

THE RELATIONSHIP BETWEEN CAUSATION AND REMOTENESS OF DAMAGE

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ABSTRACT: *In strict theory, causation (called 'cause in fact') and remoteness (called 'cause in law') must be dealt with as two separate requirements in each case. Causation is a matter of fact and requires the claimant to prove that the negligent act caused the damage complained of. The rules concerning remoteness of damage are a matter of law and broadly require the claimant to establish that the damage was of a kind which was reasonably foreseeable. It is concerned with setting a limit on the extent of the harm for which the defendant should be held liable. However, it is not always a clear cut issue to establish where causation ends and remoteness begins, nor is it always a simple matter to separate some aspects of remoteness from issues which arise in relation to duty of care. Both causation and remoteness of damage frequently turn on issues of policy. Both are relevant throughout the law of tort and are dealt with in connection with negligence for the sake of completeness.*

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INTRODUCTION

Causation

The claimant will not succeed unless it can be demonstrated that the negligent act of the defendant caused or materially contributed to the damage complained of. This matter is a question of fact, and there are many cases which go to trial on the question of causation when there is no dispute about duty and breach. The task of establishing a causal connection between the act of the defendant and the damage suffered by the claimant is not always simple. Often, there may be a complex set of conditions present, or even two concurrent sets of circumstances, and it can be difficult to untangle the web of circumstances to pin-point liability.

A typical examination problem

To take a road accident for example: A's car has faulty brakes because of a poor repair done by B, a junior mechanic who should have been supervised. A is driving late at night along a slippery wet road, which has been poorly maintained by the local highway authority. He has chest pains and feels dizzy. C, a child, runs into the road, whilst a teacher, on duty as the children leave school, attends to a sick child. A sees C, but just as he is about to apply the brakes, he has a heart attack, and loses consciousness. The brakes would have failed in any case but a deep rut in the road causes the car to swerve into the child, killing him. A is also killed. He had visited his doctor the day before complaining of chest pains but the doctor had negligently failed to diagnose a serious heart condition. Who is responsible for the two deaths? It need not be necessary to establish a single cause of the damage, and indeed there are often concurrent causes, in which case responsibility may be apportioned. In such cases, the various defendants, their lawyers and insurers often argue as to the proportion of liability each should bear, and frequently a case which might have been settled out of court at an early stage if there had only been one defendant will be taken to trial or settled at the door of the court because the

defendants are fighting one another. Potential defendants in the above case would be A's estate, the local highway authority, the local education authority, the garage, the child's estate and the doctor. Not all of these would be worth suing, but insured defendants, and local authorities who are their own insurers, certainly would. Traditionally, the courts have applied various metaphors to assist in establishing cause. Judges speak of 'chains of causation', 'conduit pipes', and so on. Various tests are applied by the courts. For example, the following questions may be asked:

- has the chain of causation been broken?
- would the harm to the claimant have occurred 'but for' the defendant's negligence, or would the harm have been suffered anyway?
- was there a *novus actus interveniens* (a new intervening act)?

A close study of some of the cases in this area might assist you. Bear in mind that causation is important throughout the law of tort, even when there is strict liability. It is merely for the sake of convenience that it is dealt with here, and in most of the textbooks, in the context of negligence.

The 'but for' test

When the damage would have happened anyway, even without the defendant's negligence, there will be no liability on the part of the defendant. This 'but for' test is often applied first, and is rather a simplistic approach. It is not very helpful in multifactorial situations, such as our road accident problem. There are some relatively simple situations when it can work well. In *Robinson v Post Office* [1974] 1 WLR 1176, a patient who was to be given an antitetanus vaccination was not tested properly for an allergic reaction before the vaccination was administered and he did develop an allergy. However, as the result of the test would not have been discovered in time, and as the vaccination was necessary almost at once, it was decided that the failure of the doctor to test for the allergy did not in fact cause the damage. More recently in *Devon County Council v Clarke* [2005] EWCA Civ 266, the Court of Appeal found that there was a causative link between a psychologist's negligence, the lack of remedial teaching provided to the claimant and the long-term effects of his dyslexia. In *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 4282, a night watchman was taken to hospital vomiting and suffering from severe stomach pains, but the casualty doctor on duty sent him away to see his own GP. He died soon afterwards of arsenic poisoning, and it was discovered that an unknown person had put arsenic in the tea of the watchmen on duty on a particular site. There was no dispute about the fact that the doctor had been negligent. What was in issue here was whether that negligent act had caused the man's death. It was held that it had not. The man would have died anyway. Much of the evidence turned upon the question of whether he would have survived if he had been given an antidote as soon as possible after arriving at the hospital, and it was proved that he would not. The defendants were not liable. In some cases it has been held that even if a breach of duty by a defendant does not satisfy the 'but for' test, it nevertheless amounted to a 'material contribution' to the risk, so the defendant should be responsible when the risk materializes. *Carter v Basildon & Thurrock University Hospitals NHS Foundation Trust* [2007] EWHC 1882 (QB) is a case similar to *Barnett v Chelsea and Kensington HMC*, in which the arguments about causation were relatively straightforward and the decision turned on factual evidence. The claimant contended that his wife, who was aged only 20 at the time, had died as a result of clinical negligence on the part of hospital staff. His

wife had attended the hospital for a post-natal check up, complaining of severe headaches in the mornings. The staff involved allowed her to leave the hospital, and she died the next day of a stroke. The defendants admitted breach of duty, as they agreed that his wife should have been admitted to hospital for assessment and observation when she explained about her headaches at the post-natal check, but argued that nothing could have prevented the death and that the negligence made no difference. It was held that if she had been admitted to hospital when she had her check up, and been given the correct treatment, on the balance of probabilities, she would not have died. Fact situations are frequently complex, and in many situations the 'but for' test is unhelpful. The House of Lords ruling on *Chester v Afshar* [2004] UKHL 41 indicates that the traditional 'but for' test may not always be appropriate and that the courts may, in appropriate cases, introduce a new and radical approach to causation. The claimant could not argue that 'but for' the defendant's negligent failure to inform her of the risks of her treatment she would have decided not to undergo the proposed surgery. That was because she admitted that she would probably have had the operation at some future time in any event, but she would not have had the operation at the precise time that she did. The difficulty was that claimant was honest about this. Had she been less honest it would have been a simple matter for her to establish causation. However, as the risk would have been the same whenever the operation was carried out, it was impossible for her to suggest that the defendant's negligent failure to warn had been the cause of her injury. Established tort law until then had required that for a claimant to succeed in negligence it is necessary to prove that there was a breach by the defendant of a duty of care, and that the breach of duty that resulted in damage. That principle had been modified to some extent by the decision in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22. In this case therefore, the requirements of the negligence claim had not been satisfied, and this clearly presented a difficulty for the claimant. In Lord Hope's words: The question of law . . . is whether it was sufficient for Miss Chester to prove that, if properly warned, she would not have consented to the operation which was in fact performed and which resulted in the injury, or whether it was necessary to prove that she would never have had the operation. The House of Lords held that the defendant had been negligent in failing to inform the claimant of the risk of paralysis, and that the claimant was entitled to damages *even though that failure to inform had not resulted in the injuries suffered by the claimant*. Lord Steyn drew on the analogy of *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32, in which on policy grounds the House of Lords had modified the approach that is required to prove causation, and had decided that as each defendant had materially contributed to the damage, all should be liable. He concluded that the claimant's right to dignity and autonomy should be vindicated 'by a narrow and modest departure from traditional causation principles'.

Lord Hope examined the cases of *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] AC 871, *Chappel v Hart* and rejected the use of the conventional 'but for' test in this case, deciding in favour of the claimant. However, his view was that the injury in this case was so intimately connected with the failure of the duty to warn that it could be regarded as having been caused by it. Lord Walker took a similar stance, arguing that advice by the doctor is the very foundation of a patient's consent to treatment: In a decision which may have a profound effect on her health and well-being a patient is entitled to information and advice about possible alternatives or variant treatments. He concluded that a claimant ought not to be without a remedy, even if that remedy involves some extension of the existing principle, as in *Fairchild*, otherwise the duty of the surgeon would be meaningless. The two dissenting speeches are interesting. Lord Bingham concluded that whenever the surgery was carried out the risk would have been the same, and took the view that the law should not seek to reinforce the right of a

patient to receive information by providing the opportunity 'for the payment of very large damages by a defendant whose violation of that right is shown not to have worsened the physical condition of the claimant'. Lord Bingham's view was that the timing of the operation was irrelevant to the injury suffered by the claimant. The injury would have been as liable to occur whenever the surgery was performed and whoever carried it out. Lord Hoffman thought that conventional rules of tort should apply in this case, and that the claimant should have proved that she would not have had the operation at all in order to succeed in her claim. He used the game of roulette to illustrate the situation here, pointing out that the odds of a particular number coming up are exactly the same whether roulette is played today or a week later or at a different casino. In this case the risk of injury to which the claimant was exposed would have been the same on any occasion she had the surgery, and the injury was not caused by the failure to warn of the risk. The decision of House of Lords gives greater priority to doctrine of informed consent than to the basic principles of causation in tort. It represents a departure from logic in favour of the principle that patients should be enabled to make informed choices about their treatment. The policy issues were clearly stated and the causation issue was dealt with under the framework that covers the scope of the defendant's duty. This was the second case within the space of two years (the other being *Fairchild*) in which held that where there was a breach of duty, the usual requirement of proving causation could be circumvented in the interests of 'justice' and that when compensation appears to be appropriate the 'but for' test can be dispensed with to the detriment of the defendant. The House of Lords offered little guidance as to when it might be appropriate to take this approach, and there is uncertainty as to when policy might dictate yet another incremental departure from the established rules relating to proof of causation. It might be going too far to suggest that the majority in the House of Lords intended to create an entirely new tort, closer to battery (in which damage need not be proved for a claim to succeed) than negligence, and actionable without proof of damage. This would be the tort of failing to inform a patient of the risks of medical treatment. Bearing in mind the conceptual confusion that this approach would create that seems unlikely, as even Lord Hoffman argued that it could be said that damage of some kind, in terms of affronts to dignity and autonomy might be suffered by a claimant who was not informed of risks. This decision should not be regarded as a general departure from the principles that govern causation. It concerns only cases of consent to medical treatment. It does however, indicate yet again that establishing causation in tort is a very inexact science and that causation is a concept that is prone to policy decisions.

Novus actus interveniens

It may sometimes be possible to establish that a *novus actus interveniens*, or intervening act, has caused the damage and that the original defendant is not liable. Such an event is said to 'break the chain of causation'. This is most likely to be the case when the two possible causes are separate in time. However, as has been observed elsewhere in the law of tort, judges often use the concepts which they have created as a means of arriving at the decisions which they consider to be the most desirable in the circumstances. An example of *novus actus* can be found in the case of *Wright v Lodge* [1993] 4 All ER 299. The first defendant's car had broken down late at night in very thick fog and she was held to have been negligent in leaving it on the carriageway. The second defendant was a lorry driver who was travelling too fast, collided with the abandoned car and slewed across the road crashing into several cars. It was held that she could not be held liable for the injuries caused to the drivers of the cars which were damaged by the lorry because the second driver was not merely negligent but also reckless and this factor broke the chain of causation. As John G Fleming says (Fleming, *An Introduction to*

the Law of Torts, 1977, Oxford: Clarendon), the various metaphors used in establishing causation are: . . . only a screen behind which the judges have all too often in the past retreated to avoid the irksome task of articulating their real motivation. *Crown River Cruises v Kimbolton Fireworks* [1996] 2 Lloyd's Rep 533 provides an example of an unbroken chain of causation. Debris from fireworks on a barge where the first defendant held a firework display caused a fire on a second barge moored nearby. The fire-brigade failed to extinguish the second fire properly, as a result of which the claimant's barge was set alight. It was held that there was no *novus actus* on the part of the fire-brigade and found them 75% responsible for the second fire.

The 'dilemma' principle

An intervening act will not break the chain of causation if it can be established that the intervening actor was not fully responsible for his or her actions, perhaps because he or she had been put into a dilemma by the original actor.

In *Sayers v Harlow BC* [1958] 1 WLR 623, the defendant claimed that the claimant's own act was the entire cause of her misfortune. She had been locked in a public lavatory belonging to the defendants because of a faulty door lock and, faced with the prospect of remaining in the lavatory all night, she decided to try to climb out. She did this by attempting to stand on a toilet roll holder, which spun around and threw her onto the floor. As a result of the fall, she suffered injuries, and sued the council for compensation. It was held that since she had been put into a dilemma by the council, her actions were not unreasonable, and she was not fully responsible for the damage suffered, but she was contributorily negligent, and the damages were reduced accordingly. The chain of causation set up by the defendants had not been broken. In *Wieland v Cyril Lord Carpets* [1969] 3 All ER 1006, the claimant had been injured and was forced to wear a surgical collar. This restricted her neck movements, and she could not look down through her bifocal glasses. She fell down a flight of stairs as a result, and sued the defendants for negligence. The original defendants were liable for all the injuries because they should have foreseen that the claimant's life would be restricted by the original injury. She was not unreasonable in attempting to carry on her life as normal. By contrast, the case of *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 was decided in favour of the defendants, who had negligently injured the claimant's leg. As a result, the leg was likely to give way at any time. Without asking for help he attempted to climb a flight of stairs and the injured leg gave way, causing him further injuries. It was held by the House of Lords that the act of climbing the stairs constituted a *novus actus interveniens* which broke the chain of causation. The risk taken by the claimant was unreasonable. The defendants could not be liable for every foreseeable consequence of their actions. This decision is difficult to accept, given that under basic principles of remoteness of damage (to be discussed later in this chapter), the defendant must take the victim as he finds him. It follows that where the defendant actually creates a foreseeable risk it should be all the more likely that he would be liable for the consequences of the risk which he himself created.