

Back to basics: Causation

Introduction

- Factual causation:
 - the applicability and limitations of the “but for” test
 - more problematic cases of factual causation
- Causation in law
- “Loss of a chance” and the issues arising in valuing such claims
- Remoteness of the damage

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First principles:

- C needs to prove in fact or in law that the breach of duty caused or materially contributed to the loss *and* that the damage is not in law too remote
- The burden of proof is (almost) without exception upon C

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Factual causation - the “but for” test

- But for you knocking me off my bike...I would not have suffered a broken leg
- Thus - if the damage would have occurred in any event, D will not be liable
- Consider...
 - Whether the injury would have occurred *and*
 - Whether the accident would have occurred

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Factual causation...more problematic cases

- Scientific uncertainty - various possible causes of the injury
- Only a “material contribution” made to the damage
- Multiple tortfeasors responsible for the same injury

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Wilsher v Essex AHA - cause of injury is unclear

- C (a premature baby) was negligently given excessive quantities of oxygen and later suffered retinal damage (RLF)
- RLF could be caused by excessive oxygen...but could also develop for four other (non-negligent) reasons
- C failed - he could not show that the excess oxygen caused or materially contributed to the RLF

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Bailey v MOD - A material contribution

- C underwent a gallstone operation and developed pancreatitis, after which, negligent care weakened her further.
- She aspirated her vomit and suffered a heart attack and hypoxic brain injury
- The aspiration and heart attack had two causes
 - pancreatitis and negligent care
- D was liable - the poor care had made a “more than negligible” contribution to the weakness and thus the vomiting and heart attack
- The “but for” test is therefore modified

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Diamond v Royal Devon & Exeter NHS Foundation Trust -

- C underwent repair of a hernia using surgical mesh, having not been advised of the possibility of a suture repair - although this was unlikely to succeed
- C failed
 - “But for” test applies to causation in consent cases - C would have done the same if properly and fully advised
 - There is no free standing claim for damages arising from a failure to inform obtained consent

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Fairchild v Glenhaven - impossible to say which tortfeasor responsible

- C worked for various employers, all of which negligently exposed him to asbestos, as a result of which, he developed mesothelioma
- He could not prove which employer had exposed him to the “guilty fibre”.
- However, each had materially increased the risk, thus allowing recovery

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Legal Causation

- “Common sense” test - problematic
- “Scope of duty”

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Legal Causation

- SAAMCO (*South Australia Asset Management Corporation v York Montague Ltd*)
 - Valuers negligently overvalued property given as security for loan
 - Property market subsequently fell.
 - “Scope of duty”
- Court of Appeal: Applied “but for” test. Valuers therefore liable for whole loss (negligent undervalue + property market fall)

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Legal Causation

- SAAMCO (*South Australia Asset Management Corporation v York Montague Ltd*)
 - Valuers negligently overvalued property given as security for loan
 - Property market subsequently fell.
 - “Scope of duty”
- House of Lords: (rule known as “the SAAMCO cap”)
 - Valuers liability limited to difference between negligently high value, and actual value at date of valuation (i.e. pre market-fall). Property market fluctuations not within scope of valuer’s duty.

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Legal Causation

- Hughes-Holland v BPE Solicitors
- Supreme Court examined SAAMCO
- Lord Sumption:
 - But-for a necessary condition for recovery, but not always a *sufficient* condition
 - Law assigns/filters responsibility for the consequences of a breach
 - Consequences of law vs Duty to protect C from loss.
- A matter of impression?

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Legal Causation

- Intervening acts of third parties
 - D commits breach of duty
 - D's breach allows 3rd P to cause damage

- The more predictable the 3rd party act, the less likely to be deemed an intervening act.
 - Home Office v Dorset Yacht
 - Scope of duty analysis helpful

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Loss of a chance

- Historical facts
 - Damage in the past: balance of probabilities.
 - Damage in the future: recoverable according to likelihood of occurring

- Lord Diplock in *Mallett v McMonagle* [1970] A.C. 166 at 176.

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Loss of a chance

- Lord Diplock in *Mallett v McMonagle* [1970] A.C. 166 at 176.
 - “In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.

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Loss of a chance

- Hypothetical facts.
 - *Hotson v East Berkshire Health Authority*
 - But-for failure
 - 25% chance of avoiding necrosis.
 - No causation: Cause was the fall, not the failure to diagnose.
 - *Gregg v Scott*
 - Delay in diagnosing cancer reduced chance of cure from 42% to 25%.
 - *Hotson* applied.
- Proof that negligence probably caused damage, not possibly caused damage.

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Loss of a chance

- Future financial benefits/detriments.
 - Loss of chance of winning a civil action
 - *Kitchen v Royal Air Force Assoc* [1958] 1 W.L.R. 563, CA
 - Loss of a commercial opportunity
 - *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, CA
 - Loss of chance of employment
 - *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296 H.L.
- Lord Hoffman in *Gregg*: Property, like a lottery ticket.

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Loss of a chance

- *Perry v Raleys Solicitors*
 - Miners' compensation scheme
 - C negligently advised by solicitors
 - C dishonest
 - Balance of probabilities test appropriate, save where substantial uncertainty dependent on conduct of others.

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Remoteness of damage in PI/clin neg claims

- D will be liable for damage of a kind which a reasonable person should have foreseen
- No need to foresee the precise mechanism of injury
- Physical and psychiatric injuries are not treated differently - foreseeability of either will suffice
- “Eggshell skull” rule - extent of damage does not need to be foreseeable

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Questions please...

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Back to Basics: Accident Claims under the
Package Travel and Linked Travel Arrangements
Regulations 2018

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