

Causation in clinical negligence – common law and HRA

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Causation: why so complicated?



“Though the doctors treated him, let his blood, and gave him medications to drink, he nevertheless recovered.”

– Leo Tolstoy, *War and Peace*

The starting point for any case

- C must prove on the balance of probability that the negligence caused or materially contributed to the adverse consequences complained of

The but-for test

- In some cases it is easy to apply, eg:
 - a surgeon mistakenly removes my right kidney instead of my left
 - I am left with one defective kidney
 - But for the surgeon's negligence, I would have had one good kidney
 - I succeed in establishing causation

- But many cases are, or at least appear to be, much more complex...

The 'injury would probably have happened anyway' case

- **Hotson v. East Berkshire (1987):**
 - C fell out of a tree and damaged his femur
 - Negligent 5 day delay in diagnosis
 - Went on to develop avascular necrosis of the tip of the femur leading to permanent disability in the hip joint

- At the trial, the judge found that there was a 75% chance that even without the delay C would still have developed avascular necrosis
- And awarded C 25% of his damages on a loss of chance basis

- HL overturned the award, holding that the fall was the effective sole cause of the avascular necrosis or, put another way:

C failed to show that the negligent delay in diagnosis was a material contributory cause of the avascular necrosis

What about the judge's 25%?

- HL put an additional simplifying gloss on the evidence as found by the judge, interpreting it to mean that when C arrived at hospital the fate of the hip was already determined: the fall led to there being not enough healthy blood vessels left to avoid avascular necrosis

Or, as Lord Ackner put it:

- The judge determined as a matter of fact, on the balance of probabilities, that the delay had no effect on the claimant's ultimate condition

So, we learn from Hotson:

- Causation of injury remains a matter of proving past fact on a balance of probabilities
- C fails if the evidence shows that the outcome would probably have been the same in any event

The ‘can’t say what caused or contributed to the injury’ case

- **Wilsher v. Essex AHA (1988):**
 - C was born prematurely and required a catheter to measure his blood oxygen levels
 - The catheter was inserted into the wrong vein leading to the administering of too much oxygen over a prolonged period

- C developed a retinal condition called RLF that led to blindness

At trial:

- It was common ground that too much oxygen in the blood *could* cause RLF
- But the evidence also showed that RLF *could* develop for other reasons
- The judge found for C by reversing the burden of proof

On appeal, HL overturned the decision holding:

- Burden of proof on C
- C had not shown that the excess oxygen levels caused or materially contributed to the development of RLF

The 'loss of a poor* chance of a favourable outcome' case

- **Gregg v. Scott (2005):**
 - C had a lump under his arm but was negligently told it was nothing
 - A year later he was diagnosed with cancer
 - Trial judge found that the delay allowed cancer to progress more quickly

- And that the delay reduced C's chances of 10 year survival (ie a cure) from 42% to 25%
- Claim dismissed on the basis that C would not have been cured anyway

- Claim reached HL for resolution of two arguments:
 - (i) faster progression of cancer = injury, compensation for which should include loss of chance of survival
 - (ii) loss of chance of survival was compensatable injury in its own right

- HL rejected both
 - (i), because you cannot reclassify the injury to avoid causation: you have to establish causation of loss before you can quantify that loss
 - (ii), because loss of chance of a favourable outcome is not compensatable damage in clin neg claims: *‘everything is determined by causality’*

- Lord Nicholls in his dissenting judgment called the outcome irrational and indefensible:

‘The patient could recover damages if his initial prospects of recovery had been more than 50%. But because they were less than 50% he can recover nothing.’

- But it remains the law

The 'material contribution' case

- **Bailey v. MOD (2008)**

- C in hospital for a gall-stone operation
- After the op she was in a weakened state because of pancreatitis
- Negligent care weakened her further
- she aspirated her vomit and suffered a heart attack and hypoxic brain damage

- The judge (Foskett J) at first instance found that the heart attack was caused by weakness, which itself had two causes: non-negligent pancreatitis and negligent care
- Hospital held liable

On appeal:

- Negligent care made a material contribution to the weakness which in turn was the physical cause of her aspiration of vomit and heart attack

- Decision upheld

Waller LJ summarised the law:

(1)

“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...”

(2)

...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...

(3)

...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.”

The ‘more than doubles the risk’ case

- **XYZ v. Schering Chemical (2002)**
 - the issue was whether a contraceptive pill caused blood clots
 - The only evidence was epidemiological
 - Cs tried to prove that those taking the pill were at more than twice the risk of a clot
 - They could not and failed

- But the logic of Cs' approach was accepted by Mackay J (and has since been approved and deployed in later cases):

“If the risk from potential cause A is $x\%$ and the risk from the other potential cause B is $2.1x\%$, it is more likely than not that the condition which has eventuated has been caused by B.”

Further reading

- *Unnecessary Causes* by Prof Jane Stapleton (LQR Jan 2013)
- The analysis of Jay J in *Rich v. Hull & East Yorks* [2015] EWHC 3395
- *Schembri v. Marshall* [2020] EWCA Civ 358