CAUSE OF DEATH

LAW AND PRACTICE NOTE

i. INTRODUCTION

The Inquiry's terms of reference require it "to establish the circumstances of the death of Sheku Bayoh, including the cause or causes of the death …". The Inquiry will require to determine whether, on balance of probabilities, any fact or circumstance (whether individually, or in combination) was causative of Mr Bayoh's death. In actions for damages arising from negligence, the courts have developed three distinct tests to establish causation, which might assist the Inquiry in its task: the 'but for' test, the material contribution test and the material increase in risk test[1]. The latter two methods of establishing causation have been developed to avoid unjust outcomes. The following paragraphs contain an account of the development of the case law in this area, and the issues arising from it.

ii. THE 'BUT FOR' TEST

It is well established that the first method of determining causation is the 'but for' or *sine qua non* test[2]. This test, asks the court to consider whether *but for* the negligent act or omission, would the injury still have occurred. An example of the application of this test can be found in the case of *Kay's Tutor v Ayrshire and Arran Health Board*[3]. In this case, the appellant's son had negligently been given an overdose of penicillin whilst being treated in hospital for meningitis. The child was subsequently found to be deaf, however, the overdose was not the only possible cause of the deafness. It was held that the Court at first instance had erred in finding that *but for* the penicillin overdose, the prospects of avoiding the injury would have been good[4].

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[1] Steel, Professor Sandy, *Material contribution to damage, again*, L.Q.R. 2022, 138(Oct), p540
[2] Ibid
[3] 1987 S.C. (H.L.) 145; Stewart, *Reparation: liability for delict* (W. Green/Thomson: 2023, at A13-003
[4] Ibid

This rule poses difficulty in situations where an injury is caused by two or more distinct harms, each of which would have been sufficient in themselves to result in the injury. For example, two hunters fire their guns at the same time, a third individual is fatally wounded. Both bullets penetrated the body at the same time, but it is impossible to know which inflicted the fatal wound[5].

In such cases the *'but for'* test is of little assistance as it is circular for the court to consider whether 'but for' one cause the injury would not have been sustained as the other cause would be sufficient in any case[6].

To tackle the issues of justice and fairness arising in cases where application of the *"but for"* test does assist in determining causation, the courts have developed the concepts of *material contribution* and *material increase in risk*[7].

iii. MATERIAL CONTRIBUTION

The term material contribution first appeared in Scots law in the 19th century, in cases concerning nuisance[8]. These cases often involved industrial pollution in circumstances where it was not possible to apportion liability between different factories. In *Duke of Buccleuch v Cowan*[9], the Court approached the issue of causation in a common-sense manner, holding the defender liable as they had *materially contributed* to pollution in a water course[10].

The first departure from the 'but for' test in the context of negligence is generally accepted to be *Bonnington Castings Ltd. v Wardlaw*[11]. This case involved a claim a by an employee who had sustained an injury – pneumoconiosis – from exposure to silica dust in the course of his employment. Some of the exposure to the dust was due to negligence on the part of the employer, however, other aspects of exposure were understood to be non-negligent. It was not possible, scientifically, to prove which exposure had led to the injury. In his judgement, Lord Reid stated:

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[5] Steel, Sandy and Ibbetson, David, *More grief on uncertain causation in tort*, C.L.J. 2011, 70(2), p452
[6] Knutsen, Erik. (2003). *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach.* Texas International Law Journal Vol.38:249, p 253
[7] Moore, Michael, *Causation in Law* (published 03/10/ 2019) in the Stanford Encyclopaedia of Philosophy, available at: https://plato.stanford.edu/entries/causation-law/ *(accessed 04/04/2023),* chapter 5; Gloag and Henderson: *The Law of Scotland*. (2015), Chapter 26
[8] Steel, Sandy and Ibbetson, David, *More grief on uncertain causation in tort*, C.L.J. 2011, 70(2), p453
[9] [1866] 5 M 214
[10] Ibid, p453
[11] [1956] A.C. 613

"It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of 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."[12]

It was held that any contribution to a harm which is more than *de minimis* will be material[13].

In *McGhee v National Coal Board*[14], Lord Simon of Glaisdale held that *Bonnington* and, another Scottish Court of Session case, *Nicholson v. Atlas Steel Foundry and Engineering Co. Ltd* established that:

"where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively."[15]

iv. MATERIAL INCREASE IN RISK

This test provides that if it can be shown that an act or omission materially increased the risk of injury, then the causative requirement will be satisfied.

The principle in *Bonnington* was extended in a Scottish House of Lords case, *McGhee v National Coal Board*[16]. The appellant worked for a brick manufacturer and claimed that he had contracted dermatitis due to his inability to wash off the dust particles from the kilns before he left work. Instead, he had to cycle home before he was able to do so. The medical experts could only state that, had washing facilities been provided, it would have materially reduced the risk of the appellant developing dermatitis[17]. It was argued by the respondents that material contribution had to be proved. The House of Lords found in the appellant's favour, determining that the lack of washing facilities had materially increased his risk of developing dermatitis. In

[12] Ibid at paragraph 620
[13] Ibid at paragraph 621
[14] [1973] 1 W.L.R. 1
[15] McGhee supra note 12 at paragraph 8
[16] Lord Hope of Craighead, *Personal Injuries Bar Association Lecture 2002: James McGhee – a second Mrs Donoghue?* Journal of Personal Injury Law 2023, 1, 1-12
[17] Ibid

reaching this conclusion, the Lords considered the impossible task that the appellant faced in proving causation, given the current scientific knowledge[18].

In his judgement, Lord Reid commented that he could see no substantial difference between stating that a defender materially increased the risk of injury and stating that they made a material contribution to that injury. He stated that it would be “contrary to common sense” to assert that negligence which materially increased the risk of injury did not materially contribute to the injury[19] and that, "there may be some logical ground for making such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which a man’s mind works in the everyday affairs of life"[20].

The concept of material increase in risk was firmly established in *Fairchild v Glenhaven Funeral Services Ltd*[21]. *Fairchild* comprised three separate appeals, all with similar factual circumstances: all men had been negligently exposed, when working for a number of different employers, to asbestos fibres which led each man to develop mesothelioma.

It was impossible for the appellants to prove which exposure had led each of the men to develop the condition. If the Court was to adhere to the established causative requirement, the appellants would fail as they would be unable, due to scientific uncertainty, to demonstrate which negligent exposure was responsible. This obviously gave rise to issues of fairness, as Lord Hoffman states in his judgment:

“…in these circumstances, a rule requiring proof of a link between the defendant's asbestos and the claimant's disease would, with the arbitrary exception of single-employer cases, empty the duty of content. If liability depends upon proof that the conduct of the defendant was a necessary condition of the injury, it cannot effectively exist.”[22]

The appeal was successful. Per Lord Nicholls of Birkenhead[23]:

“So long as it was not insignificant, each employer's wrongful exposure of its employee to asbestos dust, and, hence, to the risk of contracting mesothelioma, should be regarded by the

[18] Ibid
[19] Lord Reid in *McGhee* supra note 12 at paragraph 12
[20] Lord Reid in *McGhee* supra note 12 at paragraph 5
[21] [2002] UKHL 22
[22] Ibid at paragraph 62
[23] Ibid at paragraph 42

law as a sufficient degree of causal connection. This is sufficient to justify requiring the employer to assume responsibility for causing or materially contributing to the onset of the mesothelioma when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established. Given the present state of medical science, this outcome may cast responsibility on a defendant whose exposure of a claimant to the risk of contracting the disease had in fact no causative effect. But the unattractiveness of casting the net of responsibility as widely as this is far outweighed by the unattractiveness of the alternative outcome."

Per Lord Rodger of Earlsferry[24]:

"Following the approach in *McGhee* I accordingly hold that, by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants are taken in law to have proved that the defendants materially contributed to their illness."

The House of Lords held that the defenders were jointly and severally liable. *Fairchild* therefore extended the principle in *McGhee* to include injuries caused by multiple defenders[25]. It was made clear in the judgements that *Fairchild* was very limited in scope[26]. It can be applied in the following circumstances: the disease must be indivisible; it must be caused by a single agent that has multiple possible sources, and proof of causation must be scientifically impossible[27].

The issue of whether proof of a material increase in risk could equate to proof that the risk caused the harm in question, was taken up in *Barker v Corus[28],* a case that also concerned mesothelioma. In his judgement, Lord Hoffman put forward the view that material increase in risk was a separate concept, better characterised as the wrongful creation of a risk or chance of injury[29].

[24] Ibid at paragraph 168
[25] Hogg, Martin A, *Re-establishing orthodoxy in the realm of causation*, Edinburgh Law Review 2007, 11(1), at page 4
[26] *Fairchild* supra note 19 at paragraphs 34, 40-41, 60-73
[27] Ibid
[28] [2006] UKHL 20
[29] Ibid at paragraph 36

The next significant case to apply the material risk exception was determined by the Supreme Court. *Sienkiewicz v Greif*[30] held that the exception to the causative rule set out in *Fairchild* was applicable in cases involving a single exposure[31].

[30] [2011] UKSC 10
[31] Ibid