

Causation in Clinical Negligence

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Three Degrees of Causation

- ▶ (1) 'But for': winner takes all
- ▶ (2) 'But for': winner proves some causative damage
- ▶ (3) Material Contribution
- ▶ We'll look at (1) and (2) and their limitations, then consider issues of proof before moving onto (3).

Introduction to 'But For' Causation

- ▶ Where the harm is indivisible, a party will be liable for the whole of it, if they caused it, applying "but for" principles.
- ▶ Note that if two wrongdoers have both together caused an indivisible injury, in respect of which it is impossible to apportion liability between them, then each is co-liaible for the whole of the injury suffered. See *Rahman v Arearose Limited* [2001] QB 351.
- ▶ Where the harm is divisible, a party will be liable if their culpable conduct made a contribution to the harm, to the extent of that contribution.

So What Do We Mean by 'But For' Causation?

- ▶ "But for the actions of the Defendant (D), would the harm to the Claimant (C) have occurred?"
- ▶ If the harm to C would have occurred regardless of D's breach of duty, D is not liable.
- ▶ So in *Barnett v Chelsea & Kensington Hospital* [1968] 2 WLR 422, D sent a seriously ill man home from A&E, the doctor not even seeing him. He later died of arsenic poisoning. However, C would have died even if he had been examined and admitted for treatment by way of antidote. Thus an obvious breach, but no 'but for' causation.

Loss of Chance? ('But For')(1)

- ▶ Another example is *Hotson v East Berkshire HA* [1987] AC 750.
- ▶ C fell out of a tree. D negligently failed to diagnose the resultant hip fracture, sending him home.
- ▶ C returned to hospital five days later and was treated but an avascular necrosis developed, causing life-changing injury.
- ▶ There was a 75% chance that with initially non-negligent treatment, the avascular necrosis would have developed, and a 25% chance of a full recovery. The trial judge awarded 25% of the value of the claim based on avascular necrosis.
- ▶ The House of Lords demurred: the 75% probability that the avascular necrosis would have occurred in any event meant that C had failed to establish causation on the balance of probabilities.

Loss of a Chance? ('But For') (2)

- ▶ But isn't loss of a chance an established legal concept?
- ▶ Loss of a chance in contract might be recoverable – see *Chaplin v Hicks [1911] 2 KB 786*. However that was partially rowed back from in *Allied Maples Group Ltd v Simmons & Simmons [1995] 1WLR 1602*.
- ▶ See also the pure economic loss claims resulting from negligence – *Kitchen v Royal Airforce Association [1958] 2 All ER 241*.
- ▶ The House of Lords had another go at loss of a chance in *Gregg v Scott [2005] UKHL 2*.
 - ▶ D negligently misdiagnosed C's malignant cancer, categorising a tissue sample as benign fatty tissue. Treatment was thus delayed, and chances of 10 year survival reduced from 42% to 25%.
 - ▶ The House of Lords, by a majority, upheld Hotson. C had failed to prove that on the balance of probabilities D's negligence had resulted in the loss of chance of a recovery because his prospects for survival were, at 42%, always less than 50%. Loss of a chance was not applicable to clinical negligence claims.

Loss of a Chance? ('But For') (3)

- ▶ Note that in *Gregg v Scott* the Claimant was still alive.
- ▶ *Gregg v Scott* has an arbitrary outcome: a patient with a 51% chance of recovery reduced to 49% by clinical negligence will be awarded damages, a patient with a 49% chance of recovery reduced to 0% by clinical negligence will not be awarded damages.
- ▶ The timing may have been adverse – Lord Hoffman observed that he was not in favour of any further exceptions to established rules of causation following *Chester v Afshar* [2004] UKHL 41 and *Fairchild v Glenhaven Funeral Services Limited* [2002] UKHL 22.

Loss of a Chance ('But For'): where injury proven (1)

- ▶ Note however that once injury caused by clinical negligence is established then loss of a chance has a role to play in establishing the level of damages.
- ▶ In *XYZ v Portsmouth Hospitals NHS Trust [2011] EWHC 243* D removed C's right kidney with a view to it being donated to C's father. The "operation was performed negligently, and to a degree recklessly". The kidney was successfully transplanted but C suffered irreversible failure of the left kidney. He received a kidney from his sister, but there were significant risks ahead, and serious physical consequences including nerve damage.
- ▶ C was 39 at trial. He would have launched a business, there were multiple potential outcomes but for the breach of duty.

Loss of a Chance ('But For'): where injury proven (2)

- ▶ Spencer J noted *Anderson v Davis* [1992] PIQR Q91 at Q98: "Where the question for the judge is one of past facts, then mere balance of probability wins the day. Where the question is one of what might have been the situation in a hypothetical state of facts, then, to the extent that a chance of the event necessary to an award of damages falls significantly below 100%, the award should be discounted."
- ▶ We are familiar with contingencies from the Ogden Tables. XYZ was in a different league.
- ▶ The judge calculated out the effects of the potential 'but for' futures and assigned percentages to each.

But For Causation – Some Damage (1)

- ▶ It may be possible to obtain a finding on the ‘but for’ basis of some element of damage being due to the clinical negligence
- ▶ So, for example, in oncology claims a finding that delay has altered staging may lead to a successful claim in respect of surgery or other treatment that would otherwise have been avoided.
- ▶ It may also be possible to argue that although an earlier death is likely, the timing has been shifted forward, on the balance of probabilities, by reason of D’s breach of duty.

But for Causation – Some Damage (2)

- ▶ We'll look at material contribution shortly.
- ▶ Suffice to note for now that the courts are going to expect the experts to make some real effort to split off what is due to breach of duty and what is not due to breach of duty.
- ▶ That is most commonly encountered where there has been a pre-index incident vulnerability or pre-existing condition.
- ▶ See the less well known than it ought to be case of *BAE Systems (Operations) Ltd v Konczak* [2017] EWC Civ 1188.

Proof of 'But For'

- ▶ We won't rehearse the obvious points about having medical evidence in order, and focused on causation. The law reports are littered with instances of breach of duty being found, but no causation.
- ▶ We do make the point that first impressions count and the evidence, both medical and lay, should insofar as possible enable all reading it to think as the case may be that the merits of the claim/its extent are obvious or the reason the claim should fail is obvious.
- ▶ The problem is that in many cases it will not be simply a matter of the expertise and experience of your medical experts.

Proof of 'But For' - Statistics



- ▶ The lure of 51%
- ▶ You are not proving a chance, rather, you are proving both a chance and that the Claimant would have fitted within it.
- ▶ The rodeo example: 1000 people attend, it is discovered that 501 people haven't paid, on the way out you (who have paid) are stopped and the ticket price demanded. On the balance of probabilities *any person* stopped by the stewards has not paid. That is scant evidence that you have not paid.
- ▶ Venn diagrams are a useful way of approaching this sort of issue conceptually.



Proof of 'But For' – Schembri (1)

- ▶ In *Gregg v Scott* Lord Nicholls noted that statistical evidence is not strictly a guide to what would have happened in one particular case.
- ▶ Typical questions are how fact-sensitive the medical literature giving rise to statistical issues is to the index case, how much weight can be attached to it, etc. That will be weighed with the experience and expertise of the experts.
- ▶ In *Schembri v Marshall [2020] EWCA Civ 358* C's wife had died of an untreated pulmonary embolism. She should have been referred to hospital the previous day by her GP. If so, would she have survived? C could not prove on the balance of probabilities that his wife would have been among the 64%-75% of people for whom specific anticoagulant treatment would have been effective.
- ▶ However, the literature strongly pointed to survival, the expert evidence preferred by the Judge supported survival, and the reason why the actual outcome was not known was the admitted negligence of D.

Proof of 'But For' – Schembri (2)

- ▶ D's appeal was dismissed.
- ▶ A pragmatic and common sense view of the evidence in the round was necessary.
- ▶ Moreover, per *Drake v Harbour [2008] EWCA Civ 25* upon proof of negligence “and that the loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism ... If [the Court] concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence.”

Proof of 'But For' – Schembri (3)

▶ *Drake* perhaps reflects earlier grapplings with increasingly complex causation issues.

▶ Lord Justice Scott in *Vyner v. Waldenberg Brothers, Ltd.* [1946] K.B. 50:

"If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

▶ Lord Goddard in *Lee v. Nursery Furnishings Ltd.* [1945] 1 A.E.R. 387:

"In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident."

Material Contribution

- ▶ This area of law is currently in something of a mess.
- ▶ But there are reasons for caution.
- ▶ We are looking at material contribution to damage.
- ▶ There is an exception – material contribution to risk – thus far unique to industrial disease and likely to stay there – see *Fairchild v Glenhaven* [2002] UKHL 22.

What is material contribution? (1)

Bonnington Castings v Wardlaw

- ▶ C developed pneumoconiosis during the course of his employment with D.
- ▶ Two factors contributed to the pneumoconiosis: silica dust particles from the operation of swing grinders ("innocent dust") and silica dust from the operation of pneumatic hammers ("guilty dust").
- ▶ Could the guilty dust be a cause of C's pneumoconiosis which had developed over an extended period?
- ▶ Lord Keith's view was that the swing grinder guilty dust ingestion must have been substantial even if small in proportion.
- ▶ Prima facie the particles accreted to cause the pneumoconiosis i.e. **cumulatively**. But beyond that nothing could be said about proportion or relative causative potency.
- ▶ On its face this was a case of a single tortfeasor, with an indivisible injury.

What is material contribution? (2)

Bonnington Castings v Wardlaw

- ▶ Lord Keith: *"On the whole evidence I consider that the pursuer has discharged the onus that is upon him of showing that the defenders' fault was a material contributing cause of his illness."*
- ▶ Lord Reid: *"In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota 'of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the appellants."*

Material Contribution – Fork in the road

- ▶ On the science *Bonnington* would now be decided differently.
- ▶ The material contribution road then forked, with the industrial disease fork proceeding down a risk-based route.
- ▶ That is largely, but as we will see, not completely, outside the scope of today's seminar.

Material contribution – *Sido John v Manchester* [2016] EWHC 407

- ▶ Does material contribution apply to single or multiple factors cases?
- ▶ Picken J:

*“[97] Dr John's case is **not an industrial disease case**. As such, it is not a case about contribution to risk, but is a case which is concerned with **material contribution to injury or damage**. As such, and unlike a case which has as its focus risk rather than injury or damage where for causation to be made out there needs to be a single agent, the 'material contribution' approach **applies to both single agency and multiple factor cases**. This is the point which was made by Lord Bingham in the Fairchild case ((2002) 67 BMLR 90, [2003] 1 AC 32 (at [22])) when considering the Wilsher case. Lord Bingham explained that: 'It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage.'...*

Material contribution – *Sido John (2)*

*...Accordingly, I am in no doubt that Mr Kennedy was ultimately right to accept that the 'material contribution' approach is appropriate in a case such as the present. There is no reason in principle why that should not be the case. Nor is there any authority which mandates such a conclusion. In short, **the 'material contribution' approach applies, in my view, just as much to multiple factor cases as it does to 'single agency' cases.**"*

Material Contribution – Cumulative Causes:

Bailey v MOD [2008] EWCA Civ 883 (1)

- ▶ With the caveat that this may not have been a material contribution case ...:
 - ▶ C was an in-patient on a renal ward in non-negligent hospital 2
 - ▶ She aspirated her vomit, leading to a cardiac arrest, leading to hypoxic brain damage.
 - ▶ Prior to transfer to hospital 2 she had been treated at hospital 1.

- ▶ C's case was:
 - ▶ (1) there was lack of care in resuscitation (not ultimately in issue);
 - ▶ (2) proper care would have led to early intervention and prevented her becoming as ill and weak as she became; and
 - ▶ (3) it was that weakness caused, or materially contributed to, by lack of care that led to her being unable to prevent herself aspirating.

Material contribution - Bailey v MOD (2)

Waller LJ concluded at [46] – [47]:

- ▶ One cannot draw a distinction between medical negligence cases and others.
- ▶ The position in relation to cumulative cause cases can be summarised as follows.
 - ▶ If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. **Hotson** exemplifies such a situation.
 - ▶ If the evidence demonstrates that ‘but for’ the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden.
 - ▶ In a case where medical science cannot establish the probability that ‘but for’ an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the ‘but for’ test is modified, and the claimant will succeed.
- ▶ *Bailey* involved cumulative causes acting so as to create a weakness and thus the material contribution test applied.

Material Contribution – Successive Causes – Williams v Bermuda (1)

- ▶ Mr Williams attended A & E with abdominal pain (from, it was later discovered, a ruptured appendix).
- ▶ A CT scan was (correctly) thought to be necessary.
- ▶ The factual finding was that there was a negligent delay in obtaining the CT scan, reporting it, and commencing surgery.
- ▶ By the time of the delayed operation there was widespread inflammation and pus from the ruptured appendix.
- ▶ The pus led to increased cardiac oxygen requirements, intra-operatively Mr Williams' blood pressure fell dangerously low, he suffered a myocardial ischaemic event with lung complications and required treatment in ITU.

Material Contribution – Successive Causes – Williams v Bermuda (2)

► Lord Toulson gave the judgment of the Board:

"[38] The distinction drawn by Ms Harrison is also inconsistent with the opinion of Lord Simon of Glaisdale in McGhee v National Coal Board ... [which] said that where on the balance of probabilities an injury is caused by two (or more) factors operating cumulatively, one (or more) of which is a breach of duty, it is immaterial whether the cumulative factors operate concurrently or successively.

[39] The sequence of events may be highly relevant in considering as a matter of fact whether a later event has made a material contribution to the outcome (as Hotson illustrates), or conversely whether an earlier event has been so overtaken by later events as not to have made a material contribution to the outcome. But those are evidential considerations. As a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome."

Material Contribution – Smith LJ in line with what is generally understood

- ▶ In *Dickens v O2* [2008] EWCA Civ 1144 albeit obiter:
- ▶ *“I respectfully wish (obiter) to express my doubts as to the correctness of Hale LJ's approach to apportionment. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is **not scientifically possible** to say how much that contribution is (apart from the assessment that it was **more than de minimis**) and where the injury to which that has lead is **indivisible**, it will be **inappropriate simply to apportion the damages across the board**. It may well be appropriate to bear in mind that the Claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a **reduction in some heads of damage for future risks** of non-tortious loss. But my provisional view is that there **should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play**”.*

Material Contribution – Along Comes AB v MoD

- ▶ Claims for exposure to radiation said to have been caused by nuclear testing carried out by the British Government in the Pacific region in the 1950s.
- ▶ Smith LJ at [134] observed that material contribution is available “*where the negligent and non-negligent causative components have both contributed to the disease (as opposed to the risk of the disease) and it is not possible to apportion the harm caused and therefore the damages*” in a setting where “*the **severity of the disease** is related to the **amount of exposure**”.*
- ▶ At [150] Smith LJ then held that material contribution only applies where the disease or condition is divisible “*so that an **increased dose** of the harmful agent **worsens the disease**”, cancer being indivisible as one either gets it or does not.*
- ▶ Go figure. In fact the answer may be that AB v MoD was about *proof*.

Material Contribution – Into the Buffers?

Davies v Frimley [2021] EWHC 169

- ▶ This is where AB swings into play. Davies concerned failure to diagnose/provide timely treatment of meningitis, the Claimant's wife died. C succeeded on a 'but for' basis, very much mirroring a Schembri approach. Material contribution was considered obiter.
- ▶ Judge Auerbach: three orthodox routes to proof:
 1. First, where the harm is divisible, a party will be liable if their culpable conduct made a contribution to the harm, to the extent of that contribution.
 2. Secondly, where the harm is indivisible, a party will be liable for the whole of it, if they caused it, applying "but for" principles.
 3. Thirdly, if two wrongdoers have both together caused an indivisible injury, in respect of which it is impossible to apportion liability between them, then each is co-liable for the whole of the injury suffered.

Material Contribution – into the Buffers?

Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB) (1)

- ▶ Primary “but for” claim failed, secondary claim of material contribution (which would have failed as a matter of fact let alone law).
- ▶ The question was whether in cases of a single tortfeasor and an indivisible injury material contribution could apply.

Material Contribution – into the Buffers?

Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB) (2)

- ▶ Soole J at [147] - [151]:
- ▶ 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].*

Material Contribution – into the Buffers?

Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB) (2)

- ▶ 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.**"

Material Contribution – Where Are We?

- ▶ What is an indivisible injury? In *Davies* it was argued by the defendant that death is indivisible.
- ▶ However death is a state – if one thinks of a coroner’s verdict provision is made for a cause or causes. Scroll back to a few moments before death and you may find a variety of cumulative causes of which only one is a breach of duty.
- ▶ Then look at a hypoxic brain injury – what difference would a capable midwife have made say a handful of minutes earlier: a lesser injury, but what difference would there have been in terms of disability? That mirrors *Sido John*.
- ▶ So even on a narrow reading of *AB* and *Heneghan* what might seem to have been indivisible, and seemingly accepted as such in *Thorley* (see paragraph 139) by the Claimant was not indivisible may not in fact be indivisible.
- ▶ In any event *AB* may not be quite the problem it has been taken to be: albeit obiter, in with *Sienkiewicz v Greif (UK) Limited [2011] UKSC 10* wherein Lord Phillips expressed the view that a party who “*tortiously contributed to the cause*” of an indivisible disease will be liable in full.” That is in accordance with *Williams v Bermuda*.

Material Contribution - Conclusion

- ▶ We suggest that the analysis of Professor Sarah Green (Causation in Negligence, Hart Publishing, 2015, Chapter 5, p97) and approved in *Williams v Bermuda* remains compelling:

“It is trite negligence law that, where possible, defendants should only be held liable for that part of the claimant’s ultimate damage to which they can be causally linked ... It is equally trite that, where a defendant has been found to have caused or contributed to an indivisible injury, she will be held fully liable for it, even though there may well have been other contributing causes ...”

- ▶ Material contribution is plainly going to head to the Court of Appeal.
- ▶ However, a ‘but for’ analysis is always going to be much safer if available.
- ▶ If you have a ‘but for’ case with an option of material contribution be careful how you run material contribution – material contribution has the capacity to weaken the primary case.