CAUSATION – MATERIAL CONTRIBUTION

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SUMMARY OF CURRENT PRINCIPLES:

1. C must prove D is a proximate cause of his injury (Wilsher)
2. D bears 100% where joint or concurrent tort (subject to LR(CN)A1945 and then CL(C)A 1978)
3. Proof means proving on balance of probability (>50% possibility) that D is a proximate cause – this converts to certainty with no deduction for "doubt" (Hotson)
4. If C cannot prove D caused his injury C may prove instead that D materially contributed to his injury (Bonnington). Can apply to divisible (Bonnington) and indivisible (Williams) injuries
5. If C proves material contribution under Bonnington each D bears 100% (subject to vicissitudes then LR(CN)A 1945 and then CL(C)A 1978))
6. If the court can apportion it will (Rahman) but it must have a rational basis to do so;
7. If there is no rational basis to apportion then the injury is "indivisible" and each D bears 100% (subject to vicissitudes then LR(CN)A1945 and then CL(C)A 1978)
8. If science cannot prove material contribution:
   (a) If a mesothelioma case do Fairchild criteria apply? If so each D bears 100% (LR(CN)A1945 and then CL(C)A 1978)
      - All D's in breach
      - Individual exposures each amounts to material contribution to risk (usually will)
      - Other causes excluded (=single process)
   (b) If a cancer (or not meso?) case and science does not permit findings as to respective causative contribution of competing causes the court may look to respective contribution to risk of competing causes and apportion each D's share (there will be no scope for LR(CN)A1945 and then CL(C)A 1978) (Jones))
      - All D's in breach
      - Combined exposure (Henegan) amounts to material contribution
      - Other causes excluded or same process in play (Williams)
   (c) (In non mesothelioma cases) Material contribution usually proved by proving agent doubled the risk of injury (Novartis) but caution required with epidemiology (Sienkiewicz / Williams).
9. Contributory negligence – risk based apportionment does not apply – breach of statutory duty burden, blameworthiness, synergistic effects auger against such an approach? Froom v Butcher still reigns (Shortell/Blackmore).

"DOUBLING THE RISK" CASES

Novartis Grimsby v Cookson [2007] EWCA Civ 1216

Bladder cancer caused by exposure to carcinogens

The evidence of Mr Barnard which the Recorder accepted was that occupational exposure accounted for 70% to 75% of the total. Put in terms of risk, the occupational exposure had more than doubled the risk due to smoking....
The natural inference to draw from the finding of fact that the occupational exposure was 70% of the total is that, if it had not been for the occupational exposure, the respondent would not have developed bladder cancer. In terms of risk, if occupational exposure more than doubles the risk due to smoking, it must, as a matter of logic, be probable that the disease was caused by the former.

Ministry Of Defence v Ab & Ors (2010) [2010] EWCA Civ 1317

Atomic veterans litigation – accepted that doubling of risk (from environmental factors) correct test to apply but that C had no prospect of proving so and that *Fairchild* would not be extended to cover the situation.

Sienkiewicz v Greif (UK) Limited [2011] UKSC 10

Mesothelioma: D's attempt to undermine use of Fairchaild by imposition of doubling the risk test

Liability for mesothelioma falls on anyone who has materially increased the risk of the victim contracting the disease. What constitutes a material increase of risk? The parties were, I think, agreed that the insertion of the word "material" is intended to exclude an increase of risk that is so insignificant that the court will properly disregard it on the de minimis principle. Mr Stuart-Smith submitted that there should be a test of what is de minimis, or immaterial, which can be applied in all cases. Exposure should be held immaterial if it did not at least double the environmental exposure to which the victim was subject. It does not seem to me that there is any justification for adopting the "doubles the risk" test as the benchmark of what constitutes a material increase of risk. Indeed, if one were to accept Mr Stuart-Smith's argument that the "doubles the risk" test establishes causation, his de minimis argument would amount to saying that no exposure is material forthe purpose of the Fairchild/Barker test unless on balance of probability it was causative of the mesothelioma. This cannot be right.

I doubt whether it is ever possible to define, in quantitative terms, what for the purposes of the application of any principle of law, is de minimis. This must be a question for the judge on the facts of the particular case. In the case of mesothelioma, a stage must be reached at which, even allowing for the possibility that exposure to asbestos can have a cumulative effect, a particular exposure is too insignificant to be taken into account, having regard to the overall exposure that has taken place. The question is whether that is the position in this case.

Jones and Others v Secretary Of State For Energy and Climate Change [2012] EWHC 2936

Phurnacite litigation – lung/skin cancer – smoking – not possible to draw the line on test of materiality – only evidence related to risk – Bonnington rejected – doubling of risk accepted

Dr Rudd suggested that it would be necessary for the court to examine the risk factors and to make a judgment as to where the line of materiality should be drawn, according to the court's view as to whether it would be reasonable to compensate an individual for a specific level of increased risk. For example, I would have to decide whether it was reasonable to find that, where there had been occupational exposure to carcinogens which gave rise to, say, a 15% increase in the risk of developing lung cancer, the occupational carcinogens had made a 'material contribution' to the claimant's cancer. Whereas a lesser risk would not Such an exercise would involve an arbitrary decision on my part as to where to draw the line. I cannot envisage on what basis I could decide where to make the distinction between what is and is not 'material', other than by reference to the test propounded by Lord Reid, which is in any event binding on me. Nor do I know how I could decide at what level of risk it would be 'reasonable'

to compensate a claimant. It does not seem to me that it would be permissible for me to carry out such an exercise.

All these considerations lead me to the conclusion that it cannot be right to approach the cases of lung cancer – nor indeed those of bladder cancer – by applying the Bonnington principle. Moreover, to adopt the claimants' arguments would, as the defendants have pointed out, have potentially far-reaching effects. It would mean that, in any case of cancer where a claimant could establish tortious exposure to a carcinogen that was 'material' (according to whatever measure of materiality the court chose to adopt) the claimant would succeed in establishing causation and would be entitled to 100% damages. Whilst I have some sympathy with the predicament of claimants who may have difficulty in establishing a link between occupational exposure to carcinogens and the development of their cancers, I cannot accept that such a result would be fair to potential defendants who would be required to pay full damages in many cases

In view of my conclusions on the material contribution argument, I must look for another way of approaching the case. The obvious alternative – and that urged on me by the defendants – is the application of the 'doubling of risk' test. It is plain that the majority of members of the Supreme Court in Sienkiewicz considered that the test can be used in appropriate circumstances although there was obvious concern about over-reliance on epidemiological evidence alone.

All these factors encourage me in the belief that the 'doubling of risk' test is an appropriate approach in the circumstances of this litigation.

Williams v The Bermuda Hospitals Board[2016] UKPC 4

Clinical negligence – delay – causation – Court advises caution in use of risk based analysis

Finally, reference was made during the argument to the "doubling of risk" test which has sometimes been used or advocated as a tool used in deciding questions of causation. The Board would counsel caution in its use. As Baroness Hale of Richmond said in Sienkiewicz at para 170, evaluation of risk can be important in making choices about future action. This is particularly so in the medical field, where a practitioner will owe a duty to the patient to see that the patient is properly informed about the potential risks of different forms of treatment (or non-treatment). Use of such evidence, for example epidemiological evidence, to determine questions of past fact is rather different. That is not to deny that it may sometimes be very helpful. If it is a known fact that a particular type of act (or omission) is likely to have a particular effect, proof that the defendant was responsible for such an act (or omission) and that the claimant had what is the usual effect will be powerful evidence from which to infer causation, without necessarily requiring a detailed scientific explanation for the link. But inferring causation from proof of heightened risk is never an exercise to apply mechanistically. A doubled tiny risk will still be very small.