

PROOF OF CAUSATION BY MATERIAL CONTRIBUTION

'BUT FOR' BY ANOTHER NAME?

1. In tort the onus is on a claimant to show that the defendant's wrongdoing caused him actual damage. In a claim for personal injury the claimant satisfies that onus if he establishes on a balance of probabilities that the defendant's negligence or breach of statutory duty has caused or materially contributed to his injury. This paper examines the meaning and scope of 'a material contribution' to injury.

2. In **BONNINGTON CASTINGS LTD. v. WARDLOW** 1956 AC 613 the House of Lords confirmed that in respect of a breach of statutory duty as well as negligence the onus of proof lay on the claimant to prove that the breach had caused the injury.

Giving the main judgment Lord Reid stated at 620:

"It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of statutory duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England".

As to the meaning of 'a material contribution' Lord Reid stated at 621:

"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. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material."

3. The usual approach to causation is to identify the effective cause of the injury by the application of the 'but for' test. Would the claimant's injury have occurred 'but for' the breach of duty of the defendant? The question arises: is the requirement to establish a material contribution different to the 'but for' test? If it is a different test then what is that test and in what circumstances does the law permit a claimant to prove causation by this different requirement? More than 55 years after Lord Reid's apparently clear statement of principle in **BONNINGTON CASTINGS**, the answer to these questions is far from certain. Given that we are concerned with a basic principle of causation this is a surprising state of affairs.
4. Lord Reid's formulation of the principle that a claimant must prove the breach caused or materially contributed to his injury has been repeated in House of Lords' judgments many times¹. In **FAIRCHILD** Lord Rodger observed that there was nothing new in Lord Reid's reference to 'material contribution' in **BONNINGTON CASTINGS**. Lord Rodger stated that there was already ample authority for the proposition in both English and Scots law². Lord Rodger makes plain that where a claimant can establish causation by proving a material contribution, this is a different requirement to the 'but for' test:

"In such cases this basis of liability is of considerable importance. Since it is enough that the defendant's wrongful act materially contributed to the claimant's injury, the law is not applying the *causa sine qua non* or 'but for' test of causation. In **WARDLOW**, for instance, the pursuer did not need to prove, that, but for the dust from the swing hammers, he would not have developed pneumoconiosis. All he needed to prove was that the dust from the swing

¹ **WILSHER v. ESSEX A.H.A. 1988 1 AC 1074** Lord Bridge at 1091E-F.

FAIRCHILD v. GLENHAVEN FUNERAL SERVICES 2003 1 AC 32 Lord Bingham at 46 para 14.
² at 99 para 128

hammers contributed materially to the dusty atmosphere which he breathed and which caused his illness"³.

Lord Rodger makes clear that the requirement of proving a material contribution is less onerous than proving causation on a 'but for' basis. He identifies other industrial disease cases where the House of Lords have adopted the material contribution approach⁴. He does not discuss the scope of the rule and whether its application is limited to certain types of case such as industrial disease. Such considerations were unnecessary in the context of the issue in **FAIRCHILD**.

5. Can a claimant prove causation by the material contribution approach in types of case other than industrial disease? In **PAGE v. SMITH No. 2 1996 1 WLR 855** the claimant was involved in a road traffic accident of moderate severity. He suffered no physical injury but alleged that the psychological trauma caused by the accident had resulted in an exacerbation of a pre-existing chronic fatigue syndrome (CFS). The trial judge, Otton J., applied the approach of Lord Reid in **BONNINGTON CASTINGS** and found that the defendant's negligence had materially contributed to the recrudescence of the CFS and emphasised that the vital element was that the negligence should be a material contribution to the injury and not a minimal or trivial one. The case went to the House of Lords on the issue of foreseeability but causation was then remitted to the Court of Appeal. The defendant argued that the judge had applied the wrong test. He should have asked himself whether the claimant would have suffered the injury but for the defendant's negligence. The Court of Appeal

³ at 100 para 129

⁴ **NICHOLSON v. ATLAS STEEL 1957 1 WLR 613**
QUINN v. CAMERON & ROBERTSON LTD. 1958 AC 9
GARDINER v. MOTHERWELL MACHINERY 1961 1 WLR 1424.

rejected this criticism although Sir Thomas Bingham doubted that the outcome would have been different whichever test was applied.

6. In **DONACHIE v. CHIEF CONSTABLE OF GREATER MANCHESTER POLICE 2004 EWCA Civ 405** the claimant was a serving police officer who suffered extreme stress while attempting to attach a tagging device to a suspect's car. The device repeatedly failed to operate, with the result that the claimant had to attach the device no less than nine times. The claimant suffered from pre-existing hypertension. The extreme stress led to the claimant developing a clinical psychiatric state and subsequently to an acute rise in blood pressure which caused a stroke. There was a history of defective tagging devices and a breach of duty was established. The case gave rise to issues of foreseeability and causation. On causation counsel for the claimant contended before the Court of Appeal that on the judge's findings of fact the stress had materially contributed to the psychiatric condition and the stroke. It was submitted that on the **BONNINGTON** test the claimant had established causation. The Court of Appeal agreed.

7. In **BRITISH STEEL PLC v. SIMMONS 2004 UKHL 20** the claimant, in the course of his employment at a steelworks, sustained relatively minor physical injury as a result of a fall for which his employers accepted liability. He subsequently experienced an exacerbation of a pre-existing skin condition. He also developed a change of personality and a severe depressive illness which prevented him from returning to work. The trial judge awarded damages for the physical injury, but not for the additional consequences which he regarded as too remote. The House of

Lords held that on the trial judge's findings of fact a contributory cause of the skin condition and the depressive illness was the claimant's anger at the happening of the accident. It was unnecessary for the claimant to prove that the accident alone would have been enough to cause anger sufficient to exacerbate the psoriasis and bring on the psychiatric condition. The claimant was entitled to succeed if the accident made a material contribution to the anger which produced the exacerbation of the skin condition and the depressive illness. Lord Hope stated at para 18:

"The general rule is that it must be shown that the injury would not have occurred but for the act or omission of the defender. But if a number of factors contributed to the injury it is sufficient that the contribution which the factor attributable to the defendant's fault made to the injury was material."

Lord Rodger observed at para 58:

"His anger at the defenders that the accident had occurred at all, despite the warnings, also made a material contribution to the development of his condition. Before the House, Mr. Smith sought to argue that the principle in **WARDLOW v. BONNINGTON CASTINGS LTD.** ... did not apply in this situation. But he cited no authority for his proposition and, in my view, it is unsound. The usual rule applies and, in the absence of any basis for identifying and apportioning the respective roles played by the various factors in the development of the pursuer's condition, the pursuer is entitled to recover damages for all of his injuries."

Lord Steyn, Lord Scott and Baroness Hale all agreed with the judgments of Lord Hope and Lord Rodger. **SIMMONS** appears to be authority for the proposition that in an ordinary personal injury claim, where several factors have contributed to the injury, it is sufficient for a claimant to prove that the defendant's breach of duty has materially contributed to the injury.

8. In **CLOUGH v. FIRST CHOICE HOLIDAYS AND FLIGHTS LTD. 2006** **EWCA Civ 15** the claimant was walking on the wall of a swimming pool when he

slipped and fell suffering a catastrophic injury. There had been a failure to use non-slip paint on the wall which constituted a breach of duty. However, the trial judge found that causation was not established. At paragraph 44 of the Court of Appeal's Judgment the President of the QBD stated that the use of the words 'but for' was shorthand which might convey the impression that a claimant's claim for damages for personal injuries must fail unless he can prove that the defendant's negligence was the only or last cause of his injuries. Such an impression would be incorrect. A claimant is required to establish a causal link between the negligence of the defendant and his injuries. The necessary causal link would be established if, as a matter of inference from the evidence, the defendant's negligence made a material contribution to the claimant's injuries. He referred with approval to Lord Rodger's analysis in **FAIRCHILD** of the principle of material contribution.

9. In **BAILEY v. MINISTRY OF DEFENCE 2008 EWCA Civ 883** the Court of Appeal considered whether the principle of material contribution had any application to medical negligence cases. The claimant was operated upon for a gallstone problem. Following that operation there was a lack of adequate care. The claimant developed an acute pancreatitis but this was not a consequence of lack of care. A few days after the operation the claimant was in a weakened state, partly as a result of the want of care and partly due to the pancreatitis. In that weakened state the claimant aspirated her vomit which led to a cardiac arrest which, in turn, caused the claimant to suffer hypoxic brain damage. The claimant's counsel submitted that the correct question was whether the defendant's negligence caused or materially contributed to the injury. The defendant's counsel submitted that the right test was "the normal unmodified

requirement that the alleged failure should have caused the harm, so that without it the damage would not have occurred".

10. The only judgment in **BAILEY** is that of Waller L.J. who identifies the crucial question as being what caused the claimant's weakened state (para 33). He quotes from the trial judge's conclusions that both the lack of care and the pancreatitis had contributed to the weakened state. The judge was unable to say which had made the greater contribution. What he did find was that each contributed materially to the overall weakness which led to the aspiration and the cardiac arrest. Waller L.J. observed, at para 34:

"If all that is necessary is "a material contribution" and if, for that material contribution to be established, it is sufficient to establish a contribution which is more than negligible then it seems to me that the judge's conclusion cannot be faulted. The question is whether that is sufficient".

Waller L.J. noted that the trial judge had not been able to conclude that 'but for' the defendant's negligence the injury would not have occurred. All that he was able to find was that the breach of duty had made a contribution which was more than negligible. This was not an application of the 'but for' test and reference is made to Lord Rodger's analysis of material contribution in **FAIRCHILD**. Waller L.J. states that Lord Rodger accurately summarised the position when he said at paragraph 129 of **FAIRCHILD** that in a cumulative cause case such as **WARDLOW** the 'but for' test was modified.

11. Waller L.J. concludes at para 46 that no distinction is to be drawn between medical negligence cases and other types of personal injury claim:

"...in relation to cumulative cause cases ... if the evidence demonstrated on a balance of probabilities that the injury would have occurred as a result of the

non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. **HOTSON** exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligence was more than negligible, the 'but for' test is modified, and the claimant will succeed".

Waller L.J. concluded that in the instant case cumulative causes, including the want of care, had acted so as to produce the claimant's weakened state and the judge was therefore entitled to reach the conclusion he did.

12. **MINISTRY OF DEFENCE v. AB** (the atomic veterans' litigation) concerns a group action by individuals who were exposed to radiation as a result of the testing of thermonuclear devices in the region of the Pacific Ocean during the 1950s. These individuals suffer from a variety of illnesses, including several types of cancer, which they allege are the consequence of radioactive fallout. Limitation was tried as a preliminary issue by reference to a number of lead cases. The trial judge ruled that none of the lead claims were barred by limitation, either because he found a date of knowledge such that the claim had been commenced within the primary limitation period or, alternatively, he exercised his discretion under Section 33 of the Limitation Act 1980 in favour of the claimants. On appeal (2010 EWCA Civ. 1317) the Court of Appeal reversed the trial judge. At the heart of the defendant's submissions was the contention that these were very weak cases on causation and applying the 'broad merits' test when exercising the Section 33 discretion, the claims should not be allowed to proceed.

13. A single judgment was handed down by the Court of Appeal. In reviewing the judge's decision, the Court of Appeal summarised the parties' respective submissions as to the law on causation and the application of the law to the instant case (paragraphs 122 to 149). The Court of Appeal, in accepting the submissions on behalf of the MoD, held that in respect of claimants suffering from various cancers it was not open to these claimants to rely on **BAILEY** and **BONNINGTON CASTINGS** and prove that radiation exposure had made a material contribution to the disease:

"This principle applies only where the disease or condition is 'divisible' so that an increased dose of the harmful agent worsens the disease" (para 150).

In **BONNINGTON** there had been tortious and non-tortious exposure to harmful dust. The tortious exposure had increased the severity of harm. In **BAILEY** the negligence had increased the physical weakness. In **BONNINGTON** the pneumoconiosis and in **BAILEY** the weakness were divisible conditions, whereas cancer is an indivisible condition, one either gets it or one does not. The severity of the condition does not alter because one has been exposed to a greater or smaller amount of the causative agent. The Court of Appeal suggested that in the case of cancer, causation can only be established on a 'but for' basis by proving that the tortious exposure has more than doubled the risk of getting the disease.

14. The analysis of the Court of Appeal in the above case is open to question. Whilst it is true that the silicosis suffered in **BONNINGTON** is a divisible injury with degrees of severity depending on the extent of exposure, in the judgments in the House of Lords the condition was treated as though it was an indivisible injury. Lord Reid's analysis of the evidence is directed to determining whether the negligent exposure has contributed to the disease, not whether it made the disease worse. In **BAILEY** the

claimant was not suing for her weakened state. She was suing for the effects of brain damage. Her weakened state had led to that injury. Tortious and non-tortious factors both contributed to the weakened state. In that sense there was a cumulative cause but this was not the injury. The cumulative cause triggered the cardiac arrest which resulted in brain injury. There was no suggestion that the brain injury was divisible. If a Court finds that a cancer has been caused by a combination of factors, in part tortious and in part non-tortious, is there any reason in principle why the doctrine of material contribution should not apply?

15. The analysis of Lord Phillips in **SIENKIEWICZ v. GRIEF (UK) LTD. 2011 UKSC 10** strongly indicates that a claimant can prove causation in a cancer case by relying on the principle of material contribution. **SIENKIEWICZ** was a mesothelioma case and was concerned with the scope of the **FAIRCHILD** exception. Did the exception apply to what the defendants termed a 'single exposure' case and in such a case should a claimant be required to prove causation on a 'but for' basis by proving that the tortious exposure had more than doubled the risk of contracting mesothelioma? This involved the Supreme Court considering the usefulness and weight to be attached to epidemiological evidence. In particular the Court considered whether a 'doubles the risk' test should be applied in multiple cause cases involving diseases other than mesothelioma. In respect of a case where asbestos was alleged to have caused death by lung cancer, Lord Phillips stated that:

"the issue was whether the asbestos to which the victim had been exposed had made a material contribution to the cause of the victim's lung cancer. The expert evidence given by both medical and epidemiological experts, but based in the case of each I suspect, on epidemiological data, was that asbestos and cigarette smoke not merely combined cumulatively to cause lung cancer, but that they had a synergistic effect in doing so. This evidence was enough, as I see it, to satisfy the Bonnington test of causation as the victim had been

exposed both to significant quantities of asbestos fibres and to significant cigarette smoke" (paragraph 75).

Later at paragraph 90, Lord Phillips stated:

"For reasons that I have already explained, I see no scope for the application of the "doubles the risk" test in cases where two agents have operated cumulatively and simultaneously in causing the onset of a disease. In such a case the rule in *Bonnington* applies. Where the disease is indivisible, such as lung cancer, a defendant who has tortiously contributed to the cause of the disease will be liable in full. Where the disease is divisible, such as asbestosis, the tortfeasor will be liable in respect of the share of the disease for which he is responsible".

16. The analysis of the law by the Court of Appeal in *Atomic Veterans* does not appear to be reconcilable with Lord Phillips' statement of principle in **SIENKIEWICZ**. The Supreme Court is to hear an appeal by the claimants in the *Atomic Veterans*' litigation. Some clarification of the law of causation may be provided by the Supreme Court's judgment.

17. The lack of consistency in the judicial approach to 'material contribution' is highlighted by the judgment of Lord Brown in **SIENKIEWICZ**. In addition to a prolonged lament at the corruption of the common law by the **FAIRCHILD** exception, Lord Brown states at paragraph 176 that all other cases (apart from cases to which the **FAIRCHILD** exception applies) require the claimant to satisfy the 'but for' test of causation. He acknowledges that in the case of cumulative injuries, the law holds a negligent employer liable even if his negligence is responsible for part only of the victim's condition. Lord Brown adds that he has difficulty in seeing this as a true exception to the 'but for' test. Although the claimant in **BONNINGTON CASTINGS** recovered full damages, Lord Brown states that subsequently damages have been apportioned to reflect the extent of the damage due to the breach.

18. The analysis of Lord Brown does not distinguish between a cumulative cause and a cumulative injury. For the application of the material contribution principle there has to be a finding of a cumulative cause in the sense that the breach of duty is one of two or more factors which have contributed to and so have been causative of the injury. If there are several possible causes, each of which may have been the sole cause of the injury, a claimant will not be able to establish causation (see **WILSHER v. ESSEX AHA 1988 AC 1074**). If the cause is cumulative, it should not matter whether the injury is cumulative i.e. divisible or indivisible. If the cause is cumulative and the breach of duty has contributed materially to the injury then causation should be established.
19. As indicated by Lord Phillips and Lord Brown in **SIENKIEWICZ** where a claimant establishes that a breach of duty has made a material contribution to an injury and that injury is deemed a divisible injury, then a defendant will only be liable for that part of the injury determined to have been caused by the breach. In **HOLTBY v. BRIGHAM COWAN (HULL) LTD. 2000 3 All E.R 421**, the claimant contracted asbestosis after occupational exposure of almost 40 years. For about half of that time he was employed by the defendants. The medical evidence was to the effect that if the claimant had only been exposed to asbestos for the period when employed by the defendants his condition would have been less severe. The judge held that the defendants were only liable for the damage they had caused and not for that part of the disease caused by unsued exposure during other employment. The Court of Appeal held that this was correct in principle. Similarly, in **ALLEN v. BRITISH RAIL ENGINEERING 2001 EWCA Civ 242**, where the claimant suffered vibration

induced injury, the damages were reduced to take into account that the exercise of reasonable care would only have reduced exposure by about half. The employers were not liable for that part of the injury caused by 'innocent' exposure.

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