

Clinical Negligence Team



Understanding Causation in Clinical Negligence Claims

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St John's Chambers



The 'But For' Test



If the Claimant proves a breach of duty and proves that, but for that breach, he/she would not have sustained damage, then, other things being equal, he/she will be compensated for that damage.

If there is only one potential causal factor, this is the only test to consider.

Scientific Uncertainty



- If there are two or more possible causes, consider first whether it can be shown, on the balance of probabilities, that one of the causes was the cause of the damage which is the subject of the claim. If yes, then causation is made out via the 'but for' test.
- If not there will be uncertainty, usually scientific in clinical negligence, as to which of the possible causes led to the damage.
- If there is such scientific uncertainty, then consider...

Are Two Causes Cumulative?



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Is it the case that the combination of the two causes has led to the injury. If yes, the causes are cumulative. As an example, take a case of sepsis which is caused in part by an infection (which was not the result of negligence) and in part by a negligent delay in treatment which allows the sepsis to advance. The two causative factors operate together to result in severe sepsis.

Are Two Causes Independent?



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- > Rather than being cumulative, are there separate, distinct causes, not working in combination, each of which could have caused the damage which is the subject of the claim?
- > If the causes are separate and the negligent cause cannot be shown to have caused the damage on the 'but for' basis, then the claim will fail on causation (*Wilsher v Essex AHA* [1988] A.C. 1074 HL)

Wilsher



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A baby was rendered almost blind in hospital. The hospital had been negligent and allowed the baby to ingest excess oxygen. Excess oxygen was one possible cause of the blindness. There were, however, 4 other totally different and independent possible causes in that case which could have led to the blindness. Those 4 causes were not related to the Defendant's negligence. There was no way to prove which one of the 5 causes had led to the blindness. The 'but for' test could not be fulfilled in relation to the breach and there was uncertainty as to whether the breach caused any damage. The claim failed.

It must be scientifically clear that the breach has made some "material" contribution to the damage for the claim to succeed.

Is there a "material" contribution?



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- It must be possible to demonstrate, on the balance of probabilities, that the negligent causal factor made a more than minimal contribution to the damage. It will then be deemed a "material contribution". *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

Divisible/Indivisible Injuries



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- Divisible injuries are those where the severity of the condition is linked to the dose of the agent which causes the condition. Indivisible injuries are not dose related and can occur from one exposure or one negligent act.
- To use an industrial disease example to illustrate the distinction, a claimant might develop asbestosis from being exposed to asbestos. Asbestosis becomes more severe, the greater the exposure and it is a divisible condition. Contrast this to mesothelioma, also caused by asbestos. That condition is not dose related and can develop from just one fibre of asbestos. That is an indivisible injury.



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- A Claimant for a divisible injury will only recover from each Defendant, their contribution to the injury, however big or small.
- In the case of an indivisible injury, if material contribution is established, even if it is clear that other non-negligent causal factors were at work, the Claimant will recover in full against the Defendant for the entirety of the injury. In most clinical negligence cases we are concerned with indivisible injuries

“Material” Contribution for Divisible Injuries – A Low Bar



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Carder v. University of Exeter [2016]

- In that case the defendant had been responsible for only 2.3% of the claimant's total exposure to asbestos dust. The Claimant developed asbestosis (a dose-related condition or divisible condition).
- The Court of Appeal determined that even though the additional 2.3% exposure gave rise to no *measurable* symptoms, they meant that the claimant was slightly worse off. He recovered 2.3% of the full liability value of the claim

“Material” Contribution for Indivisible Injuries



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If it has been established that there are:

- (i) two cumulative causes for the damage and
- (ii) that there is scientific uncertainty as to whether the indivisible injury would have occurred but for one of them.

It seems very likely that the contribution of the negligent cause will be sufficiently significant so as to be deemed “material”.

***Bailey v Ministry of Defence*
[2008] EWCA Civ 883**



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- The claimant became ill with gall bladder problems and went in for an exploratory procedure. The procedure was more difficult than expected and the stone, which was in fact blocking the bile duct, was not found. Overnight, following the procedure, as a result of negligence, the Claimant was not rehydrated as she should have been (the material negligence). As a result, she was not fit to undergo a repeat procedure the next day.



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- > The Claimant then developed pancreatitis which is an inflammatory condition not due to negligence. As a result of pancreatitis and a stone that had not been removed, she became ill and had to undergo two major operations. She became extremely weak as a result. and, as a result, became extremely weak. During recovery, the Claimant vomited and, because she was still very weak and could not protect her airway, she inhaled her vomit and suffered a cardiac arrest, resulting in brain damage (an indivisible injury).

The Arguments



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- > The defendants argued that the claimant's weakness was overwhelmingly due to the non-negligent pancreatitis. The claimant accepted that pancreatitis was a major cause of weakness but argued that the negligence in failing to rehydrate her materially contributed to her weakness. The dehydration had not only weakened her in itself, but it had also resulted in delay in the removal of the stone and the need for more extensive surgery.

The Judgment – C wins



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*"I would summarise the position in relation to cumulative cause cases 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. 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."*

Williams v Bermuda Hospitals Board [2016] UKPC 4



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- In this case there was a delay in diagnosing the Claimant's appendicitis. In particular there was a negligent delay in performing a CT scan after the Claimant's arrival at hospital. There was then further period of non-negligent delay. The total delay meant that when surgery was performed, Mr Williams' appendix had ruptured, leading to sepsis which precipitated myocardial ischemia or heart failure.
- The Claimant won on the basis that the delay had materially contributed to the injury.

Concurrent and Successive Causes



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- On appeal to the Privy Council, the Defendant had argued that for the material contribution doctrine to apply, the defendant's contribution to the pathological process had to be concurrent with any non-negligent cause and had to increase the magnitude (and not merely the risk) of the harm.



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- The Privy Council upheld the Bermuda Court of Appeal on the basis of an "incremental analysis" of the facts, see [41]: *"In the present case the Judge found that the injury to the heart and lungs was caused by a single known agent, sepsis from the ruptured appendix. The sepsis developed incrementally over a period of approximately 6 hours, progressively causing myocardial ischaemia. (The greater the accumulation of sepsis, the greater the oxygen requirement). The sepsis was not divided into separate components causing separate damage to the heart and lungs. Its development and the effect on the heart and lungs was a single continuous process during which the sufficiency of the supply of oxygen to the heart steadily reduced."*



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> Another interesting point from Williams was that it was suggested that it was not necessary to depart from “but for” causation to explain the doctrine of material contribution. *Bailey* was specifically analysed and it was noted that the Claimant’s injury was caused by her weakness due to pancreatitis and her weakness due to negligent treatment. This was deemed to be an example of the egg-shell skull principle in operation. The Defendant had to take Ms Bailey as they found her (weakened by pancreatitis), and since the *totality* of her weakened condition caused the harm (i.e. the weakness caused both by the pancreatitis and the negligent treatment), she made out “but for” causation.

Sido John v Central Manchester & Manchester Children’s University Hospitals NHS Foundation Trust



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The claimant suffered from cognitive and neuropsychological deficits following a delayed CT scan of his head injuries sustained earlier the same night by falling backwards on a staircase. Subsequent surgery was also delayed resulting in a worse outcome than would otherwise have been the case.



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> The conclusion of the court in John was that the material contribution approach applies just as much to multiple factor cases as to single agency cases. That was to deal with the defendant’s argument (ultimately abandoned) that the Bonnington Castings/ Bailey approach only applied where there was a single agent to cause the injury whereas Dr John’s injury was caused by multiple factors:- an initial head injury, negligent treatment of raised inter-cranial pressure, and subsequent (non-negligent) post-operative infection.

Material Increase in Risk



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- > Fairchild v Glenhaven
- > To fulfill this exception it is necessary for a claimant to prove (i) breach of duty; (ii) that breach increased risk of injury; (iii) a single causative agency (i.e. asbestos fibres); and (iv) medical science was unable to determine which defendants' exposure (if any) actually caused the injury. Then C can succeed and recover damages in line with the proportion to which they contributed to the risk of injury.
- > It's fair to say that it is controversial to attempt to apply Fairchild outside of industrial disease. Seek advice.



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