

# CAUSATION, CONTRIBUTION AND CHANCE

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## Causation – the basic “but for” test

- Breach of duty is irrelevant if no harm caused.
- Burden of proof is on the Claimant.
- X would probably not have happened “but for” Y.



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## “But for” : an exclusionary test

- The search for the “effective cause”.
- First step is to eliminate irrelevant causes.
- If damage would have occurred in any event, not a “but for cause”.



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### ***Barnett v Chelsea & Kensington***

- Claimant vomiting after drinking tea. Sent home from hospital by Dr who did not get out of bed. Died some hours later. Arsenic poisoning.
- Clear breach of duty. Causation?
- No causation – would have died anyway.



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### **Missed diagnosis – “but for”**

- *Hotson v East Berkshire* [1987]: Negligence meant Claimant lost the 25% chance of making a full recovery.
- Does his claim succeed?
- No: the law treats it as a certainty that he was not going to make a full recovery.



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### ***Gregg v Scott***

- Negligent misdiagnosis of a lump as benign.
- 12 month delay in diagnosis. Prospects of 5 years survival had reduced from 42% to 25%. Valid claim?
- No causation: on the balance of probabilities, the Claimant would not have survived 5 years in any event.



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### Causation in complex cases

- Scientific uncertainty as to cause.
- Competing negligent/non-negligent causes.
- Relaxation of the “but for” text.



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### Bonnington Castings v Wardlaw

- Pneumoconiosis due to silica dust.
- Main source of the dust was innocent; minority was “guilty”.
- Inference drawn that guilty dust was contributory to the damage: liable for full extent of loss.



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### 2 important features of Bonnington

- HL drew an inference that there was a connection between the guilty dust and the disease in absence of hard scientific evidence.
- Express departure from “but for”: material contribution to damage was sufficient.



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### *Wilsher v Essex AHA*

- 5 competing causes of the infant's blindness.
- Only 1 of the 5 was negligent.
- Impossible to say which was the cause.
- Causation not established.



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### *Effect of Wilsher*

- Where breach merely adds a new risk factor to existing risk factors, not legitimate to infer causation.
- BUT may be causation where breach increases an existing risk factor (material contribution to damage).



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### *Bailey v MOD: the arguments*

- Aspiration due to weakened state.
- 2 causes of weakened state: pancreatitis (non-negligent) and negligent care.
- Defendant argued *Wilsher* negligence had merely added another risk factor.



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### Bailey v MOD: the outcome

- Held that there were 2 contributory causes to the weakness, not merely 2 risk factors.
- Since the breach had made a material contribution to the weakness, causation established.
- Application of *Bonnington*.



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### Bailey v MOD: the consequences

- No change in the law.
- Re-statement of *Bonnington*.
- Causation is established where there is a material contribution to the harm.



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### Application of Bailey

- *Ayesha Canning Kishver v Sandwell & West Birmingham Hospitals NHS Trust* [2008] EWHC 2384
- Sir Christopher Holland



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### Ayesha Canning - Kishver

- Evidence did not establish brain injury arose from prematurity at birth – possible not probable.
- Residual possible innocent causes could not be ruled out; so militate against C’s success using “but for test”.
- B of Ps cardiac collapse contributed to the cerebral atrophy.



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### Relaxation of Causation Rules

- *Fairchild v. Glenhaven Funeral Services* [2002] UKHL 22.
- *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10.



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### Fairchild / S 3 Compensation Act 2006

- Multiple tortfeasors expose C to asbestos.
- C develops mesothelioma as result of exposure.
- Science does not allow C to prove which exposure caused injury.
- Exceptional rule applies:
- Liability established on basis of *materially increased risk of injury*.
- Ds jointly and severally liable for injury.



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### Sienkiewicz : D's arguments

- Single exposure cases do not fall within Fairchild exception.
- C obliged to prove causation on balance of probabilities.
- C fails – D did not double the environmental risk of injury.
- Alternatively, D's exposure did not *materially* increase the risk of injury (de minimus).



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### Sienkiewicz : Decision

- Fairchild applies to single exposure cases.
- Rock of uncertainty remains.
- Beware:
  - Misapplication of “double the risk” arguments.
  - False air of authority in epidemiological arguments.



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### Lord Brown's vision of the Future

*...the law tampers with the “but for test” at its peril ... Claimants should henceforth expect little flexibility from the courts in their approach to causation*

Lord Brown JSC, [186]



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## Sienkiewicz's Future



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## Apportionment

- If there is adequate evidence, the Court will apportion between 2 tortfeasors who have made a material contribution to damage.
- *Holby v Brigham Cowan (Hull) Ltd.*
- In *Bonnington*, D had not raised apportionment and did not have the evidence.



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