What caused the problem? It depends on which law you chose...

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An enquiry into causation is usually a 'real world' enquiry into what actually happened, with experts producing root cause analyses and lessons learned. The necessity and value of such enquiries is well understood by the club's membership, both to understand why problems have occurred and, crucially, to prevent their reoccurrence.

At first sight, this looks like a typical lawyer's answer to what ought to be a relatively straightforward factual enquiry. However, the law has an important role to play in such enquiries, because causation has an important legal context and that legal context varies dramatically by legal system and by decision-maker. In this article, we will compare the different approaches taken in different jurisdictions.

English law

The starting point of enquiring into causation under English law is to identify all possible causes by asking whether the loss would have occurred 'but for' the cause under consideration. It does so by applying the court's 'common sense' (that lawyers and common sense might mix can come as a surprise to many). Whilst this is a broad test, it is not so broad as to catch everything that leads chronologically to the loss: a drilling contract between a rig owner and an operator is not a cause of personal injury to a roughneck whilst drilling operations are underway.

Once all possible factual causes are identified, the law will seek to identify those that are relevant legally: not all factual causes are legal causes, and the relevant causation test depends on whether the claim in respect of the loss is a contractual claim or a (non-contractual) tort claim. The principal device of legal causation is 'remoteness', ie the question of whether the loss that has been suffered is, as a matter of law, too remote from the breach of contract or tort to be the subject of a claim.

1 In contract, if the loss in question is something that could reasonably have been within the contemplation of the parties when they negotiated the contract, then the loss will be recoverable.

2 In tort, the test is broader and requires only an enquiry into whether the damage was a reasonably foreseeable result of the breach. If so, it does not matter that the extent of the damage is unexpected or that it came about by a mechanism that could not have been predicted.

The reason for the broader test in tort is simple: contracting parties take time when contracting to consider possible eventualities and provide for them; a tortfeasor and his victim do not have that opportunity and will never have contemplated the tort. In the offshore context, this distinction is particularly important in personal injury cases. A contractor will have individuals employed and contracted by many entities on the rig or vessel at any one time, and so an injured individual might have only one contractual claim, but many tortious claims. What if that injured individual is airlifted to hospital for surgery, and the surgeons are grossly negligent in that they make the situation much worse and kill the patient, when his injuries were not originally life-threatening? As a matter of English law, the death of the patient may not have been caused by the original accident either in contract or tort: the supervening negligence, if sufficiently careless, 'breaks the chain of causation' and would be the legal cause of the patient's death.

Other jurisdictions

USA

State and Federal law in the USA have the same distinctions between contract and tort as English law.

However, in the USA, there tends to be a reluctance to allow intervening causes to break the chain of causation. Continuing the personal injury example used above, it is unlikely in the USA that the negligence of the surgeon would be sufficient to break the chain of causation and disconnect the original accident from the death of the individual. The party (or parties) originally liable for the injury would therefore be liable for the death of the individual, as medical malpractice in the USA is considered to be entirely foreseeable.

Mexico

Mexico has no specific concept of tort. Liabilities are classified as either contractual or extra-contractual, and the principles of causation and recovery are the same in both.

Only those liabilities that flow 'directly and immediately' from the breach will be recoverable. Every other intervening act will have its own consequences and the victim will have to pursue each negligent party individually. As such, Mexico sits at the opposite end of the spectrum from the USA and England in its approach to subsequent causes and breaks in the chain of causation.

China

The Chinese position is similar to that in Mexico; there is no distinction between causation in tort and contract. The test is one of reasonable foreseeability, although the horizon of foreseeability is more restrictive than that of England or the USA. In other words, and in common with Mexico, any intervening act including the victim's own failure to take steps to mitigate the loss, is likely to provide a defence to the claim. Medical malpractice for example would not be deemed to be a reasonably foreseeable consequence of the original breach and the chain of causation would be broken. As with Mexico, the victim will have to pursue each negligent party separately.

Conclusion

Causation is a basic and fundamental component of any legal claim, but the importance of the comparative considerations between types of claim and different jurisdictions can often be overlooked. When issues of causation do arise, they can cause a great deal of controversy and delay the resolution of the dispute. It is always advisable, therefore, to consider the type of claim at the outset and how it will be assessed depending on whether the claim is brought under a tortious or contractual cause of action. In relation to tort, whilst there is no opportunity to choose a favourable law and jurisdiction, knowledge of the different approaches taken to tort claims is essential in order to resolve them quickly and cost effectively.