CAUSAL UNCERTAINTY IN PI CLAIMS

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OVERVIEW AND BACKGROUND

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CAUSATION IN ITS PROPER ENVIRONMENT

The *Meadows v Khan* questions:

(1) Actionability – Is the claimed harm actionable in negligence?

(2) Scope of duty – Against which risks was there a duty to take care?

(3) Breach – Did the defendant breach a duty by act or omission?

(4) Factual causation – Is the loss the consequence of any breach?

(5) Duty nexus – Is there sufficient nexus between the particular harm claimed and the subject-matter of the duty of care?

(6) Legal responsibility – Is the particular harm claimed too remote? Is there a different effective cause (*novus actus*)? Should the claimant have mitigated the relevant loss?

DIVISIBLE AND INDIVISIBLE INJURIES

- Divisible injuries are dose-related: *Increased exposure leads to increased harm*
  - Pneumoconiosis (e.g. due to 'innocent' and 'guilty' dust – *Bonnington*)
  - Deafness (e.g. due to noise at work and age)
  - Asbestosis (e.g. due to employment with defendant and with others)

- Indivisible injuries cannot be apportioned between different causes: *Increased exposure irrelevant once injury triggered*
  - Lung cancer
  - Mesothelioma

WHAT IS CLEAR AND UNCLEAR TODAY?

- Indivisible injuries:
  - If the breach is a 'but for' cause there is liability for the whole
  - If the injury would have happened anyway, no liability
  - If the breach materially increased the risk, there is liability for the whole only within the circumstances prescribed in *Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32*
  - If the breach materially contributed to the process of injury… ?

- Divisible injuries:
  - Any material contribution is a 'but for' cause of some injury.
  - Liability is for the element caused or – if apportionment is not argued/found – for the whole.

MATERIAL CONTRIBUTION – OLD CASES

- Victorian cases:
  - *Senior v Ward* 1 EL & EL 385 954 (1859)
  - *Buccleuch v Cowan* (1866) 5 M 214
  - *Wakelin v Ldn SW Railway* [1886] 12 App Cas 41

- 20th century before *Bonnington Castings* (1956):
  - *Grant v Sun Shipping Company Ltd.* [1948] AC 549
  - *Summers v Tice* 33 Cal 2d 80; 199 P 2d 1 (1948)
  - *Cook v Lewis* [1951] SCR 830

THE *BONNINGTON* AND *MCGHEE* SHAKEUP

Bonnington Castings v Wardlaw [1956] AC 613:

- Pneumoconiosis due to 'innocent' and 'guilty' dust.
- 1st instance: no liability because not shown that the 'guilty' dust was the most probable cause.
- HL – 'Guilty' dust materially contributed; Defendant 100% liable.
- Lord Reid (p621):

  'It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex *is not material, but I think that any contribution which does not fall within that exception must be material.'*

BONNINGTON – THE DEBATE

- No discussion of whether injury divisible or indivisible, or of apportionment.

- Did the 'guilty' dust have to be a necessary ('but for') cause of injury?

  Lord Keith (p396): '*Prima facie the particles inhaled are acting cumulatively, and I think the natural inference is that* ***had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all****.'*

  Lord Reid (p623): *'…****the combined effect [from both sources] was to cause the respondent's disease****… 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****.'*

MCGHEE – MATERIAL INCREASE OF RISK

McGhee v National Coal Board [1973] 1 WLR 1:

- Dermatitis from brick dust. Impossible to know respective causative potency of (a) ambient exposure (non-tortious) and (b) lack of washing facilities (tortious).

- HL: Causation nevertheless made out.

Lord Reid: *'I think that in cases like this we must take a broader view of causation. The medical evidence is to the effect that the [lack of showers]* ***added materially to the risk*** *that this disease might develop…* ***From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury.***'*

Lord Wilberforce: *'… (M)erely to show that a breach of duty increases the risk of harm is* ***not,*** **in abstracto,** ***enough*** *to enable the pursuer to succeed… I find in the cases… an analogy which suggests the conclusion that,* ***in the absence of proof that the culpable addition had, in the result, no effect, the employers should be liable*** *for an injury, squarely within the risk which they created.'*

MCGHEE CRITICISED/CONFINED

- *'*McGhee *is undoubtedly a problematic case'* (Baroness Hale, *Sienkiewicz v Grief* [2011] 2 AC 229).

- Reversal of burden (Lord Wilberforce) disapproved in *Wilsher v Essex Health Authority* [1988] AC 1074 and *Fairchild*.

- Equation of material increase of risk and material contribution to injury (Lords Reid, Salmon and Simon) underlies the *Fairchild* exception, which is strictly confined.

FAIRCHILD

Fairchild v Glenhaven Funeral Services [2003] 1 AC 32

- Asbestos-caused mesothelioma – exposure by multiple employers.
- 'Modified approach' to causation justified in specific circumstances:
  - Tortious exposure by multiple actors
  - All increased the risk of the disease
  - Causes other than tortious exposure can effectively be discounted
  - Science does not enable attribution or apportionment
- In such a case, proof of a material increase in the risk of contracting the disease is sufficient (applying *McGhee*).
- *'Policy considerations weigh in favour of such a conclusion… I would… emphasise that my opinion is directed to cases in which each of the conditions… is satisfied and to no other case.'* (Lord Bingham at [34])

OVERSUBSCRIBED CONCURRENT CAUSES

- ‘Two hunstmen’ / ‘polluted stream’ example: Multiple tortfeasors concurrently cause indivisible injury, apportionment impossible.
- All are jointly and severally liable for the whole.
- *‘The reason for the rule that each concurrent tortfeasor is liable to compensate for the whole of the damage is not hard to find. In any such case, the claimant cannot prove that either tortfeasor singly caused the damage, or caused any particular part or portion of the damage. Accordingly his claim would fall to be dismissed, for want of proof of causation. But that would be the plainest injustice.’*

  (Laws LJ, *Rahman v Arearose* [2001] QB 351 at [18])

SUCCESSIVE CAUSES – *BAKER & JOBLING*

- Where the supervening event is tortious:
  - *Baker v Willoughby* [1970] AC 467
  - Leg tortiously injured in RTA but then shot by robbers and amputated prior to trial.
  - HL – Defendant liable for 1st injury as if 2nd had not occurred.

- Where the supervening event is non-tortious:
  - *Jobling v Associated Dairies* [1982] AC 794
  - Liability for lost earnings due to back injury at work curtailed by supervening unrelated myelopathy causing unfitness for work.

- NB these are 'but for' cases. No problem with apportionment.

WHERE DOES *WILSHER* FIT IN?

- Addition of a new risk factor – 'but for' causation applies
- *Wilsher v Essex AHA* [1988] AC 1074
  - Excess oxygen to premature baby a possible cause of eye condition, but 4 other possible non-tortious causes.
  - HL: 'But for' causation applies. No liability.
  - → Mere addition of a discrete risk factor is insufficient to show causation.

- Cf where the risk of injury is more than doubled. Such an increase may be held to show 'but for' causation (*Sienkiewicz*).

PSYCHIATRIC INJURIES – A SPECIAL CASE?

- *Rahman v Arearose Ltd* [2001] QB 351: Psychiatric injury apportioned between defendants on a 'rough-and-ready basis'.

- *Hatton v Sutherland* [2002] ICR 613:

  'Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.' (Hale LJ at [43])

- Cf *Dickins v O2* [2009] IRLR 58 – Smith LJ (at [46]):

> *'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 led is indivisible, it will be inappropriate simply to apportion the damages across the board… **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**.'*

BAE Systems v Konczak [2018] ICR 1, Underhill LJ:

- *Hatton* should be followed.
- *'**The message of** **Hatton** **is that [psychiatric] harm may well be divisible**'* [72]
- *'(T)he tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise… that **the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm**… the question is whether the tribunal can identify, **however broadly**, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.'* [71]
- *'**If there is no such basis**, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury though, importantly, if… the claimant has a vulnerable personality, a discount may be required in accordance with (Hale LJ's) proposition 16.'* [72]

MATERIAL CONTRIBUTION: WHAT WE KNOW IN 2022

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BAILEY V MOD [2008] EWCA CIV 883

- 11th: ERCP procedure, removal of gall stone
- Negligent failure to resuscitate until 4pm on the 12th
- Non-negligent pancreatitis
- 14th: bleeding from gut, renal failure, circulatory support
- 15th: surgery
- Steady improvement
- 26th: moved to renal ward
- Aspirates vomit → cardiac arrect → hypoxic brain injury

BAILEY V MOD [2008] EWCA CIV 883

- Judge found that the failure to aspirate vomit was caused by C's weakened state, which had two components: negligent delay in resuscitation, and pancreatitis. Could not find whether negligent cause was a 'but for' cause. But found that it made a material contribution.
- CA finds that this was a departure from the 'but for' test, which Lord Rodger in *Fairchild* said was permissible in a cumulative cause case: [36] + [39]
- *Wilsher* distinguished because it is not a cumulative cause case, but a distinctive causes case: [44]
- *Hotson* distinguished because there, 'but for' resolved against C

BAILEY V MOD [2008] EWCA CIV 883

- Infamous [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's case 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."

AB V MINISTRY OF DEFENCE [2010] EWCA CIV 1317

- Claim by over 1,000 veterans said to have suffered injury as a result of exposure to ionising radiation from atmospheric tests of thermonuclear devices carried out in the 1950s
- Mostly cancers
- Claim allowed to proceed by Foskett J.
- Much of the case turned on whether Cs had knowledge
- CA allows MoD's appeal: Cs' case on causation was so bad that s33 LA 1980 discretion ought to have been exercised against them
- Cs specifically sought to rely on *Bailey*

AB V MINISTRY OF DEFENCE [2010] EWCA CIV 1317

[150]: *"…we accept that, at least so far as cancers are concerned, the claimants cannot rely on proving that the radiation exposure has made a material contribution to the disease, as in Bailey and Bonnington Castings.* ***This principle applies only where the disease or condition is 'divisible' so that an increased dose of the harmful agent worsens the disease****…*

[With reference to Bonnington] The tort did not increase the risk of harm; it increased the actual harm….

Cancer is an indivisible condition; one either gets it or one does not. The condition is not worse because one has been exposed to a greater or smaller amount of the causative agent."

- Arguably wrong because the 'harm' in *Bailey* was *not* 'divisible': the physical weakness was the *mechanism*, not the actual *harm*

AB V MINISTRY OF DEFENCE [2012] UKSC 9

- Most of the judgments in the SC concerned knowledge / s14
- However, no criticism whatsoever of CA approach to causation
- Indeed, Lord Mance (in the majority) appears to approve CA on the *Bailey* point: [89]

HENEGHAN V MANCHESTER DRY DOCKS [2016] EWCA CIV 86

- Lung cancer caused by asbestos
- Defendants sued accounted for only 35% of the exposure
- Application of *Fairchild* would have meant that C recovered only 35% of full quantum, because of *Barker v Corus* (the Compensation Act 2006 only reversing *Barker* in relation to mesothelioma)
- Accordingly, C argued that he could recover 100% of the loss by application of material contribution
- Material contribution failed on the facts: at first instance judge found that it could not be said that any particular exposure contributed to the disease; upheld by CA, which noted same approach in Australia ([30]-[32])

HENEGHAN V MANCHESTER DRY DOCKS [2016] EWCA CIV 86

- Dicta on the law, however, suggests strongly that MC could not operate in an indivisible case:
- [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.”

HENEGHAN V MANCHESTER DRY DOCKS [2016] EWCA CIV 86

- [46]: "[The *Bonnington Castings*] 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.."
- As noted by the judge in *Thorley* at [148], was the CA saying that MC cannot apply to II as a matter of principle, or is it simply a further difficulty of proof?

WILLIAMS V BERMUDA [2016] UKPC 4

- Acute appendicitis with appendicectomy and cardiac complications
- 1117: Arrives in ED
- 1140: examined
- 1310: CT scan ordered
- 1519: appendix begins to rupture
- 1715: earliest should/would have been taken to theatre
- 1727: CT scan performed
- 1910: latest should/would have been taken to theatre
- 1930: report received
- 2130: taken to theatre

WILLIAMS V BERMUDA [2016] UKPC 4

- Approves a passage from Sarah Green on Causation which states that MC can apply to indivisible injuries: [31]
- *Bonnington* was not argued as a divisible injury case; therefore the dicta within it are not restricted to divisible injuries: [32]
- *Hotson* was a 'distinct causes' case which failed on ordinary principles, but at 783 Lord Bridge said "*if the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed*."

WILLIAMS V BERMUDA [2016] UKPC 4

- Relied on the following passage of Lord Simon's opinion in *McGhee*, at p8:
- *"where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury"*
- However, *McGhee* has been held to have been a "material increase in the risk" / *Fairchild* type case: see *Sienkiewicz* and *Barker v Corus*

WILLIAMS V BERMUDA [2016] UKPC 4

- Said as follows of *Bailey* at [47]:
- *"The Board does not share the view of the Court of Appeal that the case involved a departure from the but-for test. The judge concluded that the totality of the claimants weakened condition caused the harm. If so, but-for causation was established. The fact that her vulnerability was heightened by her pancreatitis no more assisted the hospitals case than if she had an eggshell skull."*

WILLIAMS V BERMUDA [2016] UKPC 4

- [42]: “On the trial judges findings, that process continued for a minimum period of two hours 20 minutes longer than it should have done. In the judgment of the Board, it is right to infer on the balance of probabilities that the hospital board’s negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs.”

WILLIAMS V BERMUDA [2016] UKPC 4

- *Williams v Bermuda* does appear to apply MC to an indivisible injury: [31]
- BUT:
  - no analysis of the argument that, on the authorities, MC cannot apply to indivisible injuries; in particular no analysis of *AB v MoD* in the judgment, even though this is binding authority against MC to indivisible injuries
  - Analysis of *Bailey* appears wrong
  - Not binding in England and Wales

DAVIES V FRIMLEY HEALTH NHSFT [2021] EWHC 169 (QB)

- Deceased arrives at hospital 0910 with bacterial meningitis
- Antibiotics given at 1320 but died next day
- HHJ Auerbach (sitting as a HC Judge) finds that had antibiotics been given by 1040, deceased would have survived, therefore 'but for' causation made out: [167]
- Considered material contribution anyway. *Obiter,* but a detailed and very good analysis.

DAVIES V FRIMLEY HEALTH NHSFT [2021] EWHC 169 (QB)

- [200]: “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.”
- “Secondly, where the harm is indivisible, a party will be liable for the whole of it, if they caused it, applying “but for” principles.”
- “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."
- [201] “Fairchild provides a further distinct route to liability, in the limited types of case to which it applies, based on contribution to risk, but leading to liability for the actual harm. Where it applies to a mesothelioma case, the effect of the 2006 Act is that each contributor to the risk is co-liable to the claimant for the whole of the harm. Otherwise, as in Heneghan, it is apportioned.”

DAVIES V FRIMLEY HEALTH NHSFT [2021] EWHC 169 (QB)

- [202] "*…what the authorities since Bonnington Castings have wrestled with, is whether that decision establishes the existence, outside of Fairchild cases, of an additional route to liability, for either the whole or part of the harm suffered, that may be available where none of the routes I have referred to at [200] above applies, and which is conceptually distinct from all of them*."
- Whilst *Bailey* held that *Bonnington Castings* created a new route to liability, that is contradicted by *AB* and also *Heneghan:* [203]
- *Sienkiewicz* also considered that *Bonnington* only an exception because 100% liability imposed in a divisible case. And Lord Brown against any novel route: [205]
- *Williams* also did not consider *Bonnington* or *Bailey* as exceptions: [206]-[209]

DAVIES V FRIMLEY HEALTH NHSFT [2021] EWHC 169 (QB)

- [209]: "*I conclude that, while Bonnington Castings was viewed in Bailey as establishing a novel principle, later authorities of the Court of Appeal, House of Lords and Privy Council view it as having resulted in an anomalous outcome, for peculiar reasons, and not as standing for any novel legal principle, distinct from the general jurisprudence on co-contribution to divisible or indivisible harms. This conclusion appears to me to accord with deep principle, and with the prevailing view at the highest level, ever since Fairchild, that it stands alone as an exception to orthodox principles, in a tightly circumscribed type of case. In any event, I am bound to follow what I understand to be the principles emerging from those authorities*."

THORLEY V SANDWELL [2021] EWHC 2604 (QB)

- C suffered atrial fibrillation (AF) for which he took warfarin
- Coronary angiogram on 27 April; advised to stop warfarin 23rd-28th
- Stroke on 30th
- C's case: should only have stopped Warfarin for 3 days (24th to 26th), i.e. negligent omission on 3 days (23rd, 27th, 28th)
- Trust made limited admission of breach (1 omitted day and 0.5mg reduced dose) but denied causation
- Court finds for D on breach: [80]
- 'But for' case fails on the 3-day case (therefore by extension on the 1-day case): [137] – so this is not an uncertainty case

THORLEY V SANDWELL [2021] EWHC 2604 (QB)

- Judge rejects MC to an indivisible injury
- *AB* in the CA is binding authority that MC does not apply to an indivisible injury with one tortfeasor: [147]. But this was *not* endorsed in the HL due to concession by Cs' counsel.
- *Heneghan* may be authority to the same effect as *AB*: [148]
- *Williams* and Lord Phillips in *Sienkiewicz* are contrary authority but not binding
- [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"*
- Judge also found that no material contribution in fact: [160-163]

SUMMARY

- *Bonnington Castings:* a divisible injury case, not argued as such, where 100% was recovered (with no apportionment argued)
- *McGhee:* an indivisible injury case, where dicta support MC to II, but later authorities firmly confine it as a "material increase in risk" case
- *Bailey*: an indivisibly injury case, the classic authority on MC, but which later cases explain away as a divisibly injury case
- *AB*: CA authority specifically decided on basis that MC to II is not possible, with no criticism in SC
- *Heneghan*: CA which seems to say that MC to II not possible
- *Williams:* Non-binding authority which says that MC to II *is* possible but does not grapple with the issue
- *Davies* and *Thorley*: Recent HC decisions find that MC to II not possible

WHAT ARE THE ARGUMENTS?

- <u>For C:</u>
  - ‘But for’ does not work in an oversubscribed cause case.
  - Any ordinary person would say that someone who has contributed is part of the cause; therefore a finding that causation not established is counterintuitive
  - Why should D have the benefit of the doubt in a case where we can never know what would have happened because of its negligence (benevolence principle)
  - Why should C be allowed to recover 100% in a divisible injury case (*Bonnington*) but 0% in an indivisible injury case?
  - Law is no stranger to applying different tests of causation (conversion, *Iraqi Airways*)

WHAT ARE THE ARGUMENTS?

- For D:
  - ‘But for’ a long-established part of the common law
  - Allowing recovery in such a case goes against the compensatory principle of tort – see e.g. speech of Lord Nicholls in *Fairchild*, [40-43]
  - The exceptions to ‘but for’, namely *Fairchild* and multiple-tortfeasor cases, have very strong policy reasons which are absent for any wider extension
  - ‘Benevolence’ arguments are unprincipled: why not start relaxing the need for a duty of care, or proving quantum, just because a D is in breach of duty?
  - Allowing MC in disease cases will create unprincipled distinctions (e.g. between disease and trauma cases)

CAUSATION IN OTHER AREAS OF THE LAW

- Supreme Court has recently recognised that the 'but for' test can be under-inclusive in the Covid-19 insurance case, *FCA v Arch Insurance* [2021] UKSC 1:

"[182] *It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event…*

[191] *For these reasons there is nothing in principle or in the concept of causation which precludes an insured peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause - indeed as a proximate cause - of the loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself.*"

BENEVOLENCE PRINCIPLE

Property damage case called *Drake v Harbour* [2008] EWCA Civ 25, Toulson LJ said:

"[28] *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. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense*."

BENEVOLENCE PRINCIPLE

- *Schembri v Marshall* [2020] EWCA Civ 358
- GP fails to refer to hospital on 25 April 2041
- Deceased dies of a massive PE the next day
- Stewart J rejects all positive causal mechanisms by which Deceased would have been saved
- "*The Claimant does not need to prove the precise mechanism by which her survival would have been achieved*" ([128])
- "*Overall most people do not die of PE when they are in hospital*" ([140])
- "*The court, in looking at the evidence as a whole, must take a common sense and pragmatic approach to that evidence, in circumstances where it is equivocal*" ([146])
- CA (McCombe LJ, with whom Holroyde and Phillips LJJ agreed) entirely endorses that approach: [56] + [57]

BENEVOLENCE PRINCIPLE

- *Keefe v Isle of Man Steam Packet Co* [2010] EWCA Civ 683:
- "[19] … *a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings…the court should judge a claimant's evidence benevolently and the defendant's evidence critically*"
- Applied in clin neg. cases: *JAH v Dr Matthew Burne & Ors* [2018] EWHC 3461 (QB); *Younas v Okeahialam* [2019] EWHC 2502 (QB)
- Similar point expressed in *Gregg v Scott* [2005] 2 AC 176*:* use of statistical evidence is appropriate and "*This conclusion is the more compelling when it is recalled that the reason why the actual outcome for the claimant patient if treated promptly is not known is that the defendant by his negligence prevented that outcome becoming known.*" ([32])

PRACTICAL TIPS

- Weight of authority is currently (just) against the application of MC to an indivisible injury: *Davies; Thorley* applying *AB*
- MC is often raised as an alternative case where the primary case on causation is doubtful; accordingly, it is a double-edged sword
- Two alternative lines of caselaw – benevolence principle *(King)* & common sense approach *(Schembri)* can also cause difficulties for Defendants in uncertain causation scenarios
- Focus for both parties must be on strong 'but for' causation evidence
- Claimants should be wary of relying solely on MC
- Defendants should be wary of arguing that claim must fail because C can't prove causation; they should positively show why injury would have occurred in any event
- Cases of 'but for' uncertainty are usually capable of settlement with liability discount

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