FOLEY'S LIST

ANALYSING THE COUNTERFACTUAL HYPOTHESIS

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INTRODUCTION

1. Today I want to talk to you about something called the 'counterfactual hypothesis'. What is a 'counterfactual hypothesis'?

2. By definition, this is a proposed theory about how a different outcome could have been achieved if events had happened in a different way to how they actually happened.

3. The term 'counterfactual' has regained significance in employment personal law in the last two years with the decision of the Court of Appeal in *Munday v St Vincent's Hospital Pty Ltd* [2021] VSCA 170 ("Munday") which was followed by the Court of Appeal in a later decision *Cotton on Group Services Pty Ltd v Golowka* [2022] VSCA 279 ("Golowka").

4. The counter factual was applied in the context of mental harm by the High Court in *Kozarov v Victoria* [2022] HCA 12.

5. It governs the way in which a plaintiff must show that the defendant's negligence caused the injury, otherwise known as 'causation'.

CAUSATION EXPLAINED

6. Causation is an essential ingredient in any claim for damages.

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7. In Victoria, there are currently two tests for causation, the common law test which applies in employment and transport accident cases, and the statutory test codified in the *Wrongs Act 1958 (Vic)*.[1] It is the common law test which applies to injuries sustained in employment which is the subject of this paper.

8. There are a few basic principles that you should be familiar with.

9. First, the plaintiff bears the onus of establishing that there was a reasonably practicable precaution or alternative course of conduct that could have avoided, or reduced the consequences of, the injury to the plaintiff. In other words, the plaintiff needs to prove what the defendant should have done differently, and, had the defendant done that thing, (or things) differently, the injury suffered by the plaintiff would not have occurred.

10. Second, it is not enough to prove risk. You can have a case where risk of injury is proven, but the plaintiff still fails because they failed to prove that the defendant caused the injury.

11. Third, the inference that the plaintiff would have been in a better position needs only to "more probable", or of some greater degree of likelihood. Possibility is not enough. But, it is not necessary to prove certainty. See: *Swain v Waverly Municipal Council* (2005) 220 CLR 517 ("Swain").

    Swain v Waverly Municipal Council (2005) 220 CLR 517.

12. *Swain* was a case about a man who suffered serious injury to his spine as a result of diving into the surf at Bondi Beach. He sued the Council arguing that the Council failed in its duty of care to protect him by allowing him to swim and dive into a sand bank whereupon he struck his head and suffered injury. He argued that in swimming between the flags he was entitled to be able to swim without injuring himself. The plaintiff's case was heard by a Jury who found in his favour.

13. The Council appealed and the Court of Appeal set the Jury Verdict aside. The High Court (by a majority of 3-2) overturned the Court of Appeal's decision and upheld the

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1 See for example discussion by Maxwell P in *Wodonga Regional Health Service v Hogood* [2012] VSCA 326 at [29].

Jury's decision. It is a difficult decision to understand, and I think the best way of understanding the outcome is that even though the majority of the High Court didn't necessarily agree with the Jury's decision, they chose to respect the Jury process. It does highlight that a jury trial can sometimes produce differing result to a trial by Judge alone.

14. The decision is relevant for the principles articulated by McHugh J (who was in the minority in *Swain* and who argued that the plaintiff should not have won). He provided in his judgment some helpful guidance on the principles of causation.

15. McHugh J's approach was later followed by the Court of Appeal in *Munday v St Vincent's Hospital Pty Ltd* [2021] VSCA 170 (see below).

16. At [41], McHugh J explained that the law requires the plaintiff to prove some evidence from which a Judge or Jury can find that there was an alternative step (or steps) which was practical, and that the defendant was reasonably able to take that step (or steps). It is not enough, for example, McHugh J said, to prove the existence of risk and then allege the defendant took no precautions. More is needed, he argued.

17. At [44]-[45], McHugh J also provided some guidance on the question of whether the reasonably practicable alternative should be a matter of expert evidence or comes within common knowledge and common sense.

Tabet v Gett (2010) 240 CLR 537

18. Another case you should be familiar with is *Tabet v Gett* (2010) 240 CLR 537, 578 [111]; [2010] HCA 12 ("Tabet").

19. *Tabet* was a case about a girl who sued through a litigation guardian for damages for brain damage which she claimed was sustained as a result of the defendant's negligence. The facts in brief summary were that she was admitted to hospital when she was six years old. She was given a diagnosis of chicken pox, encephalitis, and/or meningitis. It later turned out there was a tumour in her brain. On her second day in hospital, she suffered a seizure. No CT scan was performed after the seizure. On the third day in hospital, she suffered another seizure. It was not until after the seizure on the third day that a CT scan was performed. It was then that the tumour was discovered.

20. The tumour was subsequently removed, and in the process, it seems she suffered brain damage. She sued the hospital and argued that the CT scan should have been performed after the seizure on the second day. The trial Judge agreed that it was negligent (ie it failed the standard of care) not to perform the CT scan after the seizure on the second day, but she lost her case ultimately because she could not prove that if the CT scan had been performed on the second day that the outcome would have been any different. In other words, she could not prove that the defendant's negligence *caused* her brain damage.

21. On Appeal the High Court upheld the trial judge's decision. Keifel J (Hayne and Bell JJ agreeing) said what was required was for the plaintiff to show that the more probable inference from the evidence is that a defendant's negligence caused the injury or harm. "More probable", it was said, means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty.

22. The Plaintiff failed, the High Court (Keifel J (Hayne and Bell JJ agreeing)) said, because (see at [114]) the expert medical evidence did not establish the necessary link between the omission of the Defendant, with the consequent delay in treatment, and the brain damage which occurred. There was no evidence as to what harm might have been caused by the delay. It could not be said that "but for" the delay the Plaintiff (appellant) would not have suffered brain damage. On the facts as found by the trial Judge, the probability was that the tumour would have caused the brain damage in any event.

23. Hence, a plaintiff can fail in their claim, even where a breach of duty has been established, if they cannot prove that the injury was caused by the breach, or in other words, if they cannot prove that they would have been any better off had the Defendant's negligence not occurred.

THE COUNTERFACTUAL HYPOTHESIS

24. What is a 'counter factual hypothesis'? In *Munday v St Vincent's Hospital Pty Ltd* [2021] VSCA 170 ("Munday"), a majority of the Court of Appeal (Maxwell and Walker JA) said at [22]:

> "…the plaintiff must propound an alternative state of facts, premised upon the defendant's having exercised reasonable care and, specifically, upon there having been no such omission.

25. At [23], the Court went on to say the plaintiff's counterfactual hypothesis must identify:

"(a) what the defendant would have done had reasonable care been exercised; and

(b) how the taking of that action would have averted the loss or damage which the plaintiff in fact suffered." (underline added)

26. In that case the Plaintiff, a nurse, sued for injury sustained to her hand after her thumb was squashed while trying to transfer a patient. She was using a wooden board, which looks like a giant cheese board, which had holes at each end. She had her thumb in the hole at the time as she was transferring her patient to a bed. Her thumb became trapped in the hole and was squashed in the process.

27. At trial the Plaintiff did not lead evidence from an expert as to what the Defendant should have done differently. Instead, she argued that common sense showed the Defendant (her employer) should have trained her to use the board in such a way so as to avoid getting her thumb trapped in the hole and squashed.

28. The Plaintiff lost her case at trial because the trial Judge rejected her argument that common sense allowed an inference to be drawn that training would have averted her injury. The trial Judge agreed that the Defendant had breached its duty of care in that nothing had been done to protect the Plaintiff but concluded that she needed to produce expert evidence to prove her claim that the Defendant's failure to train her caused her injury. The lack of evidence as to what any such training would involve, and how any such training would avert the injury, was fatal to the Plaintiff's case.

29. The Plaintiff appealed. The Court of Appeal agreed with Her Honour. The Court of Appeal considered the argument that common sense justified an inference that training would have averted the injury. At [21] the Court referred to *Tabet* as to the requirement to prove causation.

30. The Court then examined the means needed to establish causation. At [31] the Court acknowledged there are cases where common sense is enough to prove that an injury could have been avoided. However, it also said there are other cases which require technical knowledge and experience to show what a defendant ought to have done.

31. The Court referred to three authorities in a footnote to paragraph [31] for guidance;

    a. *Greater Shepparton City Council v Clarke* (2017) 56 VR 229, 259-60 [108]-[109] (Santamaria, Beach and Kaye JJA) ("Clarke");

    b. *Swain v Waverley Municipal Council* (2005) 220 CLR 517, 535-6 [44] (McHugh J); 2005 HCA 4 ("Swain") (discussed above);

    c. *Neil v NSW Fresh Food and Ice Pty Ltd* (1961) 108 CLR 362, 368 (Taylor and Owen JJ); [1963] HCA 4.

32. See: image of Transfer Board extracted from the judgment in *Munday* below:

33. It was asserted that the use of a board to transfer a patient so as to avoid placing one's thumb in harm's way was a matter of commonsense. It was submitted that training as to the proper placement of the thumb whilst using the board would have averted the Plaintiff having her thumb squashed when she used the board to transfer a patient. (see at [33]-[34]) It was said to be so obvious that the a safe system of work involved using the board in such a way that the finger or thumb could not be trapped, that it was inevitable that any training would have directed the nurse not to put their finger or thumb in the hole (see at [35]).

34. This argument was rejected by the Court of Appeal (Maxwell P and Walker JA). At [36], the Court said it was far from self-evident how the board was to be used. It therefore went beyond the realm of common sense. At paragraphs [37] onwards the Court set out its reasons for its determination that the proper use of the board was a matter for technical knowledge and experience, without which it was not possible for the Court to reach any conclusion about the board's safe use. There were simply too many unknowns, the Court concluded, without such expertise.

35. It is interesting to note that there was a dissent. Kennedy JA considered (see at [54]) that the 'counterfactual' had been established by the trial judge's finding that a person exercising reasonable care would have provided training. This was a finding made in relation to duty and it illustrates the distinction between duty and causation is matter about which reasonable minds can differ.

36. In any event, the majority decision serves to illustrate the need for expert evidence. It serves as a cautionary tale for those seeking to prepare (whether acting for plaintiffs or defendants) a case in which it is asserted that more could have been done by a defendant.

37. So how do we judge when such technical knowledge and experience is required?

38. Each of the three authorities referred to by the Court of Appeal in *Munday* provide some assistance, however, for my part, the most helpful statement was that of McHugh J in *Swain* (discussed earlier), where McHugh said at [44]-[45] that:

    a. where the case involves a "**technical or complex operation or service**", it is likely that the plaintiff will likely need technical or expert evidence; and

    b. Where the issues involve "**technical knowledge and experience**", the plaintiff must lead expert evidence to prove what the defendant ought to have done.

39. For further reading see the Court of Appeal's discussion on these principles in *Cotton on Group Services Pty Ltd v Golowka* [2022] VSCA 279 ("Golowka") at [68] – [77] (on causation) and [103]-[104] (on common sense) and *Quigley v Commonwealth* (1981) 55 ALJR 579; 3 ALR 537 (referred to in *Golowka* at [71]-[72]).

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THE IMPORTANCE OF EXPERT EVIDENCE IN ESTABLISHING THE COUNTER FACTUAL IN CLAIMS FOR MENTAL INJURY

40. There are many difficulties faced by plaintiffs in establishing the counterfactual in claims for mental harm. In particular, it is important to keep in mind that the assessment of what a defendant should have done is to be made prospectively, not with the benefit of hindsight. Added to that is the complex nature of psychiatric injuries. Then also, do not forget the often complex structure of organisations within which people work and the complex nature of systems employed within those organisations. Its not hard to see how such claims would be a matter for 'technical knowledge and experience'.

    Kozarov v Victoria [2022] HCA 12

41. To give you a recent example, in *Kozarov* v *State of Victoria* [2020] VSC 78 ("Kozarov") the case was about a solicitor who worked for the office of public prosecutions, in particular the prosecution of sexual offences section. She brought a claim against her employer for damages for psychiatric injury which was claimed to have resulted from trauma suffered in the performance of her work dealing with sexual offences. The evidence was that the employer recognised the risk of injury from exposure to such trauma.

42. The Plaintiff won her case at trial. One of the reasons why she won was because she lead expert evidence from a psychiatrist, who was well-regarded in the treatment of post-traumatic stress, Professor Sandy McFarlane of the University of Adelaide. He has done a lot of work with persons who had served in the military and police forces, who were suffering from the effects of exposure to combat related trauma.

43. In *Kozarov,* Professor McFarlane's opinion was lead by the Plaintiff to establish the counter factual evidence regarding what the defendant should have done.

44. Some examples of the matters Professor McFarlane gave evidence about were:

    a. He was critical of the policies in place at the time, which he considered were at odds with the scientific literature on PTSD at the time; (see at [396])

b. He considered that a workshop provided to staff was inadequate because it failed to address the actual conditions which staff may have developed and that it should have provided a detailed account of the symptoms of those conditions (see at [397]);

c. He gave evidence about the effectiveness of Employee Assistance Programs ("EAPs") and in particular that the way in which they are implemented is critical (see at [399]);

d. He gave evidence regarding (in high risk environments) screening of staff by a clinically trained psychologist for symptoms of psychiatric injury (see at [403]);

e. He gave evidence regarding education and training for management and staff about the risk of PTSD as a result of exposures to trauma and the details of sexual offences (see at [411]);

f. He gave evidence about the need for awareness of workloads, monitoring of sick leave, and the capacity to transfer people out of the unit (see at [414]).

45. The trial Judge found that these were important matters which went to establishing that the defendant had failed to take reasonable steps to avert risk of injury to the Plaintiff and had it done so such risk would have been avoided.

46. The employer appealed to the Court of Appeal and the trial judge's decision was overturned. The trial judge's decision was later upheld on Appeal by the High Court. (See: *Kozarov v Victoria* [2022] HCA 12).

47. The High court concluded (See for example, Gordon and Steward JJ at [94]-[96], and Edelman J) at [112]) that the better view of the evidence was that if the employer had taken the reasonable steps of making a welfare enquiry and offering Ms Kozarov a referral for occupational screening then she would have accepted that offer and, with the benefit of screening by a clinician, the screening would probably have revealed that she had symptoms of post-traumatic stress disorder, with the result that Ms Kozarov would have agreed to a rotation out of the SSOU and her psychiatric injury would not have been exacerbated.

48. This result would not have been possible without expert evidence. Of course, whether expert evidence is required in any particular case will turn on the facts. As the High Court has said, in some cases the question of causation will be a matter of common sense. But in many others, the Plaintiff will fail unless there is expert evidence lead which proves what the defendant should have done. In my experience that will be the case in the many claims for psychiatric injury.

Bell v Nexus Primary Health [2022] VSC 605

49. *Bell v Nexus Primary Health* [2022] VSC 605 ("Bell") is another example of a case where the counterfactual hypothesis approach was applied to establish causation, in this instance through the common sense test. A brief summary of the facts is that the plaintiff was an outreach worker, whose duties required her to provide support to victims of domestic violence. She suffered psychiatric injury after having provided support to one such victim of domestic violence and being subjected to threats and attacked by the husband of that victim.

50. As to causation, the Defendant argued there was nothing that could have done to avert the injury. O'Meara J found that the plaintiff was subjected to a course of conduct by the victim's husband which was motivated to keep the plaintiff from providing support to the victim (his wife). He had begun making threats to the plaintiff two years earlier and those threats intensified in about January 2013 which was two months prior to the attack, which took place in March 2013. Nothing was done by the Defendant in that time. O'Meara J found that reallocation of the victim's file away from the plaintiff before the intensification of the threats would have avoided the attack. O'Meara was able to draw the inference as a matter of common sense.

51. It should be clear from the above decisions that not every case requires an expert to establish causation.

52. However, if acting for a plaintiff my advice is to give careful consideration to the question of causation. When in doubt, play it safe and engage an expert. A competent expert will tell you whether this is a matter for expert opinion.

53. All that may be required is simply to ask that expert (eg a psychiatrist) a question (or questions) (in addition to the questions of diagnosis, work-relationship, work capacity, prognosis, etc) seeking an opinion related to what steps could have been taken by the employer to avert the risk of injury. Some examples of what can be commented on by an appropriate expert are set out at paragraph 38 above.

54. On the other hand, if you are defending such an action, equally you should consider seeking expert opinion to comment on whether anything could have been done differently, or whether the plaintiff would have been in the same position anyway.

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