

CAUSATION & RISK

**Upping the risk: when does it
count?**

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Causation: a question of policy

- Causation is not just a matter of “fact” or philosophy: it’s a matter of policy
- The result is.....

Causation: a matter of law

“The question of fact is whether the causal requirements which the law lays down *for that particular liability* have been satisfied. But those requirements exist by virtue of rules of law....The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations represent legal differences, driven by the recognition that the just solution to different kinds of case may require different causal requirement rules.”

Lord Bingham, *Fairchild* 52

The principle behind the law of damages

“That we should take responsibility for the consequences of our acts is a well-established principle; that we should pay for acts not our own is an evil to be avoided as far as possible and not, on ordinary concepts, to be enshrined in a legal system.”

Principle (cont)

- Basic principle in tort is:
- Had the Defendant not committed the tort, would the Claimant be better off (financially, or – in the clinical negligence and PI contexts - physically and mentally)?
- This principle remains – not broadly undermined by any of the “exceptions”

The basic rule: but for....

- That in the absence of D's negligence C would probably not have suffered the injury
- Wilsher: 6 possibly causes of blindness, only one (D's) tortious
- Barnett – delay in treating arsenical poisoning: proof of fault by doctor not sufficient to shift burden to D.

Exceptions? Material increase in risk

- McGhee: eliding increase of risk and increase of contribution.

McGhee (cont)

“...the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which ordinary man’s mind works in the every-day affairs of life...I can see no substantial difference between saying that [it] materially increased the risk of injury and saying that...[it] made a material contribution to his injury”. Lord Reid

Wilsher (again)

“The conclusion I draw is that McGhee lays down no new principle of law whatever. On the contrary, it confirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach...the majority concluded that it was a legitimate inference of fact that the Defender’s negligence had materially contributed to the pursuer’s injury”: Lord Bridge.

Fairchild: widening exception to prevent injustice

- Lord Bingham: “The crucial issue on appeal is whether, in the special circumstances of such a case, principle, authority or policy requires or justifies a modified approach to proof of causation.”
- Critical features:
- Ds all in breach of duty
- Breaches of duty all same in nature (i.e. Claimant exposed to same agent)

Fairchild (cont)

“The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another. Are these such cases? A and B owed C a duty to protect against a risk of a particular and very serious kind. They failed to perform that duty. *As a result*, that risk eventuated and C suffered the very harm against which it was the duty of A and B to protect him.”

Fairchild (cont)

- Lord Bingham expressly found that McGhee did alter orthodox principles of causation to meet the particular case (cf Bridge in Wilsher)
- Fairchild is an extension of McGhee
- “It would be unrealistic to suppose that the principle here affirmed will not be subject of incremental and analogical development” (Lord Bingham)

Fairchild (cont)

It is a critical feature of the case that C cannot prove (because of the current limits of human science) which exposure caused his disease (Lord Bingham, paragraph 2; Lord Hoffman paragraph 61).

Sienkiewicz

- A radical departure from the principles of tortious liability?
- Only one D
- Unlike Fairchild, C could not prove that disease caused by tortious exposure was cause of injury
- Evidence suggested that occupational exposure increased risk by 18%

Sienkiewicz (cont)

- Any material increase in risk is sufficient in meso cases
- The “rock of uncertainty” means that on current medical evidence epidemiology is unlikely to be helpful
- Even if it could be shown that (say) 4 Defendants each caused C a 25% risk of developing meso, Fairchild would still apply

Sienkiewicz

- If medical science develops so that C could show which individual fibre triggered meso, then Fairchild would go
- Note: in this case (unlike Fairchild) the “single fibre trigger theory” was called into doubt.

Heneghan

- Lung cancer case – 6 Ds
- 6 Ds responsible for 35% of total lifetime asbestos exposure: liability admitted
- Cause of cancer admitted as asbestos exposure
- 1st instance, C awarded 35% of damages on Fairchild principles: C appealed
- In Court of Appeal, McGhee applied

Heneghan (cont)

- C argued that case was a material contribution to injury
- Court of appeal emphasized that medical science did not support this, and case was one of material contribution to risk, thus Fairchild applied

Heneghan (cont)

- i. All Ds concede breach of duty (or found liable)
- ii. All Ds increased risk of disease
- iii. All exposed Ds to the same causative agent
- iv. Medical science cannot determine which (if any) D was responsible for the exposure which initiated the cancer.

Current state of law

- Fairchild is open to extension (expressly so), so not confined to meso cases
- Fairchild is a policy decision (relying on the – presumed – reasoning in McGhee)
- Material contribution to risk only arises where:
 - a) There is an identifiable agent for the injury or
 - b) Another agent acting in the same way;
 - c) There is one tortfeasor, with a mixture of tortious and benign exposures to the agent

Cont

C must still prove that, on the balance of probabilities, his cumulative exposure to the agent (whether or not tortious, and whether or not from this particular D) caused the injury – i.e. C must prove that the agent of which he complains caused the injury, on the balance of probability: it is only once s/he establishes this, that the exceptions may apply when establishing the liability of a particular D

Where does this leave clinical negligence claims

- Gregg and Scott was post-Fairchild: why did it fail?
- Fairchild was cited as an exception: Lord Hoffmann stated that it proved the general rule
- Unlike Fairchild, there was an “innocent” potential cause for the lack of cure (i.e. the progress of the disease at the time of the negligent consultation) as well as the negligent one (the delay)

- Is there any rationale?
- What, if any, is the difference in principle between Gregg v Scott and McGhee?