

# Novus actus interveniens

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Often the most difficult aspects of the Aquilian Action to understand are those of causation. Causation comprises various aspects and includes what is often seen purely as a defence in the form of novus actus interveniens.

Causation ordinarily consists of two elements that determine whether or not a party can be held liable for the damages caused to another. These elements are factual causation and legal causation. A full and lengthy explanation of both elements can be found in the case of *Groenewald v Groenewald* 1998 (2) SA 1106 SCA. However, another element of causation that is often overlooked is that of novus actus interveniens.

Novus actus interveniens is Latin for a "new intervening act". In the *Law of Delict* 6th Edition, Neethling states that a novus actus interveniens is "an independent event which, after the wrongdoer's act has been concluded either caused or contributed to the consequence concerned". A novus actus breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof. A requirement for an act or omission committed after the initial wrongdoer's act to constitute a novus actus is that the secondary act was not reasonably foreseeable. If the subsequent event was reasonably foreseeable at the time of the initial wrongful act, it is not to be considered as a novus actus capable of limiting the liability to be imputed on the initial wrongdoer.

A novus actus is not confined to either factual or legal causation only, and can interrupt the causal chain at either point. In respect of factual causation, a novus actus interrupts the nexus between the wrongful act of the initial wrongdoer and the consequences of his act to such an extent that it frees him of the liability of his actions. However, when assessing novus actus in respect of legal causation, regard must

be had to the aspects of policy, fairness, reasonableness and justice in order to determine whether liability for the initial wrongful act can still be imputed to the initial wrongdoer, and whether the causal chain has been broken. A novus actus therefore disrupts the "directness" aspect of the initial act and the subjective test of legal causation cannot be fulfilled.

As a novus actus is an "independent" intervening act, it can be occasioned by anyone or anything other than the initial wrongdoer. This general category also includes the injured party him or herself, another third party or even an act of God. Therefore, an injured patient who walks on a slippery floor after having been injured thereafter occasioning further surgery will have created his own novus actus, or where a storm causes further and greater damage to a property after it has been damaged by a wrongdoer will also be viewed as a novus actus.

Novus actus is often utilised as a defence by initial wrongdoers who wish to prove that their liability is limited or non-existent and should be imputed on another party. This must be distinguished from contributory negligence. If an act or omission occurs before the incident that gives rise to the injury, then that is classified as contributory negligence, such as when a passenger in a motor vehicle fails to wear a seatbelt, he or she is contributory negligent. Whereas an independent act that occurs after the damage-causing incident is a novus actus, such as when a passenger is hospitalised after a motor vehicle collision and sustains further injuries in hospital.

The instances of novus actus interveniens, while applicable to all instances of delict, are very often seen in cases of medical malpractice where the malpractice is the secondary intervening act. A prime example of this can be found in the recent case of MEC Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176. The MEC for Health appealed the initial finding of the Eastern Cape High Court. In the court a quo, the plaintiff sued both the MEC and the Road Accident Fund (RAF) as a result of certain injuries she sustained.

The plaintiff was a passenger in a motor vehicle that was involved in a collision on 23 June 2011. As a result of the injuries sustained in the accident, the plaintiff was transferred from the Nelson Mandela Academic Hospital to the Bedford Orthopaedic Hospital (BOH) to undergo surgery. The plaintiff's expert testified to the fact that the right femur fracture was not properly repaired, as there was a large piece of bone that was not aligned in a normal position and as a result thereof, the plaintiff's knee joint was incongruent.

The staff at BOH failed to take the necessary x-rays of the plaintiff's leg, which would have indicated that

there was a mal-alignment of her right leg. As a result thereof, the leg healed with a 15 degree angulation, which she alleged was as a result of the hospital's negligence.

The MEC filed a special plea wherein it was pleaded that in terms of section 17 of the Road Accident Fund Act 56 of 1996, as amended, (RAF Act) the plaintiff was obliged to sue the RAF exclusively as her injuries were caused by or arose as a result of the accident. The court a quo dismissed the special plea as both the tests for factual and legal causation were applied and found that the liability for the sequelae as suffered by the plaintiff could not be attributed to the RAF.

When hearing the argument in respect of the special plea, the plaintiff's medico-legal expert testified before the court. His evidence was unchallenged and informed the court that if the plaintiff had been properly treated at BOH, the sequelae that she experienced would not have occurred at all. This then led the court to apply the necessary test to determine whether this substandard medical care afforded to the plaintiff was a novus actus.

The court assessed factual causation and found that despite the fact that the plaintiff would not have sustained any injuries but for the collision, if the plaintiff had received reasonable medical treatment (as can be expect from a hospital) the sequelae as experienced by the plaintiff as a result of the collision only, would have been much less severe. The plaintiff would not have suffered from the current sequelae at all had she been provided with reasonable medical care. Furthermore, it was held that the plaintiff would experience great difficulty in imputing legal causation on the RAF having regard to the second intervening act of the substandard medical care received by the plaintiff. The court indicated that a driver and/or the RAF would have reasonably expected that a person involved in a motor vehicle collision would have received reasonable care from the medical institution to which he or she was admitted. It was not foreseeable that the plaintiff in this instance would have received substandard/negligent care.

The court found that the substandard medical care did constitute a novus actus interveniens and that the RAF could not be held liable for the plaintiff's sequelae even though the injuries were initially caused by the negligence of the RAF's insured driver. The court commented that should the MEC's special plea succeed, that the court would deny the plaintiff of her common law right to sue the MEC as a result of his staff's negligence and would limit the damages she would be able to claim from the RAF to those that would result due to the less-severe sequelae of the injuries sustained during the collision.

In the Supreme Court of Appeal (SCA), the MEC attempted to mend the broken chain of causation

between the RAF and the plaintiff. It was argued that the RAF was liable, in terms of section 17(1) of the RAF Act, to compensate the plaintiff for all of her damages as a result of her injuries as these injuries were caused by the driving of the motor vehicle in question. The MEC's legal representatives contended that there was a sufficiently close and real link between the driving of the vehicle and the harm the plaintiff suffered as a result of her treatment at BOH, in order to conclude that harm resulted from the driving of the vehicle. They contended that but for the collision, the plaintiff would not have required any hospitalisation and therefore the further sequelae she sustained while in BOH's care could be attributed to the RAF.

The SCA had scathing words for the MEC's legal representatives and indicated that they had ignored both the factual evidence at hand and the principles of causation. Although section 17(1) of the RAF Act imparts an obligation on the RAF to compensate those injured as a result of a motor vehicle collision, it does not encompass all the damages that the injured party sustains, but merely those that are attributable to the driving of the vehicle.

The SCA also had regard to causation, specifically factual (the sine qua non test) and legal causation (sufficiently closely or directly linked). It was held that although the plaintiff would not have been hospitalised but for the collision, the negligent treatment of the plaintiff by the staff of BOH had significantly contributed to the consequences of the injuries sustained by the plaintiff and therefore had broken the causal chain between the collision and the severity of the injuries sustained by the plaintiff. The SCA dismissed the appeal on the basis that the special plea was bad and the appeal had no prospect of success.

As can be seen from the Mkhitha matter, there is often much confusion and misunderstanding regarding where a novus actus actually breaks the chain of causation. As indicated by the SCA, but for the accident the plaintiff would not have been hospitalised at all. However, when entering the hospital, the duty of care shifts. The hospital itself then had the duty of care to provide the plaintiff with reasonable medical care. It was unforeseeable that the hospital would not have provided the plaintiff with reasonable medical care, that the medical staff would have been negligent when providing the plaintiff with care and would breach their duty of care towards the plaintiff. The causal chain cannot continue infinitely. The RAF cannot be held liable for an unforeseeable occurrence as a result of the negligence of another. Therefore, even though factually speaking the plaintiff would not have been hospitalised had it not been for the collision in question, when having regard to legal causation, the negligence of the

hospital staff severed the chain of causation as the sequelae suffered by the plaintiff is no longer sufficiently closely and directly linked to the motor vehicle collision for liability to be imputed on the RAF. A suspected novus actus must be closely examined and dissected to determine whether it does in fact break the chain of causation.

While the Mkhitha matter is the most recent decision in terms of novus actus interveniens, it is certainly not the only one. There are numerous reported cases that deal with this aspect of causation, specifically *Mafesa v Parity Versekeringsmaatskappy Bpk*, *S v Mokgethi* and *Road Accident Fund v Russell*. All three are well-known cases as the issue of novus actus interveniens is not often raised. However, the interesting aspect of the Mkhitha matter is that the court found that the novus actus interveniens of the substandard medical care of the BOH was not only used to break the causal chain between the RAF and the plaintiff, but was also used as a cause of action for the plaintiff against the MEC. While novus actus interveniens is often used as a defence (as it would have been raised by the RAF had it not been utilised by the plaintiff), it can be seen as a second cause of action which is interlinked to the first. Novus actus is a diverse tool in respect of delictual claims and should always be included as a part of one's assessment of a claim.

When assessing claims in respect of delictual damages, it is important to ensure that there have been no intervening acts that could have severed the causal chain in respect of liability. Often this is an aspect that is overlooked or only established at a much later stage during litigation. Therefore, it is essential that proper investigations are done in order to ensure that all the facts are before you when assessing a matter. A novus actus interveniens has the effect of limiting a party's liability and therefore may be a useful tool when assessing damages claims.