

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.



“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”.



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.



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.



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.



Causation in complex cases

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



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.



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.



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.



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).



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.



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*.



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.



Application of Bailey

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



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.



Relaxation of Causation Rules

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



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.



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).



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.



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]



Sienkiewicz's Future



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.


