The sum of the parts

Matthew White weighs up the 'but for' test and material contribution in cumulative cause cases

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'The "material contribution" approach applies just as much to multiple factor cases as to single agency cases.'

An article in this publication in 2013 ('Breach of duty and causation, where are we now?' by Christopher Sharp QC and Matthew White, *PILJ*120, November 2013, p6) considered the circumstances in which the court will infer that a breach of duty caused a claimant's loss. An issue left for another day was that of cases in which there were cumulative causes of injury.

This article considers circumstances in which a defendant only responsible for one of a number of cumulative causes of injury can properly be held responsible for the whole loss.

Defining the problem

This article is concerned with cases where there are cumulative causes for an injury. That problem typically arises when there is a cause of the injury which is non-negligent, and a cause which arises from breach of duty, the two in combination producing the injury. This is best illustrated by some examples:

- A case of brain injury caused in part by the claimant's sickness (which was not the result of negligence) and in part by negligent delay in treatment. The two causative factors operate together to result in the brain injury.

- A lung condition caused in part by dust which was inhaled at work without there being a breach of duty, and in part by dust which was inhaled at work as a result of breach of duty.

Many of the examples in case law arise in the fields of (i) clinical negligence; and (ii) industrial disease litigation. There is a perception that courts are developing different approaches in disease claims and other types of claim. If that were happening, it would be undesirable. It is also not necessary. Provided that one appreciates the rationale that lies behind the rules on causation as presently being applied by the courts, those rules become comprehensible, and a set of principles that can deal with all types of cases emerge. It is likely that a lot will be written on this topic in coming years. This relatively short piece attempts to draw out the principles currently being applied by the courts from the cases decided recently.

Note at the outset that this piece is limited to cumulative cause cases as distinct from cases where there are multiple competing possible causes for an injury. In the latter case, a claimant must still prove that, but for the breach of duty, the injury would probably not have been sustained (*Wilsher v Essex Area Health Authority* [1987]) (see the 2013 article for circumstances in which the court will infer causation, effectively reversing the burden of proof). 'Material contribution' is not a relevant concept where the question in the case is which one of competing alternative causes was responsible for the injury.

Non-disease cases

The following examples are all from the clinical negligence field. There is no reason why the same principles would not apply to other types of personal injury

claim. Indeed the principles (properly understood) also apply to disease cases. We will come to that.

In *Bailey v Ministry of Defence* [2008] C aspirated vomit due to (i) pancreatitis (which did not have a negligent cause) which resulted in her being in a weakened state; and (ii) a lack of care in hospital (caused by the defendant's negligence). At first instance Foskett J held that the claimant succeeded on causation because the negligent lack of care materially contributed to the claimant's overall weakness. In the Court of Appeal Waller LJ (with whom Sedley and Smith LJJ agreed), upholding the decision, said (at para 46):

> In my view one cannot draw a distinction between medical negligence cases and others. 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. *Hotson v East Berkshire Area Health Authority* [1988] 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.

Notice that to remove the requirement to prove traditional 'but for' causation it is first necessary to show that medical science cannot answer the 'but for' question (one way or the other). In such circumstances if the tortious cause made a more than negligible contribution to the outcome, the tortious cause is held to be entirely responsible. Thus:

- the claimant who can prove that but for the tort they would not have been injured wins;
- the defendant who can prove that, but for the tort, the claimant would have been injured in any event wins (and for practical purposes the burden of proof would generally fall onto the defendant, albeit that there is some complexity here which would require an exploration of the burden of proof beyond the scope of this article); and
- if it cannot be shown whether or not the injury would have occurred but for the tort, the causation hurdle is lowered very significantly and all the claimant has to prove is that the tort made a more than negligible contribution to the injury.

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Note, therefore, that this approach only works in cumulative cause cases. If injury is caused by more than one cause (cumulatively), the claimant needs to prove either (a) 'but for' causation in respect of the alleged wrong; or (b) that it is not possible to show causation one way or another on a 'but for basis' and that the alleged wrong made a material contribution to the injury. However, if the injury might have been caused by one of a number of distinct causes, the claimant has to prove causation in the traditional 'but for' way.

Williams v Bermuda Hospitals Board [2016] is a decision of the Privy Council, so not technically binding in this jurisdiction, but any decision of five law Lords (here Lady Hale, Lord Clarke, Lord Hughes, Lord Toulson and Lord Hodge JJSC) needs to be regarded as extremely persuasive.

Following the decision of the Court of Appeal in *Bailey*, that decision had received some criticism, particularly centring on the difference in treatment between 'material increase in risk' (defendant liable to extent risk increased – see *Fairchild v Glenhaven Funeral Services* [2002] and *Barker v Corus* [2006] considered below) and 'material contribution to injury' (defendant liable for the whole loss). *Williams* essentially determines that the approach in *Bailey* is correct as a matter of law.

The claimant had appendicitis which was operated on. He developed sepsis which damaged his heart and lungs. The sepsis developed incrementally over about six hours, at least 140 minutes of which was a negligent delay.

Interestingly, while the board in *Williams* determined that the approach to material contribution in cumulative cause cases as outlined in *Bailey* is correct, they also expressed the opinion that it was not in fact necessary to depart from 'but for' causation for the claimant to win in *Bailey*. They point out that Ms Bailey's injury was caused by her weakness due to pancreatitis and her weakness due to negligent treatment, and see that as an instance of the egg-shell skull principle in operation: MoD had to take Ms Bailey as they found her (weakened by pancreatitis), and since the totality of her weakened condition caused the harm (ie the weakness caused both by the pancreatitis and the negligent treatment), she made out 'but for' causation. Her vulnerability being heightened by the pancreatitis did not mean that she could not make out 'but for' causation; on the

contrary, with a finding that the totality of the weakened condition caused the injury (pancreatitis and negligence), the board considered that Ms Bailey made out but for causation because the pancreatitis was akin to an egg-shell skull.

Two other interesting points arise from *Williams*. Firstly, it does not matter whether the cumulative causes of injury operate concurrently or successively. Secondly, the board determined that it was right to infer that the delay of at least 140 minutes (ie the tort) materially contributed to the injury process (which took place over six hours). See the 2013 article for circumstances in which a court is willing to make such inferences.

Subsequent to *Williams*, in *Sido John v Central Manchester & Manchester Children's University Hospitals NHS Foundation Trust* [2016], Picken J took 'material contribution' further in the clinical negligence context. Previously the courts had found that material contribution would suffice to make out causation in cases in which there was one causative agent (but cumulative causes for the injury). Examples include *Bailey* (where the single causative agent was the claimant's weakness which led to her aspiration of vomit, the weakness being caused in part by her (non-negligent) illness, and in part by failure to treat), and *Bonnington Castings v Wardlaw* [1956] (where the single causative agent was silica dust which when inhaled led to pneumoconiosis, the dust arising from dust which was not the result of a breach of duty and dust which arose from a breach).

Picken J analysed the older authorities through which the material contribution test has developed (*Bonnington Castings, McGhee v National Coal Board* [1972], *Wilsher, Hotson*). He reached the conclusion 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.

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The author ventures to suggest that the language of 'multiple factors' or 'single agency' risks disguising the vital issue at the heart of the matter: are the causes of the injury cumulative so as to result in the outcome? If they are, then there is no reason why the *Bailey* approach ought not to apply (which is the effect of Picken J's decision).

A final point worth taking from *Sido John* is the approach of the court to apportionment. The defendant argued that with different causative agents for the brain injury, the court should determine what proportion of the loss was attributable to the breach of duty, and award damages for that proportion only. The court rejected that approach. It was impossible to attribute a proportion of loss to a particular cause. If it is difficult to apportion, the court must do so. Where apportionment is impossible, that problem is visited on the defendant and not the claimant (who recovers 100% of the loss).

Meanwhile – in industrial disease litigation

In *Heneghan v Manchester Dry Docks Ltd & Others* [2016] Lord Dyson summarised the law on causation in disease claims at para 23:

> There are three ways of establishing causation in disease cases. The first is by showing that but for the defendant's negligence, the claimant would not have suffered the disease. Secondly, where the disease is caused by the cumulative effect of an agency part of which is attributable to breach of duty

on the part of the defendant and part of which involves no breach of duty, the defendant will be liable on the ground that his breach of duty made a 'material contribution' to the disease: *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. The disease in that case was pneumoconiosis which is a divisible disease (ie one whose severity increases with increased exposure to the agency). Thirdly, where causation cannot be proved in either of these ways, for example because the disease is indivisible, causation may be established if it is proved that the defendant materially increased the risk of the victim contracting the disease: the *Fairchild* exception. Mesothelioma is an indivisible disease.

The decision in Barker *was subsequently reversed by s3 of the Compensation Act 2006 in relation to mesothelioma cases.*

As a reminder, *Fairchild* was a mesothelioma case. The claimants had been exposed to asbestos by more than one employer, and could not prove which defendant's exposure has resulted in the disease (so would, on traditional principles, have failed against each defendant). Note: the claimants could not prove that any given defendant's exposure probably caused the disease on a 'but for' basis. Nor could they prove that any given defendant's exposure probably caused the disease on a 'material contribution' basis, because they could not prove that any given exposure made a material contribution to the injury. To avoid the injustice of a claim failing against all defendants simply because it could not be said which defendant's exposure resulted in the disease, the House of Lords said that if a claimant could show that an employer materially contributed to the risk of injury, that was sufficient to establish liability. In *Barker* the House of Lords determined that in this modified version of the causation test (ie 'material contribution to risk' rather than 'material contribution to injury'), each defendant was only liable in proportion to their contribution to the risk. The decision in *Barker* was subsequently reversed by s3 of the Compensation Act 2006 in relation to mesothelioma cases (such that a claimant with that condition can recover 100% of their loss from an employer who only contributed a lesser proportion to the overall risk), but only in relation to mesothelioma cases.

In *Heneghan* the deceased had been exposed to asbestos by a number of employers. He developed lung cancer (rather than mesothelioma). A claim was made against six of the employers who, between them, were responsible for 35.2% of the overall exposure. The claimant's case was that each defendant (through its contribution to exposure) had contributed not merely to the risk of the development of lung cancer, but to the disease itself. If that submission had been accepted then the claimant would have recovered 100% of his damages on the basis that (a) it was not possible to prove causation on a 'but for' basis; but also (b) each defendant had made a material contribution to the injury itself. That is, the claimants would have recovered 100% of their damages on the basis set out in the cases from *Bonnington Castings* to *Bailey*. It was determined, however, that the claimants could not show that the defendants' exposure (separately or together) materially contributed to the injury, but only to the risk of injury. That being so, the claimants recovered damages from the defendants limited to the proportion to which they had contributed to the risk of injury. They fell within the so-called *Fairchild* exception (ie where all that is required of a claimant is to prove that breach of duty materially increased the risk of injury, rather than the injury itself). To fit within that 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 (ie asbestos fibres); and (iv) medical science was unable to determine which defendants' exposure (if any) actually caused the injury.

Note in particular the third requirement for the application of the *Fairchild* exception: the *Fairchild* exception (which lowers the bar from proving 'material contribution to injury' to 'material contribution to risk') only applies to cases of a single causative agency. It would not have applied, therefore, in *Sido John*, had Dr John been unable to prove that the negligence made a material contribution to his injury. Note too that courts are reluctant to extend the *Fairchild* exception; its ambit has not yet been fully explored.

Before leaving the industrial disease field, an instructive recent case on 'material contribution' is *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 defendant contended that a 2.3% contribution to the disease would in reality make no difference to symptoms, disability, or prognosis. The 2.3% was small, but from a medical perspective material (and beyond *de minimis*). The defendant conceded that the increase in the disease was material and not *de minimis*, and that concession was fatal for the defendant. 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.

The court quoted Professor Sarah Green (*Causation in Negligence* (2015), chapter 5, p97), a quotation which also appeared in the judgment in the clinical negligence case of *Williams* above:

> 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...

An injury or disease where the severity of the condition is linked to the dose of the agent which causes the condition is described as 'divisible'. If the condition is not dose-related, it is described as 'indivisible'. For example, a claimant exposed to asbestos might develop asbestosis. The severity of that condition increases the greater the amount of the exposure. Asbestosis is a divisible condition (as is work-related upper limb disorders or noise-induced hearing loss). Asbestos exposure can also cause mesothelioma. That condition is not dose related. The condition can develop from just one fibre of asbestos, although it is impossible to say which fibre and therefore impossible to say which defendant (where multiple defendants have exposed a claimant to the asbestos) is responsible for the development of the condition. Mesothelioma is an indivisible condition (as is death).

Principles

It is possible to derive some principles, believed to be of general application (although the authorities should be reviewed with great care on any given set of facts... the difficulty that the courts have had with causation serves to show the need for caution):

- The first question is always whether or not injury would (on balance of probability) have been sustained but for the breach of duty. If but for the breach the injury would probably have been suffered in any event, the claim fails. If but for the breach the injury would probably not have been suffered, the claim succeeds.

- If it is not possible to say one way or the other whether or not injury would probably have been sustained but for the breach of duty, then if the breach is one of a number of cumulative causes of the injury, it is necessary to consider whether or not the breach made a material contribution (meaning more than a negligible contribution) to the injury. If it did, and if the injury is indivisible (if it is impossible to say what component part of it was caused by the wrong) the claimant recovers in full against the wrongdoer (even though there were other material causes of the injury).

- If the circumstances are as above but the injury is divisible (ie the component part caused by the wrong can be identified) the wrongdoer pays only for its contribution to the injury.

- The above principles do not depend on the injury arising from one single agent. Rather in a case in which there are cumulative causes for an injury, a claimant has to prove that the breach of duty caused or materially contributed to the injury.

- The author suggests that that principle is true in both disease cases and non-disease cases. Given that, defendants should be astute to seek out medical evidence to try to establish the contribution made by the breach of duty (to avoid being held liable for 100%).

- If the claimant cannot prove that breach of duty materially contributed to the injury, then in very limited circumstances (the *Fairchild* exception) a claimant can still make out causation by proving that the breach made a material contribution to the risk of injury. That is only possible where there is a single agent implicated in causation and medical science cannot say which defendant (if any) is responsible for the part of the agent which resulted in injury. In such cases the claimant recovers a proportion of damages commensurate to the increase in risk caused by the defendant.

- Cumulative causes can be concurrent or consecutive. ■

An injury or disease where the severity of the condition is linked to the dose of the agent which causes the condition is described as 'divisible'.

Bailey v Ministry of Defence
[2008] EWCA Civ 883

Barker v Corus
[2006] UKHL 20

Bonnington Castings v Wardlaw
[1956] UKHL 1

Carder v University of Exeter
[2016] EWCA 790

Fairchild v Glenhaven Funeral Services
[2002] UKHL 22

Heneghan v Manchester Dry Docks Ltd & Others
[2016] EWCA Civ 86

Hotson v East Berkshire Area Health Authority
[1988] UKHL 1

McGhee v National Coal Board
[1972] UKHL 7

Sido John v Central Manchester & Manchester Children's University Hospitals NHS Foundation Trust
[2016] EWHC 407 (QB)

Williams v Bermuda Hospitals Board
[2016] UKPC 4

Wilsher v Essex Area Health Authority
[1987] UKHL 11