?

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As solicitors, we owe a duty of care to all our clients. If we fail to exercise reasonable care and skill when providing advice or managing a matter, the client may be entitled to compensation because of this failure.

To succeed in a claim for professional negligence 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.

Establishing the existence of a contract and/or duty of care including a breach and loss is often uncomplicated. However, proof of breach and the existence of loss will not automatically bring success. Often, the ‘missing link’ in the chain of these events is causation.

Causation

Causation has been codified in New South Wales for many years in the *Civil Liability Act 2002* (NSW). This legislation is largely reflected in equivalent state jurisdictions (see *Wrongs Act 1958* (Vic)).

To establish causation in a professional negligence claim against a solicitor, s 5D(1) of the *Civil Liability Act 2002* (NSW) must be satisfied. The claimant must prove any fact relevant to the issue of causation as well (s 5E).

A plaintiff needs to establish:

- ‘factual causation’; and
- that the scope of the solicitor’s liability should extend to the harm caused (an exception to this rule is found in s 5D(2) of the *Civil Liability Act 2002* (NSW) and is for ‘exceptional cases’).

In *Kambouris v Kiatos* (*‘Kambouris’*) [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 failed to inform the plaintiff of her legal rights and breached his obligation (note: the relevant Victorian provision is identical to s 5D(1)).

Snapshot

- To succeed in a claim for professional negligence the claimant must prove three basic elements.
- Often the biggest hurdle to overcome in a professional negligence claim is whether the breach caused the loss.
- Considering causation from the beginning can mean fewer surprises later.

In this case, the plaintiff 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 he failed to inform her that the agreement with a third party 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 the in-

demnity had not been given. The plaintiff claimed recovery of loss equivalent to the value of the sold properties.

At first instance, the judge found causation was not established on either basis and that the plaintiff had not established ‘factual causation’ and/or that the scope of the solicitor’s liability should extend to the harm. Her Honour concluded that the plaintiff would have ultimately entered into the guarantee at a later time, even if properly advised from the outset.

Factual causation

Section 5D(1)(a) of the *Civil Liability Act 2002* (NSW) requires a claimant to prove ‘that the negligence was a necessary condition of the occurrence of the harm’. It is a statutory formulation of the common law ‘but for’ test (see *Adeels Palace Pty Ltd v Moubarak*; *Adeels Palace Pty Ltd v Bou Najem* [2009] 239 CLR 420; [2009] HCA 48; *Strong v Woolworths* [2012] 246 CLR 182; [2012] HCA 5; and *Wallace v Kam* [2013] 250 CLR; [2013] HCA 19) and is entirely a question of fact. If a claimant suffered the alleged loss irrespective of the solicitor’s alleged wrong doing, then the claimant will not establish factual causation. It is a determination on the balance of probabilities – i.e. whether the harm would have occurred without the negligence (see *Strong v Woolworths* [2012] 246 CLR 182 at [16]).

In *Kambouris*, even though the solicitor did not inform the plaintiff that the indemnity was not signed, the negligent omission was not causative of the plaintiff’s loss because she would have ultimately signed the guarantee in any event.

Scope of liability

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’.

While factual causation is a question of fact, s 5D(1)(b) is ‘entirely normative’ (see *Wallace v Kam* [2013] 250 CLR 375 at [14]) and asks whether responsibility for the harm should be imposed on the negligent party (see *Hudson Investment Group Limited v Atanaskovic* [2014] 311 ALR 290).

Section 5D(4) instructs the court to consider ‘(amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party’. Regard might be had to common sense, logic or policy considerations, as was contemplated by the High Court in *March v Stramere* [1991] 171 CLR 506; [1991] HCA 12.

In *Hudson Investment Group Limited v Atanaskovic* (*‘Hudson’*) [2014] 311 ALR 290; [2014] NSWCA 255, the plaintiff established factual causation, but failed to satisfy the ‘scope of liability’ requirement because the Court found that the plaintiff’s claimed loss was a consequence of its own unreasonable actions. In those circumstances there was ‘no reason in common sense, logic or policy’ (per Mason CJ in *March v Stramere* [1991] HCA 12 at [27]) for imposing liability on the solicitors.

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In *Kambouris*, the Court applied *Hudson* and was conscious of two relevant factors:

- (i) the plaintiff’s exposure under the guarantee was less after the solicitor’s wrongdoing than before and the plaintiff was in a better position by signing the guarantee; and


- (ii) the plaintiff subsequently entered into a further guarantee unrelated to the solicitor’s conduct. This had the consequence of exposing her to an even greater loss. In other words, the plaintiff had made a considered decision to enter into further indebtedness on a voluntary basis, despite her knowledge of the solicitor’s earlier conduct, disintitling the plaintiff to recover the claimed loss from the solicitor.

These cases are a useful reminder that often the biggest hurdle to overcome in a professional negligence claim is whether the breach actually caused the loss.

The ‘but for’ test is only the first step. Considering causation from the beginning can mean fewer surprises later, and allows both parties to make an informed decision on settlement if negligence is established. **LSJ**



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