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King's Bench Walk

Causation: The Two Cultures

Speakers:

Michael Rawlinson QC
rawlinson@12kbw.co.uk

Charley Turton
turton@12kbw.co.uk

Duke of Buccleuch v Cowan

(1866) 5 M 214

"The charge [i.e. to the Jury at first instance] presupposes that there may be a certain degree of pollution or a ….concurrent pollution from two sources – as to which it may be true, though it may not be proved, that each of them would have amounted to a nuisance, but it is plainly proved that the two together amount to a nuisance and that each of them materially contributes to the joint result.

Duke of Buccleuch v Cowan

(1866) 5 M 214

"….If it be necessary to prove that the pollution by each mill would by itself amount to a nuisance, you get in the circumstances in which these parties stand, into a question of the greatest possible difficulty, and more of speculation and of conjecture than anything else, because you would be driven to mere matter of opinion and nothing else. You are to conjecture what would have been the effect in the case of the mills having acted by themselves and if you cannot prove that each would have amounted to a nuisance by itself, however near it might come to it- though nine-tenths of a nuisance, or 99-100ths, were made out, still if it wants a hairbreadth, and if you do not prove it to the full point, you fail in each case against all parties…

Duke of Buccleuch v Cowan

(1866) 5 M 214

"…Now, it appears to me that that is totally out of the question. I humbly think it was well laid down that it was not necessary to prove that conjectural fact, provided this was proved, that in the existing state of the concurrent operations of these mills, nuisance was the result and that each of them contributed a material part – which, whether proved to be a nuisance in itself or not, is a material contribution to produce a nuisance."

AB v MOD

[2010] EWCA Civ 1317

"Similarly in ***Bailey***, the tort (a failure of medical care) increased the claimant's physical weakness. She would have been quite weak in any event as the result of a condition she had developed naturally. No one could say how great a contribution each had made to the overall weakness save that each was material. It was the overall weakness which led to the claimant's failure to protect her airway when she vomited with the result that she inhaled her vomit and suffered a cardiac arrest and brain damage"

Jane Stapleton

(2016) 132 LQR July Causes and Contributions

"Assuming this was the aetiology involved, that is a cumulative one leading to a final divisible injury, the causal analysis should have been relatively straightforward: the defendant's breach was a but-for cause of some part of the injuries, albeit perhaps an indeterminate part. Though the language of 'material contribution to damage' is sometimes used here, this is unhelpful in so far as it may give the impression that a departure from the but-for test is being recognised in this type of case…

Jane Stapleton

(2016) 132 LQR July Causes and Contributions

"…Since the claimant had only established that the breach was a 'but-for' cause of a part of the total injury, the central question should be one of apportionment. In the modern era courts appreciate that, since divisible injuries are the sum of exacerbations from each contribution, a contributor should only be held to be a cause of that effect, a notional part of the final injury, not jointly and severally liable for the entire final condition. Courts therefore seek to apply an approach if necessary a rough and ready approach, to apportioning injury…

Jane Stapleton

(2016) 132 LQR July Causes and Contributions

"In short, where the final condition is divisible there is no problem with establishing that a contribution is a necessary, that is but-for cause of part of that condition. The only problem here is forensic and has to do with the quantum of damages…"

Williams v Bermuda Hospitals

[2016] AC 888

"In Bonnington's case there was no suggestion that the pneumoconiosis was 'divisible' meaning that the severity of the disease depended on the quantity of dust inhaled".

Barker v Corus

[2006] UKHL 20

"..it is…hard – and settled law – that a defendant is held liable in solidum even though all that can be shown is that he made a material, say 5%, contribution to the Claimant's indivisible injury. That is a form of rough justice which the law has hitherto not sought to smooth, preferring instead, as a matter of policy, to place the risk of the insolvency of a wrongdoer or his insurer on the other wrongdoer and their insurers"

Sienkiewicz v Greif (UK) Ltd

[2011] UKSC 10

"For reasons that I have already explained, I see no scope for the application of the "doubles the risk" test in cases where two agents have operated cumulatively and simultaneously in causing the onset of a disease. In such a case the rule in Bonnington applies. Where the disease is indivisible, such as lung cancer, a defendant who has tortiously contributed to the cause of the disease will be liable in full. Where the disease is divisible, such as asbestosis, the tortfeasor will be liable in respect of the share of the disease for which he is responsible"

Professor Sarah Green

(Causation in Negligence, Hart Publishing, 2015, Chapter 5, p97)

"In short, where the final condition is divisible there is no problem with establishing that a contribution is a necessary, that is but-for cause of part of that condition. The only problem here is forensic and has to do with the quantum of damages…

Sido John v Central Manchester

[2016] EWHC 407

"98. This brings me, then, to Mr Kennedy's submission that in a case such as the present the court should engage in an apportionment exercise of the sort carried out in the Holtby case. I cannot accept that this can be right. First, I am in some doubt how this argument can work in circumstances where, as Mr Kennedy accepted during closing submissions, if the 'material contribution' test has been satisfied, then causation is made out. It seems to me that, if that is the position, then if the evidence is such that it is not possible to attribute particular damage to a specific cause, the claimant must be entitled to recover in respect of the entirety of his or her loss.

99. Secondly and in any event, I am quite clear that apportionment is not appropriate where it is not merely difficult but is impossible to allot particular loss to a particular cause"

Thorley v Sandwell & West Birmingham

[2021] EWHC 2604 (QB)

147. “On the face of it, the Court of Appeal decision in AB is binding authority that the test of material contribution **has no application to a case where (as here) there is indivisible injury and one tortfeasor**. However, given the basis on which the appeal in AB was argued and decided, I do not read the decision of the Supreme Court as an implicit endorsement of the proposition.

148. On the basis of the cited passage, Heneghan is to the same effect; albeit a later passage might suggest that the distinction between divisible and indivisible injury was being viewed through the lens of the comparative difficulty of proof of material contribution. Thus the Bonnington test ‘… is to be applied where the court is satisfied on scientific evidence that the **exposure for which the defendant is responsible has in fact contributed to the injury**. This is readily demonstrated in the case of divisible injuries (such as silicosis and pneumoconiosis) whose **severity is proportionate to the amount of exposure** to the causative agent’: [46].

Thorley v Sandwell & West Birmingham

[2021] EWHC 2604 (QB)

149. By contrast, the observations of the Privy Council in Williams provide **support for the rival contention**; in particular through the endorsement of Professor Green's statement of 'trite negligence law'; the treatment of Bonnington as a case where material contribution by a single tortfeasor was established on the basis (at least, as presented to the court) that **the injury of pneumoconiosis was indivisible**; and the footnote citation of Lord Phillips of Worth Matravers in Sienkiewicz. However whilst evidently highly persuasive, they are not strictly binding even if part of the ratio.

150. As to the very detailed discussion of the law of material contribution in John (Picken J), I do not read it as dealing directly with this particular issue.

151. This is evidently **a legal issue which is ripe for authoritative review**, at least in a case where it may affect the result. On the basis of strict precedent, I conclude that the reasoning of the Court of Appeal in AB and Heneghan must be followed. Accordingly **the claim of material contribution must fail on the basis that this modified test of causation does not apply when there is a single tortfeasor and an indivisible injury**."