

Eggshell skulls, multi-factorial cases and causation

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What is it?

“An unpleasant sensory and emotional experience associated with, or **resembling that associated with, actual or potential** tissue damage,”

(IASP 2020)

Chronic pain in litigation: why all the fuss?

1. (Mostly) no objective test.
2. Disproportionate to cause.
3. "Normal" people don't get it: *"something else going on"*.
4. Scepticism about malingering: mad or bad?

Causation: back to “but for...” basics...

1. The “but for...” test is necessary but not sufficient for legal causation.
2. Its purpose is to filter out irrelevant factors: if C would still have suffered injury but for D’s tort, then there is no causation (save in *Fairchild* cases).
3. If a cause passes the “but for...” test, it then must meet other legal tests: remoteness etc

Material contribution: *Bailey v M.O.D*

Where there are multiple causes of an injury:

1. If the “but for...” test is met, causation is proved.
2. If the “but for...” test is not met but the tortious cause materially contributed to the injury, causation is proved.

Material contribution: divisible v indivisible injury

- A “divisible” condition is one where the severity depends upon extent of injurious cause (e.g. pneumoconiosis).
- An “indivisible” condition is one where severity does not depend upon the extent of injurious cause (e.g. lung cancer).
- *“a class of case where there is simply no rational basis for an objective apportionment of causative responsibility for the injury”*

Material contribution and indivisible injury

If the injury is indivisible, material contribution is unavailable because one cannot say tortious cause contributed to the damage but

“This is evidently a legal issue which is ripe for authoritative review”

Soole J in *Thorley v Sandwell & West Birmingham NHS Trust* [2021] EWHC2604 (QB)

Are pain/psychiatric injuries divisible?

Psychiatric injury:

- *Dickins v O2* (indivisible).
- *BAE Systems v Konczak; Hatton v Sutherland; Rahman v Aearose* (divisible)

What about chronic pain states?

Question of medicine not law (Irwin LJ in *BAE Systems*).

Drawing the threads together

Causation is proved if:

1. injury would not happen but for the tortious cause;
2. medical experts can apportion responsibility between mixed causes on a rational/scientific basis.

But not if:

3. 2 is not possible....
4. Unless appeal courts revisit.

Past events: BofPs or loss of a chance

If accident not happened, would one of the other causes have triggered C's condition?

2 principles:

1. In deciding what actually happened in the past, test is BofPs.
2. In assessing damages, the court can take account of a chance that something might have happened.

Past chances: *Malvicini*

Malvicini v Ealing Primary Care Trust [2014] EWHC 378 (QB)
Robert Francis QC

- 10% discount on whole claim to reflect vulnerability

Proof of causation not aetiology

Only need to prove causation, not aetiology. 2 different outcomes:

Thorp v Sharp [2007] EWCA Civ 1433

C subconsciously exaggerating so no inference of causation of ongoing symptoms.

McMylor v Firth Rixson plc [2002] EWCA Civ 1863

Orthopods' inability to explain continuing pain no bar to recovery

Eggshells and vulnerability

Law is clear: vulnerability not relevant unless would have caused symptoms.

But a warning in pain cases (Irwin LJ in *BAE*):

“...it should be routine for the experts to assess the level of risk of crossing the borderland between non-pathology and pathology through some other stimulus than the tortious act or omission. It will be recognised that exercise is often difficult and uncertain, but it will often be possible to give such advice within reasonable parameters of time and to the level of probability. Such an exercise is necessary in order to address proposition 16 in Hatton.”

Questions?

