Common Sense and Causing Loss

Lecture to the Chancery Bar Association

By

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Over lunch the other day, one of my colleagues and I were trying to make a list of the most common judicial expressions which conceal, or perhaps reveal, a complete absence of any form of reasoning. Phrases such as "it is a matter of impression" and "doing the best I can" obviously come high on the list. But a strong candidate must be "it is a matter of common sense". This phrase is often used challengingly, even rather aggressively, implying an accusation of lack of practicality, unworldliness, fussiness and pedantry against anyone who asks for further explanation. A concept in which there is frequent judicial invocation of common sense is causation. I could offer you a huge anthology of judicial dicta in which causation has been said to be a matter of common sense. It is usually contrasted with dangerous and probably foreign notions of metaphysical speculation or even philosophy. Here is a typical example from the late Lord Salmon:

> "The nature of causation has been discussed by many eminent philosophers and also by a number of learned

> judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory."

This is in the best tradition of English anti-intellectualism. It is also a good example of our characteristic polemical judicial style. The case was about whether a factory from which some hideous chemicals had overflowed into the river Irwell in Lancashire had caused polluting matter to enter the stream. It is hard to imagine that either Mr Maurice Drake QC or Mr Ian Glidewell QC, who were counsel for the appellant and respondent respectively, had invited the house to decide this question in accordance with abstract metaphysical theory. So the opposition between common sense and abstract theory is a rhetorical device to divert attention from the absence of reasoning in the judgment. I was once arguing a case before the House of Lords against Lord Neill of Bladon, as he now is. There came a moment when he picked up my printed case and said, with a slight curl of the lip, "I must now deal with the more philosophical paragraphs of my learned friend's case." Afterwards in the robing room I said to him. "You know Pat, I never expected to hear the word 'philosophical' used as pejorative expression by a Warden of All Souls". To which he replied, "You've got to do anything to win." As it happens, he lost, but I do not think anyone would suggest that this was because of any lack of skill in argument or the attractions of philosophy to the then members of the House of Lords.

You will remember that Lord Salmon said that causation was a question of fact. Of course in one sense it is. But if that were the end of the story, there would hardly be cases about causation coming before the Court of Appeal and the House of Lords. The House of Lords is supposed to confine its attention to cases that raise questions of law of general public importance. So the existence of numerous appeals which raise questions of causation is a symptom of some deeper malaise. Furthermore, the results of such an appeal is quite often that the trial court's finding on causation is reversed. If the question is one of fact and common sense, why should this be so? Common sense is supposed to be something we all share. One of my favourite quotations from the late Lord Diplock is when he said one day in the Court of Appeal, in his characteristically acidulated style –

> "the law is nearly always most obscure in which judges say the principle is plain but the difficulty lies in its application to the particular facts".

The thesis which I want to defend this afternoon is that the reason why causation causes problems in the law is that although it is indeed a question of fact, the courts have too often not sufficiently identified what that question is. Judges cause confusion when they say "that is a question of fact" without telling you what the question is. But unless you know the question, you will not be able to get the right answer. Once the question has been identified, the answer is usually relatively easy. It may involve

scrabbling about among complicated facts, like discovering who was to blame for an explosion at a chemical plant, but it does not raises any issue of principle.

What do I mean when I say that one must first identify the question? In the case about polluting the river, Lord Salmon thought it was easy. It was "what or who has caused a certain event to occur". In that case, it was chemicals getting into the river. As it happens, we now know that this was the wrong question to ask. In that particular case, what had happened was that the factory had pumps which were supposed to prevent the tanks full of noxious chemicals from overflowing but they had got clogged with leaves and brambles in the autumn. If you ask "what or who caused the chemicals to overflow ?" you are going to get more than one right answer. One answer might be: the fact that the factory had a tank of chemicals next to the river". Another could be "the pumps got clogged". Another might be "the factory owner not only had chemicals next to the river, but did not do enough to prevent his pumps from getting clogged." How do you know which of those answers to choose ? Common sense is not going to help you very much. It might be better to go back and start again, and instead of asking "what or who caused the chemicals to get in the river?" ask "did the factory cause the chemicals to get into the river ?". Why is it better to formulate the question in this way ? Because they are being prosecuted for causing the chemicals to pollute

the river. If you cannot answer yes to the question "did they cause the chemicals to get into the river ?" " then they have to be acquitted and it does not matter what answers you might give to the question "what or who caused the chemicals to get into the river". So we formulate the question by looking at the rule of law which requires us to ask it. That tells us what the question should be.

But the matter does not stop there, because the next question is "what counts as causing the chemicals to enter the river ?" That also depends upon the rule of law which raises the question. We know what the facts were: the factory had the chemicals, they had pumps which ordinarily worked to keep them out of the river, and the pumps got clogged. Do those facts enable us to say that the factory caused the chemicals to enter the river ? The only way to answer this question is to go back to the rule of law and to ask: what is the extent of responsibility which this rule was intended to impose ? For example, how did the leaves get into the tank ? Assume, on the one hand, that they simply fell off the nearby trees. Assume, on the other hand, that there were no trees around but a neighbour dumped his garden refuse in the tank ? Should this make a difference to the answer to the question of whether the factory caused the chemicals to pollute the river? One goes back to the statute and find out what kind of liability it was intended to impose. Was it meant to be limited to cases it which the factory owners deliberately or negligently did

something which resulted in the chemicals getting in ? If so, the answer in the case of the neighbour with the garden refuse is that the pollution was not caused by the factory. It was caused by the neighbour. On the other hand, the language and policy of the statute may show that the liability was intended to be strict. If so, the keeping of the chemicals in the tank caused the pollution, notwithstanding that the act of the neighbour could also be said to have caused it.

I have spent some time on this slightly obscure criminal case about pollution because it illustrates very clearly the main point I want to make. The reason why courts get the wrong answer on questions of causation is not usually because they have misunderstood the facts or lack common sense but because they have got the law wrong. They have misconstrued the proper scope of the rule which imposes liability, the rule which provides the context in which the question of causation is being asked. They have asked the wrong question rather than got the wrong answer. So, for example, in a case on the same pollution statute, a vandal had broken a gauge on an oil tank in the middle of the night so that the oil leaked into the river. The owners of the tank were prosecuted for causing the oil to enter the river and the Divisional Court said that the pollution had been caused by the vandal and not by the owners. The House of Lords said they were wrong. Because liability was strict, keeping the oil in

the tank had caused the pollution notwithstanding that it could be said also to have been caused by the vandal.

The result is that although causation is said to be a question of fact, the answers to the more difficult causal questions usually depend upon questions of law. In saying that, I do not mean that causation does not also involve genuine questions of fact. For example, it is difficult to say that X caused Y if Y would have happened anyway. But that is almost always the easy bit. The problems about causation are in those cases in which Y would not have happened without X, but the question is whether for the purposes of some rule, X should be said to have caused Y or merely provided the occasion for something else to cause Y. The oil would not have got into the stream if the defendant had not kept his tank near the river bank, but for the purposes of criminal liability, did keeping the tank there cause the pollution or merely provide an occasion for the vandal to cause the pollution ? That depends entirely on a question of law.

With this general introduction, I want to look at some recent cases on tort liability which have raised questions of causation. What I hope to show is that the argument over causation is almost always an argument over the law. It is an argument over the true scope of the rule which imposes liability. In particular, there are two kinds of questions about the rule which have to be answered before you can properly formulate the

question of fact about causation. The first is to identify the grounds upon which the rule imposes liability. The second is to identify the kind of loss for which it provides compensation. Once these questions have been answered, the question of causation does indeed become a question of fact and usually a pretty obvious one at that.

I shall start with some cases where the problem lay in identifying the grounds upon which the rule imposes liability. I have already given an example from the criminal law: the pollution cases where some third party causes the polluting material to escape. Whether the person who put the polluting material in a position where it would escape if some third party opened the tap can also be said to have caused the pollution depends upon whether the law imposes a strict liability on people who keep polluting material within range of a river. On the whole, the answer is that it does. Therefore they cause the pollution when someone opens the tap.

A famous example of a similar problem in the law of contractual negligence is the old case of *Stansbie* v *Troman*, where the decorator left alone in the house went down to the shops leaving the front door unlocked. A thief entered and stole a diamond bracelet. Now, what caused the loss of the bracelet ? One obvious answer was that it was taken by the thief. And for most purposes this would be a sufficient answer. So the decorator said that although he might have been careless in not locking the

door, he did not cause the loss. It was caused by the thief, just as the pollution was caused by the man who opened the tap. What the court did was to look at the rule of law and consider the grounds upon which it imposed liability. The decorator owed a duty, if he left the house, to take reasonable care to make it secure against casual opportunist thieves. That was the limit of his duty. He did not have to make it impregnable against a determined burglar. But leaving the door unlocked was a breach of duty and therefore, when something happened which was exactly what he was under a duty to take reasonable care to prevent, it would not have made no sense to say that his breach of duty did not cause the loss.

Those are both cases in which the answer to the question of causation depends upon whether the rule creating liability imposes a duty to prevent, or take reasonable care to prevent, the acts of third parties. Recently, there has been an even more striking case in which the question was whether the rule imposed a duty to take reasonable care to prevent the plaintiff causing injury to himself. The case has recently been before the House of Lords. Judgment has not yet been given and I do not know what it will be. But the facts are pretty striking and they make an excellent example for this analysis of problems in causation. What happened was that the plaintiff's husband hanged himself in a cell in Kentish Town Police Station. He fastened his shirt through an open flap in the door and tied the other end round his neck. Unfortunately people do quite often try

to commit suicide in police cells and the police have instructions to take care not to give them the opportunity. In particular, their instructions are not to leave cell flaps open so that they can be used for tying things to. This man was known to be a suicide risk because he had actually tried to strangle himself that very morning in a cell at the magistrates' court. The police knew about this. So they admitted that they owed the deceased a duty to take reasonable care not to provide him with facilities for committing suicide. But, they said, they did not cause his death. He hanged himself while of sound mind. Therefore he caused his own death and it could not have been the police.

This case does seem to me to illustrate how important it is to concentrate on the grounds upon which the rule imposes liability. Of course he caused his own death, just as the pollution was caused by the vandal and the loss of the bracelet was caused by the theft. And I can quite understand an argument that the police should owe no duty of care to prevent people of sound mind from killing themselves in the cells. The common law has a strongly individualist philosophy and requires people to take responsibility for their actions and suffer the consequences. If, while of full understanding, they want to kill themselves, that is their business. If a prisoner wants to kill himself by a hunger strike, the authorities have no right, let alone a duty, to compel him to eat. There are also contrary arguments, particularly about people in police cells, where

the line between being acting with free will and under some form of pressure may not be so easy to draw. But the case is not about whether the police owe such a duty or not. They concede that they do. And the question is whether, in those circumstances, they can say that their breach of duty did not cause his death. In other words, can they say that they were not causally responsible for the very thing which they admit it was their duty to prevent ?

I leave that thought to you and pass on to a different clutch of cases where the problem was to identify the kind of loss for which the rule provides compensation. Most of them are about various kinds of financial loss, but there is a very interesting one from Australia about physical injury which I shall mention in a moment. To introduce the problem, I want to compare and contrast two recent cases in the House of Lords. They could both be called double fraud cases, because they concern the causal effect of the interaction between two quite separate frauds. The first was a claim by a company which said it had been induced by fraud to buy a large parcel of publicly quoted shares. The effect of the misrepresentation was that the plaintiff bought the shares for a few pence more than they would have been worth in the market at the time. A couple of months later, while they were still holding the shares, it emerged that the company had been defrauded of very large sums of money by one of its directors, in a way quite unrelated to the fraudulent representation

which induced the sale. The result was that the share price crashed to less than half what it had been. The plaintiff said that its whole loss on the transaction had been caused by the fraud. If not for the representation, they would not have bought the shares in the first place and would not have been affected by the other fraud. The defendants said that the additional loss was not caused by their fraud but by the second fraud. As a matter of common sense, both propositions are true. The only way to choose between them is to decide, as a matter of law, what kind of loss the law about fraudulent misrepresentation requires to be compensated. If by a fraudulent representation you induce someone to enter into a transaction, should you be responsible for all the loss he suffers as a result of entering into that transaction ? If so, the plaintiffs were right, because they had suffered the heavy loss on account of having bought the shares. Alternatively, is the liability limited to the loss caused by his having entered into the transaction on the basis represented to him rather than on what would have been the true basis ? If so, the defendants were right, because the effect of the representation was that he bought for a few pence more than what he would have paid if he had bought knowing the true state of affairs. The House of Lords held that the law of fraudulent misrepresentation requires compensation on the first basis: liability for all the consequences of entering into the transaction. That seems to me quite reasonable: one has a completely unexpected loss, through the discovery of the second fraud and the question is who should bear it ? The fraudulent

vendor who was lucky enough to offload the shares in time or the purchaser who would not otherwise have been left holding the parcel ? In the general interest of deterring fraud, the answer in favour of the innocent purchaser seems correct.

Once one has sorted out the scope of the rule of law in this way, there is no problem about causation. And notice that the answer is not determined by the factual question of whether, in the absence of the fraudulent representation, the purchaser would have bought the shares. If he would have bought anyway, but for a lower price, then obviously he cannot say that the representation caused the subsequent loss. This is indeed a question of fact. But the fact that, but for the representation, he would not have bought the shares, does not necessarily mean that he must be able to recover all the loss he suffered as a result of buying the shares. That begs the question about the extent of the protection which the law affords. The law may not consider it fair to saddle the person making the representation with all the consequences of his buying the shares. It may limit his liability to the consequences of his buying them on a false basis, i.e. thinking they were worth rather more than was actually the case. In the case of fraud, the House of Lords has decided that the extent of liability is wider. But that will not necessarily be the case with any kind of misrepresentation.

The double fraud case which I want to contrast involved fraudulent misrepresentations about the value of gemstones and land in Spain. This was a full-blown fraud on a number of banks, borrowing millions of dollars on security which was in fact worthless. Part of the security was a series of insurance policies against a shortfall in the value of the security. But the policies had a clause allowing the insurance company to repudiate if there had been fraud by the borrower and in that case there had been a massive fraud as a result of which the companies instantly repudiated liability. So the banks had no security and were unable to recover anything on their policies. They made a claim against the insurance companies on a different and rather complicated basis. It appears that an insurance broker, acting, as brokers do, for the insured, had fraudulently represented to his clients that certain layers of insurance were in place when in fact they were not. The banks said that the insurance companies knew about this and, as insurance is a contract of the utmost good faith, should have disclosed it to the banks. If they had done so, the banks would have been so distrustful of the broker that they would not have entered into the transaction and so would not have been hit by the other fraud.

Lord Templeman said that, assuming that the insurance companies were under duty to disclose which gave rise to a claim in damages, the failure to disclose did not cause the loss. Failure to disclose may have meant that the banks went into the transaction thinking that they had

insurance policies which were actually not there. But even if they had been there, they would have done the banks no good because the companies would have been able to repudiate them for fraud.

The judgment of the House of Lords in this case rather makes it look as if it is simply a question of fact and common sense. In fact, it is a decision about the scope of the hypothetical liability for non-disclosure. Should the insurance company be liable for all the consequences of the banks having entered into a transaction when they would not have done so if all the facts had been disclosed to them ? Or is the law that whether or not they would have entered into the transaction, the company is liable only for the consequences of their doing so on a false basis, that is to say, on the footing that they had certain insurance policies which in fact were not there ? The House assumed that the latter was the true scope of the rule, in which case it followed that the only consequences for which the insurance companies were liable had caused no loss.

I will leave these financial loss cases for a moment to discuss the interesting Australian case which I mentioned a moment ago. A woman was advised by a surgeon to have an operation on her throat. He was quite right: she was suffering from a progressive condition which, sooner or later, would have made such an operation essential. However, he should have warned her that there was a small risk of infection which could

damage the vocal chords. He did not do so. She said that if she had realised the risk, she would have postponed the operation and had it performed by the most experienced surgeon she could find. Whoever he was, he could not have done the operation with greater skill and care than the surgeon she had actually engaged. But, through no fault of his, an infection did occur, she suffered injury to her vocal chords and lost her voice. The question for the High Court of Australia was whether the surgeon's breach of duty, in not warning the patient of the risk, had caused her injury. She said it had because she would not have had the operation by that surgeon at that time and perhaps the bad luck of an infection would not have struck at some other time. The surgeon said failure to warn had nothing to do with the outcome. Maybe she would not have had the operation at that time, but she could have made the same point if she had been injured because the operating theatre had been struck by lightning and no one would have said that such an injury was caused by his failure to warn her.

The High Court, by a majority of 3 to 2, decided that there was the necessary causal connection. The judgments make it clear that one cannot answer the causal question without forming a preliminary view about the purpose and scope of the doctor's obligation to inform his patient about the potential risks of an operation. Obviously a powerful factor in favour of the majority is that in a case where the operation is reasonably

necessary and the risk is one which may eventuate even if the operation is properly performed, an answer that there was no causal connection because the injury was not a result of anything which the surgeon actually did would drain the duty to inform of any content. As in the case of the police suicide, one would have a duty but no liability when the very thing which was the subject-matter of the duty actually happened. On the other hand, there is an important difference between the duty to take reasonable care to prevent the suicide and the duty of the doctor to inform. The purpose of the police duty is to take reasonable care to prevent the prisoner from killing himself. Therefore, if he does kill himself, his death represents the loss which has been suffered by his dependants. Of course there may be questions of contribution, because after all he did kill himself, but in principle the loss caused by the breach of duty is his death. It is less easy to say that the purpose of the duty to inform is to prevent the potential injury about which information must be given. Having the information may not enable the patient to do anything significant to avoid the injury. The Australian lady would have had to have her operation anyway and going to another surgeon would not have increased her chances of avoiding the risk. It is therefore not so obvious that the injury is the loss caused by the breach of duty. There must be a loss, because otherwise, as I have said, the duty would lack content. But there is something odd about identifying it as the injury about which she should have been informed. One has to go back to look for the purpose of the

rule. In some cases it will be to allow the patient a free choice as to whether to subject himself or herself to a given risk or not. The injury will consist in being denied that choice. In others, like the Australian case, the patient really has no significant choice and the loss is being denied the right to go into the operation with one's eyes open about the possible consequences. In other words, perhaps we are looking in the wrong place for the loss caused by breach of the duty. Instead of looking in the conventional way for injury to the patient's body, we ought to see the rule as designed to protect the patient's personal sovereignty, her sense that she has not been treated as a mere laboratory specimen. In such a case, of course, the damages would have to be assessed on a rather different basis from that in which one regarded the injury to the vocal chords as the loss. They would be more like damages for some kind of insult or affront. But whatever view one takes, the point I make is that the answer to the common sense question: did the doctor cause the damage to her vocal chords ? depends upon a careful assessment of the scope and purpose of the rule imposing the duty to inform. It is not simply a question of fact.

Some of you may have noticed that some of this argument has been skirting around the issue which arose in the case about valuer's negligence and it should be clear now how I think that case fits into the general principles of negligence and causation. In the course of my judgment I gave an illustration of a doctor who negligently advises a

mountaineer that his knee is fit when in fact it is not. The mountaineer goes up the mountain when he would not otherwise have done so and suffers an injury, but not on account of anything to do with his knee. A number of people have said that the example is not in point: it is about causation and not about the scope of the duty of care, which was what I said that the valuers' case was about. The doctor did not cause the mountaineer's injury. That is perfectly true. We would say that for the purposes of the law of negligence, the doctor did not cause the mountaineer's injury. But why not ? It would not have happened if the doctor had not given bad advice. The reason why we say that he did not cause the mountaineer's injury is because of the view which we have formed about the scope of the duty. It is only because we do not think that the doctor should be liable for the consequences of his having gone up the mountain, even though he would not otherwise have gone, but only for the consequences of his having gone with a bad knee, that we can say that the doctor did not cause his injury. But assume that liability is under some other rule, such as fraud. The doctor, for his own purposes, because he wants the mountaineer to go on the expedition so that he can have an assignation with his wife, fraudulently assures him that his knee is fit. Why should the doctor not be responsible, as in other fraud cases, for all the consequences of the victim doing whatever he was fraudulently induced to do ? In such a case, therefore, we might well say that the fraud did cause his injury even though it had nothing to do with his knee. The

answer to the question of what caused what depends, not on common sense, but upon law; on a careful assessment of the reach of the substantive rule on which liability is based.

Perhaps at this point a personal apology might be in order. In the second episode of the valuers' case, which was concerned with interest payments, I said rather emphatically that the principle applied in the original case had nothing to do with causation. That is not true. It would be perfectly correct to say that the effect of the ruling of the House of Lords was that the negligence of the valuers had not caused the plaintiff's loss over and above what was attributable to their having lent with too little security. The rest was caused by something else, namely, the fall in the property market. But the reason why the negligence of the valuer had not caused the additional loss was because of the limited way in which the House construed the scope of the rule imposing liability. Instead of treating it, as in the share fraud case, as imposing liability for the consequences of entering into the transaction, they limited it, as in the insurance non-disclosure case, to the consequences of entering into the transaction on a false basis, that is, thinking one had more security than was actually there. Once one made this decision about the substantive law, the answer to the question as to whether the valuers caused the additional loss became easy and, indeed, trivial. So in this trivial sense the

case was about causation but I remain of the view that the really important part of the decision was about the scope of the duty of care.

Let me sum up the problem. I think that in dealing with problems of causation, courts have been too prone to resort to generalities rather than specifics. The generalities simply conceal the real reasons for the decision. In the old days they used to talk about *causa causans* and *causa sine qua non*. What that meant was that if you decided that X would not have happened without Y, *causa sine qua non*, you had done the easy bit but still had to decide whether it counted as a causa, *causa causans*. All that did was to translate the problem into Latin without telling you how you might find the answer. Nowadays, as we know, Latin has gone out of fashion. Sometimes, therefore, judges resort to metaphors like broken chains and such like. Or in one of the pollution cases, the Divisional Court said that the magistrates should ask themselves whether the act of a vandal was "an intervening cause of so powerful a nature that the conduct of the appellants was not a cause at all but was merely part of the surrounding circumstances". What on earth were the justices supposed to make of that? What does it mean to speak of a cause in terms of power? The only function served by these metaphors is to elucidate *obscurum per obscurius*, if I may be allowed some Latin of my own: they restate the question in more obscure language. They do not tell you how to find the

answer. And the same, I am afraid, is true of simple appeals to common sense.

I will end with one last example: a company in insolvent liquidation sued its auditors for negligence in auditing its statutory accounts. They had failed to notice a fraud by which the stock and work in progress were overstated in five successive years. The result was that when the fraud was eventually uncovered, the company was heavily insolvent and the creditors lost a lot of money. If the auditors had not been negligent, the company would have gone into liquidation much earlier and the creditors, or a different lot of creditors, would have lost less money. So the liquidator sued the auditors for the difference. The question in the Court of Appeal was whether the negligence of the auditors had caused the additional losses. The liquidator said they had because they would not otherwise have happened. The auditors said that they were caused by the directors continuing to trade. The Court of Appeal referred to general statements about causation in a number of cases and came to the conclusion that the answer was to be found by the application of the court's common sense. This led to the conclusion that the auditors' negligence did not cause the losses but only gave the company the opportunity to incur them.

Does the appeal to common sense elucidate or obscure the court's reasoning ? The real question, as it seems to me, was the scope of the duty owed by the auditors. Did they owe a duty to future creditors of the company to protect them against the possibility that they were unwittingly trading with an insolvent company or did they not ? If they did, then their negligence caused the losses. If they did not, then it did not. The question came before the court as one of causation rather than duty of care because technically the plaintiff was the company suing by its liquidator and the company was undoubtedly owed a duty of care. But the damages which it sought to recover were claimed on behalf of creditors and so the question of substance was whether the duty of the auditors should be regarded as protecting the interests of the creditors. There are, I think, quite powerful arguments for saying that it should not; arguments which underlay the decision of the House of Lords in *Caparo*. But these are questions of remedial justice and economic policy which cannot be submerged under an appeal to common sense.

A last comment on Lord Salmon. No one is in favour of abstract metaphysical theory. Nor is anyone against common sense. I do think, however, that judges should be encouraged to give the real reasons for their decisions. References to common sense often mean that they have not really thought them through. They are looking for the answer in generalities rather than the specifics of the legal problem which raises the

question. If one does examine the specifics, it will usually be found that the answer does indeed depend upon theory; not abstract or metaphysical, but concrete, economic and political: the theory which the judge holds about the proper scope of tort or criminal liability. If this were admitted and professed, I think we would all be a step closer towards understanding what we were doing.