Causation in English Construction Law: time for a re-statement?

The Society of Construction Law

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The Society of Construction Law

Introduction

The issue

"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 by abstract metaphysical theory."

Alphacell v Woodward [1972] AC 824 at 847, *per* Lord Salmon

Introduction

H. L. A. Hart and Tony Honoré, Causation in the Law (2nd edition), xxxiv:

"*the clarification of the structure of ordinary causal statements was and is an indispensable first step towards understanding the use of causal notions in the law*."

Introduction

The thesis question

- To what extent is it possible to set out and re-state the principles of causation insofar as they operate in construction law?
- Are those principles:
  - formally and readily ascertainable;
  - either commonly accepted or controversial as positivist statements (as opposed to economic or social policy);
  - part of the more general corpus of English contract, and commercial, law or represent rulesets that are typical to construction law contracts?

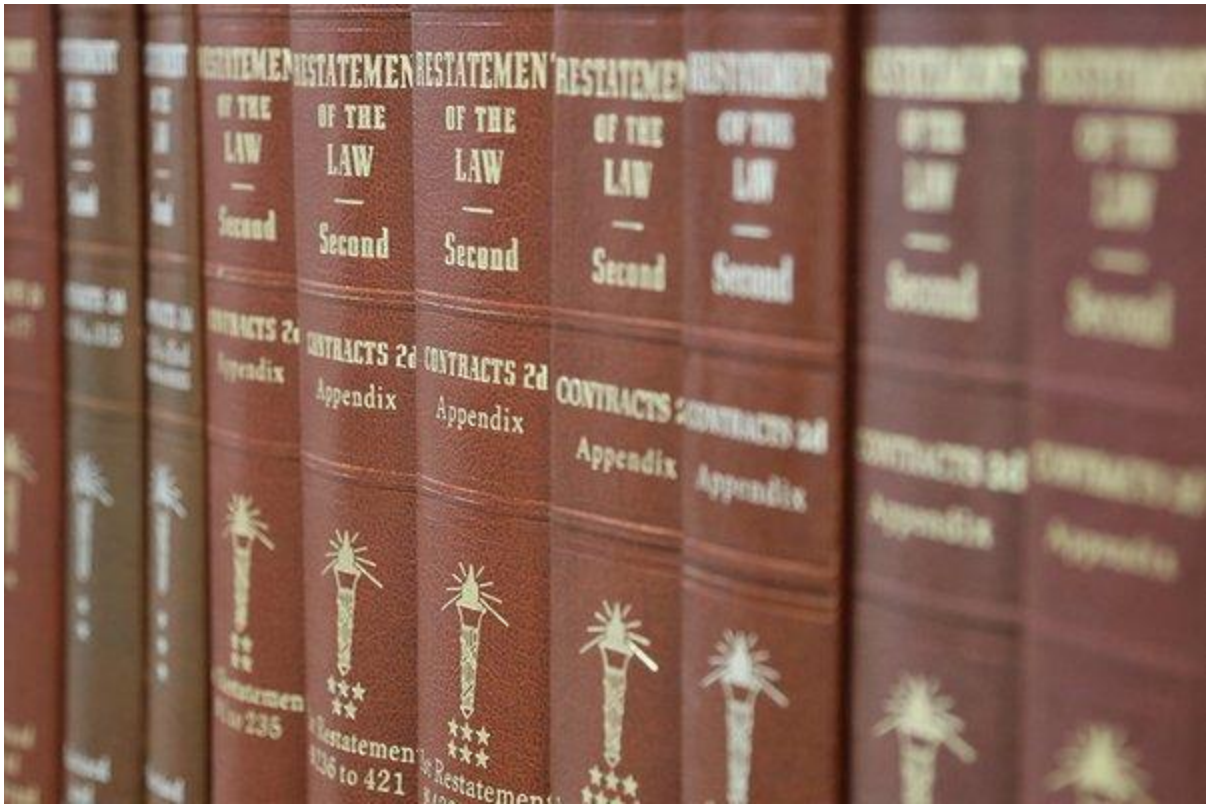
(Primary focus on contractual liability)

Introduction

Structure

- Part I: the American Law Institute Restatement programme
- Part II: *Beattie Passive Norse Limited (2) NPS Property Consultants Ltd v Canham Consulting Ltd* [2021] EWHC 1116 (TCC)
- Part III: an outline of what a re-statement of the law of causation in construction law might resemble
- Conclusion:
  - Is now the time?
  - Is there such a thing as causation in English construction law that is distinct from English contract, or commercial, law?

Part I: what is a Restatement?

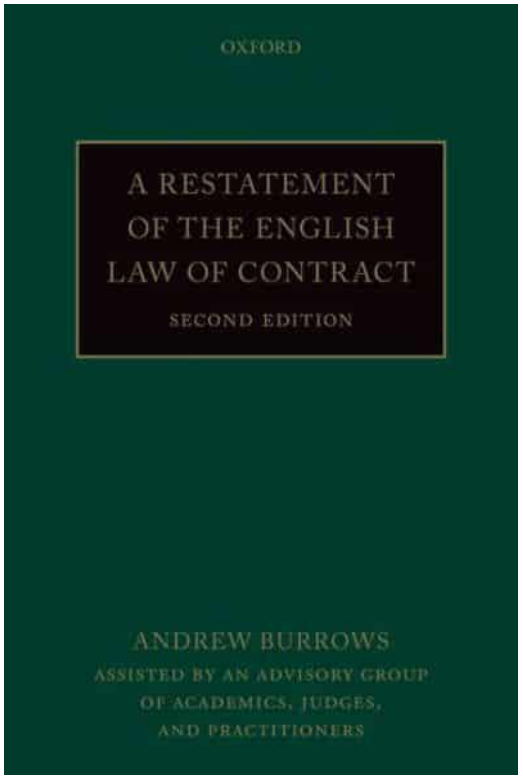


Source: the American Law Institute (www.ali.org)

The American Law Institute and the Restatements

- Academics, judges and practitioners.
- Systemise the law in a consolidated and accessible format.
- Overview of substantive doctrinal law within the context of a federal system.
- General statements of principle supported by more detailed commentary.

A Restatement of the English Law of Contract (Andrew Burrows)



- First edition: 2016. Second edition: 2020.
- Follows the Restatement of the English Law of Unjust Enrichment (2012).
- Advisory group of academics, judges and practitioners.
- "*A comprehensive account of the flesh of the law will always be necessary but it increasingly needs to be complemented by a clear identification of the bones of the subject*." (F. D. Rose (2013) 129 LQR 639, 641, reviewing the RELUE)

What does the Restatement: Contract say in respect of causation?

- Section 1(b) the Restatement's scope is limited to "*the general law applicable to contract (so that there are rules, especially in legislation, dealing with specific types of contract that are not mentioned in this Restatement*".

(Excludes construction contracts)

What does the Restatement: Contract say in respect of causation?

- Section 20 (Compensatory damages) at 20(1)(a): the claimant has a right to compensatory damages which "*have the purpose of providing a monetary equivalent to the claimant's loss caused by the breach*".
- Section 21(1)(b): "*an intervening action of the claimant or a third party or a natural event must not break the chain of causation between the breach and the loss*".
- Commentary, 137: "*No clear test or set of principles has emerged from the contract cases to determine whether the chain of causation has been broken or not*."

What does the Restatement: Contract say in respect of causation?

Commentary:

- It is rare for a natural event to break the chain of causation.
- In the context of intervention by a third party, the courts will tend to ask whether or not the defendant had a duty to prevent the third party's intervention.
- As regards the claimant's own conduct, it will be important to decide how unreasonable the conduct has been.

What does the Restatement: Contract say in respect of causation?

Cites *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370:

"*But it seems to me quite impossible to say that in reality the plaintiff's injury was caused by the breach of contract. The breach of contract merely gave the plaintiff the opportunity to injure himself and was the occasion of the injury. There is always a temptation to fall into the fallacy of post hoc ergo propter hoc; and that is no less a fallacy even if what happens afterwards could have been foreseen before it occurred*."

(*per* Salmon LJ, 394-5).

Limitations of a Restatement

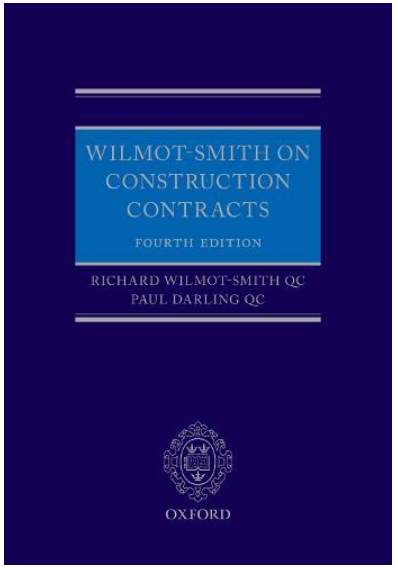
- Justice Scalia: "*Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." Kansas v Nebraska* 135 S.Ct. 1042, 1064 (2015).

- Sir George Leggatt: "*Is the "best interpretation" the one which most faithfully reflects case history and received opinions; or is it the interpretation which achieves the Herculean task of making the law as just and coherent as it can be—consistently with counting as an interpretation of the law rather than a "model law" or programme for reform?*"" (2017) LQR 133(Jul), 521, 522.

- Noted that Burrows positioned his contract Restatement *"at the descriptive end of the spectrum*" and "*steered for the mainstream*"

Limitations of a Restatement

- England is a single jurisdiction and is a common law monoculture.
- English contract law has textbooks (such as Chitty and Treitel) that take on much of the role of a US-style Restatement.
- Specifically, English construction law is assisted by successive editions of Hudson (since 1891), Keating (since 1955), Wilmot-Smith, and others.
- A classic Restatement is ordered by reference to its subject matter context but its doctrinal content.



This exercise

- Summation, or a re-statement, of the legal principles at work, rather than a Restatement.
- Differs from the approach adopted in most conventional practitioner works by considering the question of causation in construction contracts holistically.
- Structurally, takes claims arising out of a breach of contract alongside claims for an entitlement arising under the contract (such as, in particular, obligations in respect of time).

The task ahead

- Nicholas Baatz QC (2016) SCL Paper 202, at 24: "*Consideration of causation in hard cases carries with it a danger of explanations that use formulas to apply undefined values*."

- Vincent Moran QC (2014) SCL Paper 190 at 21 [93]: advocated "*The recognition of a more comprehensible approach to causation and concurrency in construction law*".

Part II: *Beattie Passive Norse Limited (2) NPS Property Consultants Ltd v Canham Consulting Ltd* [2021] EWHC 1116 (TCC)

Source: 'What it's like to live in Burwash', Sussex Life 25 June 2018. Photo: Duncan Hall. Credit: Archant.
https://www.greatbritishlife.co.uk/homes-and-gardens/property/what-it-s-like-to-live-in-burwash-7237828

The facts

- Claim brought by Beattie Passive Norse Ltd ('BPN') and NPS Property Consultants Ltd ('NPS').
- Defendant was a practice of consulting engineers called Canham Consulting Ltd ('Canham').
- Canham designed foundations for a site in Burwash in Sussex.
- Two blocks, each contained terraced houses ('PassivHaus' blocks).
- Beattie Passive Construction Ltd ('Beattie') was engaged to perform the constructions works themselves.
- Foundation works were carried out by a sub-contractor, Foxdown Engineering Ltd ('Foxdown').

The facts

- Canham accepted that the design was negligent in certain respects.
- Following the discovery that the foundations were defective, both blocks were entirely demolished and re-built.
- But was the demolition caused by the breach of contract?
  - The foundations had not been constructed in accordance with the design it had prepared, but rather an earlier Revision A design.
  - Argued that the two blocks were so woefully constructed that they would have been demolished in any event

Judgment of Fraser J

- Causation is a highly fact sensitive arena (citing *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 and *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7).

Citation of *County Ltd v Girozentrale Securities*:

"*108. The judgment of Hobhouse LJ also considered the question of whether the brokers' breach was a cause of the bank's loss. He made two further observations at 857 and 858.* ***The first was that Latin maxims that had been used in earlier cases had the capacity to mislead, and should not be used****. The second was that "conduct which contains no element of fault will not without more be treated as a cause in law…..It is often said that legal causation is a matter of fact and common sense.* ***Causation involves taking account of recognised legal principle but, that having been done, it is a question of fact in each case****".*

Judgment of Fraser J

- HHJ Newey QC in *Board of Governors of the Hospital for Sick Children v McLaughlin & Harvey plc* (1987) 19 Con LR 25, 96:

  "*However reasonably the plaintiff acts, he can only recover in respect of loss actually caused by the defendant. If, therefore, part of a plaintiff's claim does not arise out of the defendant's wrongdoing, but is due to some independent cause, the plaintiff cannot recover in respect of that part.*"

Judgment of Fraser J

- "*the reason for demolition was the work of Beattie Construction, and not the negligent design of the foundations by Canham*." [114]

- Cost of the partial repairs that were carried out before the demolition of the foundations was, however, a real loss suffered by BPN. Assessed at £2,000.

- Claim by NPS dismissed on the basis that there was no tortious duty of care (referring to *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 (TCC)).

Lessons from this case

- Fraser described the action as "*proceedings with an entirely conventional background*" [3].
- Case study of how causation operates in construction law.
- Warning against *post hoc ergo propter hoc* (i.e. the cause alleged must precede the effect).
- No appeal to common sense. Instead, Fraser J applied established legal principles, with causation thereafter becoming a matter of factual logic. Clear demonstration of Hobhouse LJ's approach taken in C*ounty Ltd v Girozentrale Securities.*

Part III: the outline of a re-statement of causation in English construction law

General principles common across construction law

Causation operates to limit a wrongdoer's liability.

- Distinct from rules as to remoteness or foreseeability of loss.

General principles common across construction law

In order to establish causation, a claimant must demonstrate that the event relied upon caused the damages claimed or engages the contractual mechanism for the award of an entitlement as a matter of fact.

General principles common across construction law

The cause alleged must precede the effect, and therefore the loss.

- Applied in delay claims – if one event is delaying the project, a second event in time may have no effect on the completion date.

- *The Haversham Grange* [1905] P 307 (CA), as explained in *Carlosgie Steamship v Royal Norwegian Government* [1952] AC 292 (HL) (discussed by Nicholas Baatz QC (2016) SCL Paper 202 at 5-7).

General principles common across construction law

The cause must be an effective cause of the loss and not just the occasion of the loss, but it need not be the 'dominant' or 'proximate' cause

- *County Ltd v Girozentrale Securities* [1996] 3 All ER 834.
- *Petroleo Brasileiro SA v ENE Kos 1 Ltd* [2012] UKSC 17, [2012] 2 AC 164
- *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1994] 1 WLR 1360.
- *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7.
- *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360.

General principles common across construction law

It is possible for the chain of factual causation to be broken. Whether or not the chain of causation is broken is a mixed question of fact and law requiring a intervening event of such impact that the wrongdoing of the Defendant can no longer be said to be an effective cause of the Claimant's loss.

General principles common across construction law

Break in the chain of causation:

Lord Bingham explained this in the negligence case of *Corr v IBC Vehicles Ltd* [2008] 1 AC 884:

"*The rationale of the principle that a novus actus interveniens [Latin for new intervening act] breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible*."

General principles common across construction law

Break in the chain of causation:

Borealis AB v Geogas Trading SA [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [47] *per* Gross LJ:

"*the question of whether there has been a break in the chain of causation is fact sensitive … 'it is almost impossible to generalise'.*"

Summarised the law at [42]-[47].

General principles common across construction law

Break in the chain of causation:

- In order to comprise a *novus actus interveniens*, breaking the chain of causation, the conduct of the Claimant must constitute an event of such impact that it "obliterates" the wrongdoing of the Defendant. The test is the same in contract as in tort.
- For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the Claimant rather than the breach of contract on the part of the Defendant; if the breach of contract by the Defendant and the Claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken.

General principles common across construction law

Break in the chain of causation:

- In circumstances where the Defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken.
- It is difficult to conceive that anything less than unreasonable conduct on the part of the Claimant would be capable of breaking the chain of causation. It is, however, also plain that mere unreasonable conduct on a Claimant's part will not necessarily do so.
- The Claimant's state of knowledge at the time of and following the Defendant's breach of contract is likely to be a factor of very great significance.

General principles common across construction law

Break in the chain of causation:

- The question of whether there has been a break in the chain of causation is fact sensitive, involving as it does a practical inquiry into the circumstances of the Defendant's breach of contract and the Claimant's subsequent conduct.

BUT – no all-embracing test for what may constitute the breaking of the chain of causation

Cf: *Flanagan v Greenbanks Ltd (t/a Lazenby Insulation)* [2013] EWCA Civ 1702; 151 ConLR 98.

General principles common across construction law

Break in the chain of causation:

How precise is this test?

- In practice, can be difficult to apply.
- Phrases such as ‘obliterated’, ‘no all-embracing test’ and even ‘chain of causation’ or ‘effective cause’ are impressionistic rather than precise.
- no clear distinction between ‘factual causation’ and ‘legal causation’. Submitted that it is clearer to consider whether a cause remains an effective cause of the loss, or whether the alleged intervening event means that it has ceased to be an effective cause i.e. the causative potency of the first event has been obliterated by reference to the indicative tests set out above.

Breach of contract

In claims for breach of contract, a claimant generally (but not always) has to demonstrate that but for the defendant's breach of contract it would not have suffered the loss. This test is modified where there are two concurrent independent causes of the loss, each of one which could separately cause the loss.

Breach of contract

But for test:

- The ‘but for’ test is likely to lead to injustice where there are multiple sufficient causes, and each cause by itself would have been sufficient.
- *Greenwich Millennium Village Ltd v Essex Services Group Ltd* [2013] EWHC 3059 (TCC)

Claim for an entitlement under the contract

In a claim for an entitlement under the contract, the starting point is the correct interpretation of the contractual terms themselves. The following is advanced in respect of the ways in which standard form contracts have been interpreted.

Claim for an entitlement under the contract

In a claim for an entitlement arising under the contract, the provisions as to the grant of an extension of time and the entitlement to an increase in the contract sum as a result of that extension of time are different and can lead to different entitlements for the claiming party. In a period of concurrent delay, a claiming contractor might be entitled to an extension of period in respect of that period, but might not be entitled to its prolongation costs in respect of that period.

Claim for an entitlement under the contract

Concurrent delay, time v money:

- *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32.
- *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), 134 ConLR 151.
- *Walter Lilly v Mackay* (2012) 143 ConLR 79.

Claim for an entitlement under the contract

Concurrent delay, time v money:

- Can be regarded as default rules in respect of the interpretation of particular standard form contracts absent a different agreement of the parties.
- *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, 180 ConLR 1.
- Sir Peter Coulson writing in 'Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses' (2019) SCL Paper 218: general approach has been to take the lead from *Henry Boot v Malmaison. (NB* Marrin (2002) SCL Paper 100 at 15: unsurprising interpretation in the 1970s)
- Subsequent decisions *"can be explained by reference to the construction of the standard form extension of time provisions."*

Does this apply to a breach of contract claim?

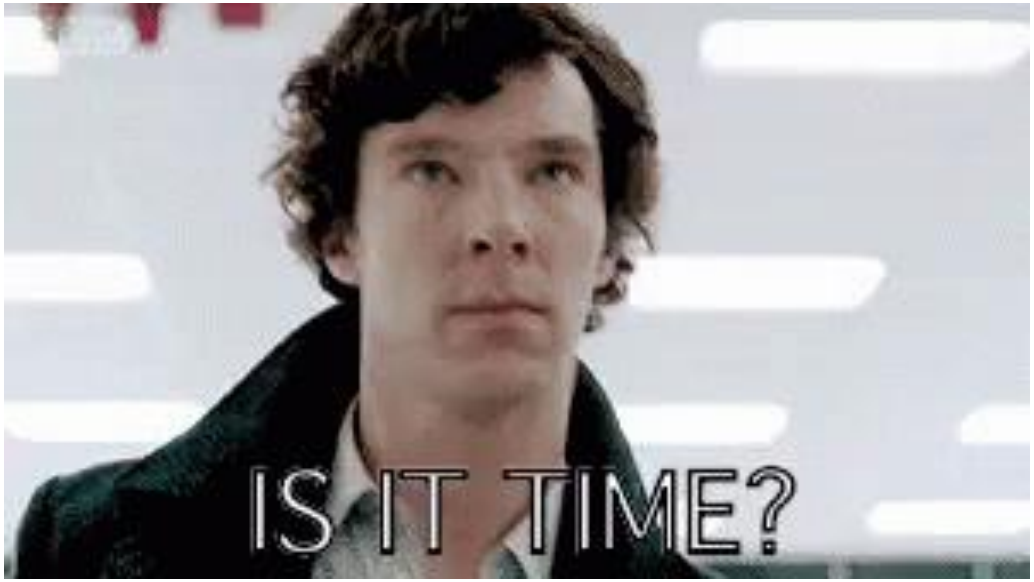
Concurrent delay, time v money:

- The conventional answer is that in a claim for damages for breach of contract, the contractor's claim would fail the but-for test in a concurrent delay situation as it cannot satisfy the but-for test.
- *But* what about the 'effective cause' test and the relaxation of the 'but for' test where there are two or more sufficient causes?
- *Likely* that where it is the claimant and the defendant who are responsible for the damage, it is not appropriate to relax the 'but for' test.

What does this ‘re-statement’ tell us?

- Draws heavily from English contract cases more generally.
- The construction law cases do illustrate is the difficulties in actually applying those principles.
- Claims for an entitlement under the construction contract (such as for time or money) can best be analysed as an exercise in contractual interpretation.
- The general understanding as to how construction contracts giving rise to an entitlement can be interpreted can be analysed as a default rule-set that the parties can modify or contract out of (subject to other doctrinal rule sets, such as the prevention principle)

Conclusion: time for a re-statement?



Why now is the right time to think about causation

- Causation, delay and COVID-19.
- Increasing complexity of causation questions with greater specialisation, increased collaboration between project participants in the pre-construction and the construction phase, and the greater use of technology both as part of the design and construction process but also in the fabric of the built environment itself.
- The common law will continue to develop new doctrinal responses to new factual circumstances, where appropriate.

Distinctiveness of construction law

- Construction law is keyed into English contract and commercial law.

- This paper has advanced an analysis that while the question of an entitlement under the contract is a matter of contractual interpretation, English construction law contains 'default rules' as to how an extension of time clause will operate compared to a loss and expense clause providing for time-related costs, absent agreement of the parties (which itself might be limited by other rule sets, such as the prevention principle).

Thank you for listening

Questions / discussion