# Where are we now?

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'Ultimately it may be judicial pragmatism that provides the key (if not a principled solution) to the apparent conflicts in the case law.'

Must a claimant prove that a defendant's breach of duty caused their loss before being entitled to recover damages from the defendant? Your instinct will be shouting 'yes'. A more accurate answer would be 'sometimes'.

Your instinct will be based on the proposition that 'he who asserts must prove', and your knowledge that as the claimant asserts that the breach of duty caused the loss they must prove as much. The trouble is that a more accurate maxim would be:

> Those who assert must prove, unless this is one of those situations in which for policy reasons someone somewhere (court or legislature) has decided that those who assert don't have to prove after all.

This article attempts to chart a path through this tangled issue.

## Clearing the decks

Issues that are not addressed here include:

- The special rules applying to claims arising from exposure to asbestos (*Fairchild v Glenhaven Funeral Services* [2002] and subsequent statutory amendment and case law).
- Remoteness.
- Medical causation (although the principles are the same and such cases need not be differentiated as such, nevertheless the multiple cause and cumulative cause issues in such cases provide their own difficulties).
- The differences between divisible and indivisible conditions. This is an interesting topic. Put shortly in cases of divisible conditions a claimant must prove that the breach made a material contribution to the injury/disease, whereas in cases of indivisible injury/disease a claimant must show (perhaps – there is controversy here) that D was responsible for at least a doubling of his risk (save in asbestos cases).
- How *res ipsa loquitur* works in relation to causation. (Quite where the maxim applies can be controversial. Some situations where ordinary rules of causation are varied are when an event occurs which calls for an explanation from the defendant (such as a slippery substance on a supermarket floor as in *Ward v Tesco Stores Ltd* [1976] or collapsing goal posts as in *Hall v Holker Estate Co Ltd* [2008]). There is a view that the courts will expand this type of approach significantly into workplace accidents given the abolition of civil liability under health and safety regulations from 1 October 2013, and (therefore) the abolition of reversed burdens of proof in 'all reasonably practicable steps' duty situations.)
- The risks from surgery (*Chester v Afshar* [2004]).
- No free-standing principle that would give apportioning effect to a contributory intervening event (See eg *Environment Agency v Ellis* [2008]).
- Loss of a chance.
- Apportionment between tortfeasors (and non-negligent causes) (eg *Rahman v Arearose Ltd* [2001] QB 351) and so on.

It will be noticed that there are a lot of points of interest concerning causation omitted from this article. The necessity to do that is shown by the following slightly doctored quote from Laws LJ in *Rahman*:

> The problem at the heart of this [article] rests in the law's attempts to contain the kaleidoscopic nature of the concept of causation within a decent and rational system for the compensation of innocent persons who suffer injury by reason of other people's wrongdoings. The common law has on the whole achieved just results, but the approach is heavily pragmatic...

Ultimately it may be this judicial pragmatism that provides the key (if not a principled solution) to the apparent conflicts in the case law.

## What the cases say

***Clough v First Choice Holidays and Flights Ltd* [2006]**

C, on holiday in Lanzarote and intoxicated, slipped on a wall dividing two swimming pools and fell, breaking his neck. There was a specific finding that he was not doing anything abnormal, or prohibited by the rules of the complex; he did not dive, nor miss his footing because he was walking too near the edge, nor topple from the wall in a drunken stupor. He slipped. The judge at first instance found that the lack of non-slip paint on the wall was negligent, but that that negligence was not proved to be causative of the accident (ie he had not proved that non-slip paint would have prevented the fall). The Court of Appeal found that since the claimant could not show that the non-slip paint would have prevented the fall, his claim rightly failed. The adaptation of 'but for' causation found in *Fairchild* (no need to prove which defendant's exposure to asbestos caused disease) and *Chester* (failure of a doctor to warn a patient of a risk of an operation – no need to prove she would not have had operation) had no wider application. In the context of this case, a material contribution to the injury would have led to success to the claimant. A material contribution to the risk of injury did not.

So far, so straightforward. C asserted that the breach of duty (ie no non-slip paint) caused his fall. The claim failed because he could not prove on balance of probabilities that non-slip paint (if present) would have prevented the fall. A simple application of 'he who asserts must prove': C asserted that the breach of duty caused or materially contributed to his injury. He had to prove it (and could not).

***Vaile v London Borough of Havering* [2011]**

A teacher at a school for children with learning difficulties was assaulted by a child with an autistic spectrum disorder (ASD) (albeit that no formal diagnosis had been made and the teacher had therefore not been expressly told of the condition).

*A simple application of 'he who asserts must prove': C asserted that the breach of duty caused or materially contributed to his injury. He had to prove it (and could not).*

The school had within it an outreach service that could provide training in techniques for dealing with children with ASD. Mrs Vaile had not received that training. About a month before the relevant assault she had been assaulted by the child. A different teacher had been assaulted by him the day before the index assault. The earlier assaults were both less injurious. Insofar as it is possible to draw a 'main' failure from the report of the case, it was that the teacher was not trained to deal with children with ASD. The defendant argued that she could not show that training would have prevented the assault. The Court of Appeal rejected that argument. Longmore LJ held, effectively, that once the teacher had proved that something which ought to have been done was not done (ie training the teacher) and that the type of injury which one would expect to arise from that failure (ie an assault) had eventuated, the court ought to infer causation (the burden of proof being, effectively, on the defendant to disprove causation). He said (at para 32):

> Although *Drake v Harbour* [2008] EWCA Civ 25 was a very different case on the facts (because there were a number of possible candidates for the cause of a fire in an unoccupied house) the words of Toulson LJ in para 28 are apposite:
>
> > where a claimant proves both that a defendant was negligent and that 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.
>
> It may be difficult for Mrs Vaile to show precisely what she or the school could have done to avoid the incident if she had been appropriately instructed in suitable techniques for dealing with ASD children but the probability is that, if proper care had been taken over the relevant three-year period, she would not have met the injury she did.

That is arguably a surprising decision. It has always been the case that a claimant must prove a breach of duty and causation. If Longmore LJ is right, he seems to be saying that provided that a claimant proves a breach of duty and loss of the type which the duty is designed to avoid, the claimant has done enough (and does not need to prove that compliance with the duty would have avoided the harm). That would be a development of the law, and it is difficult to accept that that is what Longmore LJ meant to do.

Some possible interpretations of *Vaile* to avoid the proposition that it changed the law:

- Longmore LJ means to say that the burden of proof on causation moves to a defendant where the question of proof (one way or another) is within the particular gift of the defendant. In *Vaile*, the defendant had access to its teaching materials and the defendant, therefore, was

in a position to show that teaching would have made no difference.

- Etherton LJ decided the case on the much more straightforward basis that there was unchallenged expert evidence that knowledge of the previous assault should have led to specific strategies being discussed with the teacher, which would have prevented the material attack. If that is the reason for the decision it is incontrovertible. That cannot, however, be the sole reason for the decision given Longmore LJ's judgment.
- This was a case of pragmatic inference (see further below).

***Wilson v Clyne Farm Centre* [2013]**

The claimant scout leader went to D's activity centre with some scouts. While there he slid down a fireman's pole but failed to control his descent, landing on the wood chip at the bottom and fracturing his lumbar spine. Swift J found that D was in breach of duty:

- in failing to give proper instructions for using the pole; and
- for providing inadequate impact attenuation.

The point of interest for present purposes is that while she found the first breach causative of the injury (so C won), she went on to find that C had to (but could not) prove that the insufficiently attenuated surface caused or materially contributed to his injury. She distinguished *Vaile* on the basis that in *Wilson* there was no doubt as to the causative mechanism of the accident/injury: Mr Wilson was injured when he fell onto an inadequate impact attenuating surface. He could have called expert evidence to show that on a balance of probabilities the injury would have been avoided or less severe if adequate impact attenuation had been present. He did not call such evidence and he could not prove what he needed to on causation. Swift J's view was (judgment para 164):

> It seems to me that this case is very different from *Vaile*. There, it was not possible for the claimant to establish the precise mechanism by which her accident and injury could have been avoided. In this case, there is no doubt about the mechanism by which it is being said that the injury could have been avoided.

*Note that the decision in* Hide *is in the context of Rule 4 of the Provision and Use of Work Equipment Regulations 1998.*

***Hide v Steeplechase Co Ltd* [2013]**
The claimant jockey (on a horse 'Hatch a Plan') fell at the first hurdle in a race at Cheltenham Racecourse, sliding into an upright post of the rail at the side of the track and sustaining injury. At para 27 Longmore LJ said (*obiter*):

> The padding of the uprights of the guard rail could have been thicker; the hurdle could have been placed at a greater distance from the guard rail. The defendants cannot show that if either or both precautions had been taken, Mr Hide would inevitably have suffered the injury which he did.

Even if Longmore LJ meant to say that the defendants could not show that if either or both precautions had been taken, Mr Hide would probably have suffered the injury that he did; he is saying that that burden of proving causation rests on the defendant in these circumstances. That sits well with his view as set out in *Vaile*, but not well with Swift J's view in *Wilson*.

Note that the decision in *Hide* is in the context of Rule 4 of the Provision and Use of Work Equipment Regulations 1998. The decision is that once a claimant shows that he has suffered injury as a result of contact with a piece of work equipment, the burden of proof moves to the defendant to show that the accident was due to:

- unforeseeable circumstances beyond his control; or
- exceptional events the consequences of which could not be avoided.

*Costa v Imperial London Hotels Ltd* [2012] C worked for D as a chambermaid. She injured her back pulling a bed away from a wall. There was a breach of duty in failing to provide refresher training in manual handling. At paras 15 and 17 Hughes LJ (as he then was) said:

> First, I agree that the test of causation in a case like this is the simple and purely factual one: was the breach a (not necessarily the only) cause of the injury? It is in this case wholly unnecessary to journey to the exceptional situations contemplated in multiple cause cases, such as *Fairchild v Glenhaven* [2002] 3 WLR 89. In a case like this either the breach made an impact on the injury or it did not. If it did not it does not found liability. If on the balance of probabilities the injury would have occurred anyway, the defendant is not liable... the claimant has to demonstrate that the breach was a cause of the injury; in other words that it would have prevented the injury.

In this case the claimant failed since, while she had not received refresher training (in breach of duty), that training would have covered lifting, whereas what she did was to pull a bed. Because of that the Court of Appeal held that it was wrong to find that refresher training would have prevented injury. *Vaile* was not referred to.

***Ghaith v Indesit* [2012]**
C hurt his back when carrying out a stock-take in the course of his employment by D. The Court of Appeal held that D was liable since it could not prove that it had taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable (ie the duty under Rule 4(1)(b)(ii) of the Manual Handling Operations Regulations 1992). At para 27 Longmore LJ said:

> **Causation**
> This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred eg if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury.

By saying that causation was 'not a separate hurdle for the employee', Longmore LJ appears to be saying that when an employer cannot show that it has taken appropriate steps to reduce the risk to the lowest level reasonably practicable (when that is the duty), a claimant does not have to prove that the breach of duty caused the injury. It is difficult to take that at face value. There must be some causative link between the breach and the injury. Perhaps Longmore LJ's words here are best interpreted as meaning that where the employer owes a preventative duty and alleges that compliance was not reasonably practicable, the employer must prove both that it was not reasonably practicable to take whatever preventative measure is in issue and that injury could only have been prevented by something that was not reasonably practicable (alternatively that it would not be prevented by anything that was reasonably practicable – he gives the example of a freak accident).

*How can you tell whether a court is going to require the claimant to prove that breach caused injury? There is no clearly right answer to this question.*

## Discussion

So what is going on? When does a claimant have to prove that the breach of duty caused injury? Using the above cases to try to find an answer to the question:

**Claimant's burden of proof**

- Where breach of duty was inadequate impact attenuation C must prove that more attenuation would have prevented injury (*Wilson*, 2013).
- Where breach was failing to provide refresher training in manual handling C must prove that the training would have prevented injury (*Costa*, 2012).

**Defendant's burden of proof**

- Where breach was (*inter alia*) insufficient thickness of (attenuating) matting on a post, D had to prove that more attenuation would not have prevented injury (*Hide*, 2013)

- Where breach was failing to train a teacher how to deal with a child with ASD, D had to prove that training would not have prevented injury (*Vaile*, 2011)

At first blush, there appears to be an inconsistent approach. Why?

*Keefe is a case often relied upon to support the proposition that in circumstances in which a defendant has not retained evidence or called relevant witnesses then a claimant's evidence should be judged benevolently and a defendant's critically.*

How can you tell whether a court is going to require the claimant to prove that breach caused injury? There is no clearly right answer to these questions. We offer the following as potential explanations:

**(1) Good reason**

In *Fairchild* the court was concerned with liability for mesothelioma caused by exposure to asbestos when the claimants had been exposed by more than one employer. They could not prove which employer's exposure led to the mesothelioma. The Court of Appeal held against the claimants on the basis that they could not prove (on balance of probabilities), which defendant's exposure had caused the disease. The House of Lords overturned that decision. Lord Nicholls said:

> [36] I have no hesitation in agreeing with all your Lordships that these appeals should be allowed. Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands. The real difficulty lies is elucidating in sufficiently specific terms the principle being applied in reaching this conclusion...
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> [37] *In the normal way, in order to recover damages for negligence, a plaintiff must prove that but for the defendant's wrongful conduct he would not have sustained the harm or loss in question...*
>
> [38] *Exceptionally this is not so.* In some circumstances a lesser degree of causal connection may suffice. *This sometimes occurs where the damage flowed from one or other of two alternative causes.* Take the well-known example where two hunters, acting independently of each other, fire their guns carelessly in a wood, and a pellet from one of the guns injures an innocent passer-by. No one knows, and the plaintiff is unable to prove, from which gun the pellet came. Should the law of negligence leave the plaintiff remediless, and allow both hunters to go away scot-free, even though one of them must have fired the injurious pellet?
>
> [39] Not surprisingly, the courts have declined to reach such an unjust decision... As between the plaintiff and the two hunters, the evidential difficulty arising from the impossibility of identifying the gun which fired the crucial pellet should redound upon the negligent hunters, not the blameless plaintiff. The unattractive consequence, that one of the hunters will be held liable for an injury he did not in fact inflict, is outweighed by the even less attractive alternative, that the innocent plaintiff should receive no recompense even though one of the negligent hunters injured him. It is this balance ('outweighed by') which justifies a relaxation in the standard of causation required. Insistence on the normal standard of causation would work an injustice. Hunting in a careless manner and thereby creating a risk of injury to others, followed by injury to another person, is regarded by the law as sufficient causal connection in the circumstances to found responsibility.
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> [40] *This balancing exercise involves a value judgment.* This is not at variance with basic principles in this area of the law. *The extent to which the law requires a defendant to assume responsibility for loss following upon his wrongful conduct always involves a value judgment.* The law habitually limits the extent of the damage for which a defendant is held responsible, even when the damage passes the threshold 'but for' test. The converse is also true. On occasions the threshold 'but for' test of causal connection may be over-exclusionary. Where justice so requires, the threshold itself may be lowered. In this way the scope of a defendant's liability may be extended. The circumstances where this is appropriate will be exceptional, because of the adverse consequences which the lowering of the threshold will have for a defendant. He will be held responsible for a loss the plaintiff might have suffered even if the defendant had not been involved at all. To impose liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility. Normally this is unacceptable. But there are circumstances, of which the two hunters' case is an example, where this unattractiveness is outweighed by leaving the plaintiff without a remedy...
>
> ...
>
> [43] *I need hardly add that considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold 'but for' test.* The reason must be sufficiently weighty to

> justify depriving the defendant of the protection this test normally and rightly affords him, and it must be plain and obvious that this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific. [Emphasis added].

Can we conclude that the court will find that where there is good reason it will infer causation to the benefit of the claimant? What is a good reason?

**(2) (Don't) give me shelter**

In *Harris v BRB (Residuary) Ltd* [2005] 900 (at para 19) Neuberger LJ (as he then was) said:

> Claims for personal injury arising out of exposure to noise, vibration, or other health risks, particularly where the exposure was over a long period of time in different circumstances, notoriously give rise to difficulties. While it may be dangerous to generalise, the cases demonstrate, and common sense and fairness require, that, unless it is clear that decisive evidence would have been relatively easily available, and that there was no good reason why it is not before the court, it is normally wrong for the court simply to shelter behind the burden of proof and dismiss the claim.

This is certainly a basis for differentiating the decision in *Vaile* from that in *Wilson* where Swift J observed that there was no doubt about the mechanism by which it was said the injury could have been avoided. By implication she accepted the defence case that it would have been open to the claimant to call evidence to support his case that had sufficient impact attenuation been provided he would not have sustained injury.

Harris was cited with approval more recently in *Keefe v The Isle of Man Steam Packet Co Ltd* [2010] at para 22. *Keefe* is a case often relied upon to support the proposition that in circumstances in which a defendant has not retained evidence or called relevant witnesses then a claimant's evidence should be judged benevolently and a defendant's critically, however there is nothing new in this. In *Wisniewski v Central Manchester HA* [1998] the CA upheld the right of the judge to draw adverse inferences against a health authority that failed to call a doctor to establish what he would have done had he attended. Once the claimant had established a *prima facie* case (in one case the court referred to merely a 'scintilla of a case'), the court was entitled to draw an inference against a defendant who failed to call evidence that was available to it.

*It may be argued that the law recognises the need for pragmatism (also referred to as 'common sense') in the search for a just outcome.*

Is the court choosing the circumstances in which it will 'shelter behind the burden of proof and dismiss the claim'? It did so in respect of the intoxicated claimant in *Clough*. It did so in respect of the lying chambermaid in *Costa* (the judge having found that she was an unreliable witness). The court did not, however, use the shelter of the burden of proof in respect of the dedicated teacher of children with learning difficulties in *Vaile*. Nor did it do so in respect of the blameless jockey in *Hide*. Can we conclude that the courts are seeing the burden of proof on causation as a shelter to hide behind to dismiss claims when the claimant is unappealing? Or is the policy one which seeks to level the playing field where the claimant is in difficulty in proving his case? Is the answer to be found in Lord Mansfield's dictum in *Blatch v Archer* (1774) at p970:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

**(3) Who has the opportunity to prove?**

Perhaps *Vaile* is better interpreted as suggesting that when the issue of proof lies within the particular gift of the defendant then causation will be inferred to the benefit of the claimant. That interpretation resolves a number of the cases:

**(1)** In *Vaile* the defendant (and not the claimant) could have proved what the training would have been, so the court inferred that not providing the training (which was a breach of duty) led to injury.

**(2)** In *Costa*, while the content of the training was again a matter that the defendant could have proved, there was no real issue about it. In that case the claimant failed because the breach of duty was not providing training in how to lift whereas the injury occurred when pulling such that the training would probably not have avoided the accident.

**(3)** In *Wilson*, the claimant and defendant could equally have proved whether more impact attenuation would have prevented injury, so the court did not draw the inference in the claimant's favour.

**(4)** In *Hide* it would also be true that the claimant and defendant could equally have proved whether more impact attenuation would have prevented injury, but the comments on causation were obiter, the case derived from breach of statutory duty and the causative link could arguably be inferred as a matter of common sense (see further below).

This interpretation also sits well with *Keefe*: a defendant cannot hold back evidence that might have

enabled a claimant to prove causation and then assert that the claim fails on causation grounds. It also fits with established judicial and academic authority, thus in *Dunlop Holdings Ltd's Application* [1979], Buckley LJ affirmed this principle in the following terms at p544:

> Where the relevant facts are peculiarly within the knowledge of one party, it is perhaps relevant to have in mind the rule as stated in *Stephen's Digest*, which is cited at p86 of *Cross on Evidence* [3rd ed]:
>
> 'In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the facts to be proved which may be possessed by the parties respectively.'
>
> '*This does not mean*', Sir Rupert continues, '*that the peculiar means of knowledge of one of the parties relieves the other of the burden of adducing some evidence with regard to the facts in question, although very slight evidence will often suffice*'. [Emphasis added.]

**(4) Pragmatic inference**

The duty on a claimant to prove the breach was 'a' cause is only a duty to do so on the balance of probability. Where a general duty of care arises (and possibly *a fortiori* a statutory or regulatory duty) and there is a failure to take a recognised or prescribed precaution, and that failure is followed by the very damage which that precaution was designed to prevent, then it may (or may not) be a reasonable inference that the breach has indeed caused the injury. Again this is not a novel concept. In *Lee v Nursery Furnishings Ltd* [1945] Lord Goddard said on the issue of whether the evidence established that the accident was due to a breach of the Woodworking Regulations:

> 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 the breach of the regulation was not connected to the accident, was not the cause of the accident.

Where the link may be difficult to prove on the basis of current medical knowledge (see *Fairchild* or the dermatitis cases like *McGhee v National Coal Board* [1973]) then there is a further incentive to conclude that the case is proven by inference. The principle has been clear for years in industrial illness cases (see eg per Lord Reid in *Gardiner v Motherwell Machinery and Scrap Co Ltd* [1961]).

*You cannot assume with confidence that yours is a case in which the claimant will or will not have to prove causation.*

Such a difficulty in proving the link is not however limited to industrial illness cases. In *Vaile*, Longmore LJ noted the difficulty of the court directing an examination and assessment of the 'difficult (and no doubt sensitive) child' which might be a step in the process of proving the case more fully. He also cited Toulson LJ in *Drake* (see above).

In cases, therefore, where D holds the cards by reason of their special knowledge, or has failed to disclose evidence or otherwise where the odds are stacked against the claimant, a similar approach may be more likely.

It may be argued that the law recognises the need for pragmatism (also referred to as 'common sense') in the search for a just outcome. In *McGhee* Lord Reid had observed that:

> But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life.

While in *Alphacell Ltd v Woodward* [1972] at 847 Lord Salmon said:

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

Even in *Wilsher v Essex Area Health Authority* [1988] the House of Lords accepted that there was nothing irrational or illegitimate, in an appropriate case, in adopting a robust and pragmatic approach to the undisputed primary facts of the case, and in drawing an inference (as a matter of common sense) that a defendant's negligence had caused or materially contributed to a claimant's injury.

In the Canadian Supreme Court the issue of causation in medical malpractice claims was analysed in *Snell v Farrell* [1990] by Sopinka J. In some cases, he noted, there was talk of a shifting of the secondary or evidential burden of proof. His view, however, differed:

> It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See *Cross*, op cit, at p129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted. The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be

drawn although positive or scientific proof of causation has not been adduced.

This and the appropriate application of Lord Mansfield's *dictum (supra)*, he suggested, was what Lord Bridge had in mind in *Wilsher* when he referred to a 'robust and pragmatic approach to the… facts'

Once the court has identified the case as an appropriate one in which to draw such an inference, it is then, *de facto* (rather than *de jure* perhaps) going to become the case that D must disprove the inference, at least where C has established a *prima facie* case.

## Summary

None of these approaches is obviously or unequivocally correct in every case. The outcome in any one case will inevitably be fact specific. However, it is more sound to analyse the apparent dichotomy between the decisions reviewed here in terms of those where an inference is justifiably drawn and those where it is not, rather than drawing the conclusion that there has been a reversal of the burden of proof, other than in the manner described by Sopinka J.

## Practical application

It's all very well observing that sometimes the court will not require a claimant fully to prove that the breach caused the injury/loss, but how should you approach litigation in the light of that? You cannot assume with confidence that yours is a case in which the claimant will or will not have to prove causation. We offer the following practical tips. They are of necessity of general application and the circumstances of any given case might necessitate a different approach:

### For claimants

- Do not assume that the court will infer causation from breach.
- If it is within your power to prove causation in a negligence (or similar duty: OLA or whatever) case, do so.
- Our preferred strategy is to prove causation when you can in a statutory duty case too: it is probably too risky to do otherwise.
- If it is not within your power to prove causation (but it is within the defendant's power), ask the defendant for the evidence that is required to prove/disprove causation. If they do not provide it, you have a good argument that the court ought not to dismiss the claim on a causation basis in such circumstances.
- If the evidence (perhaps scientific, perhaps simply factual) is unclear and cannot give an unequivocal answer, establish such primary facts as you can and construct an argument that justice demands the link is made. If you can prove the duty and the breach and an injury that is manifestly intended to be prevented by compliance with the duty, then you will be nearly home.

### For defendants

- Note that if proving or disproving causation is within your power (and, importantly, not within the claimant's power), you are not going to get away with an argument that the claimant must prove causation and cannot do so. In these circumstances you will need to explore your evidence on causation and either:
  - give up on the issue; or
  - provide the evidence to disprove causation.
- Note that it seems quite possible that if the defendant in *Vaile* had set about proving the content of the training, they would have been able to prove that the breach (not providing training) made no difference.
- If both defendant and claimant are equally well placed to prove or disprove causation in a negligence-based claim, then if the claimant is not being proactive on the issue, leave it alone. Let the claimant proceed to trial without the evidence that they will need on the issue. There is of course risk here (ie if the claimant springs evidence on you late, you might find yourself in difficulty). The risk would have to be weighed up in any given case.
- While statutory duty cases are riskier (particularly given the obiter comment in *Hide*), the above paragraph probably holds true. ■

*Alphacell Ltd v Woodward*
[1972] AC 824
*Blatch v Archer*
(1774) 98 ER 969
*Chester v Afshar*
[2004] UKHL 41
*Clough v First Choice Holidays and Flights Ltd*
[2006] EWCA Civ 15
*Costa v Imperial London Hotels Ltd*
[2012] EWCA Civ 672
*Drake v Harbour*
[2008] EWCA Civ 25
*Dunlop Holdings Ltd's Application*
[1979] RPC 523 (CA)
*Environment Agency v Ellis*
[2008] EWCA Civ 1117
*Fairchild v Glenhaven Funeral Services*
[2002] 3 WLR 89
*Gardiner v Motherwell Machinery and Scrap Co Ltd*
[1961] 3 All ER 831
*Ghaith v Indesit*
[2012] EWCA Civ 642
*Hall v Holker Estate Co Ltd*
[2008] EWCA Civ 1422
*Harris v BRB (Residuary) Ltd*
[2005] EWCA Civ 900
*Hide v Steeplechase Co Ltd*
[2013] EWCA Civ 545
*Keefe v The Isle of Man Steam Packet Co Ltd*
[2010] EWCA Civ 683
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