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Medical Causation Where Are We Now: Pitfalls and Hurdles

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This article was originally published in the June 2020 edition of the AvMA Lawyers Service Newsletter (pages 27-29). To read the full newsletter, please click here.

In the context of clinical negligence cases, causation can be just as tricky to establish as breach, perhaps even more so. The difficulties arise in part because many of these cases involve Claimants who were injured or ill before seeking the treatment or advice that they ultimately complain of and, they remain ill or injured after receiving the same (or not, as the case may be).

In addition, when addressing the issue of causation, the court is often required to pose the hypothetical question of what would have happened if there had not been a breach of duty by the Defendant. This usually gives rise to a number of imponderables and possibilities, which can make resolving that question a far from straightforward exercise.

In most cases, the central issue for the court to determine when approaching the question of causation is whether, on the balance of probabilities, there is a causal connection between the Defendant's breach of duty and the damage of which the Claimant complains. In the vast majority of cases, this issue is resolved by applying the "but for" test, namely, whether, on the balance of probabilities, the injury would have occurred but for the Defendant's negligence.

The case of *Hotson -v- East Berkshire Health Authority*[1] highlights how important it is not to lose sight of this core test.

The Claimant, Stephen John *Hotson* sustained a serious leg injury when he fell from a tree. As a result of the Defendant's negligence, there was a five-day delay before the Claimant's leg injury was correctly diagnosed and treated. The Claimant subsequently developed avascular necrosis and was left with a permanent deformity of the left hip. Breach of duty was admitted. On the issue of causation of the avascular necrosis, the trial Judge found that even if the Claimant had been correctly diagnosed and treated, there was a 75% risk that the Claimant's injury would have followed the same course. He then went on however to award the Claimant damages based on the loss of a 25% chance of recovering from the injury.

The decision was upheld by the Court of Appeal, but subsequently reversed by the House of Lords. Their Lordships found that trial Judge's findings of fact unmistakably amounted to a finding that the Claimant's injury and not the delay, was the sole cause of the avascular necrosis and its consequences. What the trial Judge had done was

[1] [1987] A.C. 750

consider the quantification of damage (where considerations of loss chance may arise) without first considering whether causation had been established on the balance of probabilities. Lord Ackner in particular observed, "*to my mind, the first issue which the Judge had to determine was an issue of causation – did the breach of duty cause the damage alleged. If it did not, as the Judge so held, then no question of quantifying damage arises.*"[2]

The but for test can however cause problems for Claimants in cases where there are multiple causes for their injury or condition, which is often the case in clinical negligence claims. If there are multiple cumulative causative factors, only one of which being the negligent cause, it may be impossible for the court to apply the but for test to determine a causal link between the Defendant's breach of duty and the damage suffered by the Claimant. In such cases, it is appropriate for a modified test to be applied and instead, the court should be asked to consider whether the contribution of the negligent cause was material.

The application of this modified test is exemplified in the case of *Bailey -v- Ministry of Defence and Another*[3]. In that case, the Defendant appealed against the decision of Foskett J, who found the Defendant liable in damages for a serious brain injury suffered by the Claimant. The Claimant was a patient on the renal ward of the Defendant's hospital for operative removal of a gallstone. It was accepted that the Defendant failed to provide the Claimant with adequate post-operative management, which resulted in the Claimant undergoing further procedures that would not otherwise have been necessary. The Claimant however, developed pancreatitis independent of the Defendant's poor management. These factors caused the Claimant's condition to deteriorate and she became extremely weak.

The Claimant sustained brain damage when she aspirated her vomit, which caused her to suffer cardiac arrest. It was the Claimant's case that her weak condition was materially contributed to by the lack of care provided by the Defendant, leading to her inability to prevent herself from aspirating, which in turn led to her cardiac arrest and consequent brain damage. The Defendant argued that the pancreatitis was the effective cause both of the vomiting and the aspiration or that at least, the evidence did not establish that but for the want of care, the Claimant would not have aspirated.

The Defendant's argument was not accepted by Foskett J, who found that there were two material contributory causes of the Claimant's weakness; the non-negligent pancreatitis and the negligent lack of care and since the overall weakness caused the aspiration, causation was established.

The Court of Appeal upheld this decision. In his lead judgment, Waller LJ gave the following helpful guidance as to the application of the modified test; "*if the evidence demonstrates on a balance of probabilities that the injury would*

[2] *Ibid* p.792 [G]
[3] [2009] 1 W.L.R. 1052

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 [discussed above] *exemplifies such a situation… 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 instant case involved cumulative causes acting so as to create a weakness and thus the Judge in my view applied the right test, and was entitled to reach the conclusion he did."*[4]

In order to succeed in an argument that a Defendant's breach materially contributed to the damage suffered by the Claimant:

(a) the negligence must contribute to the damage itself (and not merely an increased risk of damage, save for in exceptional cases);[5]

(b) the contribution must be material (more than negligible);[6] and

(c) there must be no alternative complete cause of the injury[7].

The modified test was necessary to address the inevitable evidential difficulties that are faced by Claimants in clinical negligence cases, where the difficulty of attributing causes to a particular condition is the product of scientific uncertainty.

When considering the potential problem of a lacuna in evidence about the aetiology of a particular condition, it is perhaps helpful for Claimants to remind themselves of the presumption enunciated *per curium* by the Privy Council in *Williams -v- Bermuda Hospitals Board*[8] namely, that *"if it is a known fact that a particular type of act (or omission) is likely to have a particular effect, proof that the Defendant was responsible for such an act (or omission) and that the Claimant had what is the usual effect will be powerful evidence from which to infer causation, without necessarily requiring a detailed scientific explanation for the link."*

Indeed this appears to be the approach taken by the Court of Appeal in recent case of *Mario Schembri -v- Ian Marshall*[9]. In his decision at first instance, Stewart J found that he was unable to identify a specific train of events or

[4] *Ibid* p.1069 [46] – [47]
[5] See *Fairchild v Glenhaven Funeral Services Ltd t/a GH Dovener & Son* [2002] UKHL 22
[6] See *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613, 621
[7] In *Wilsher v Essex Area Health Authority* [1988] A.C. 1074 the Claimant was unable to show that the Defendant's negligent administration of excess oxygen during his birth was a more likely cause of his retrolental fibroplasia than the various other known possible causes
[8] [2016] A.C. 888, 907 [48]
[9] [2020] EWCA Civ. 358

mechanism, which would have prevented the deceased's death but for the negligence of the Defendant GP in failing to refer her to hospital when she attended his surgery complaining of symptoms of breathlessness. Stewart J was nonetheless of the view on the evidence that the deceased's chances of survival would have been significantly increased had she been in hospital overnight and found that on the balance of probabilities it was more likely that she would have survived had she been referred.

In his judgment, Stewart J referred to the case of *Drake -v- Harbour*[10] in which Toulson LJ stated *"where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism."*

The Court of Appeal in affirming the first instance decision, observed *inter alia* that Stewart J, in concluding on his analysis of the evidence that he was unable to find a specific mechanism that would in all probability have prevented the deceased's death, was entitled to take a "pragmatic" and "common sense" view of the evidence as a whole, which led him to find that causation had been established.

It can be seen that the developments in the common law discussed herein, have had a significant impact on clinical negligence cases. These developments have been necessary to ensure that Claimants, where justice demands it, are able to overcome the inevitable pitfalls and hurdles that arise in complex litigation, such as in clinical negligence cases where there are live causation issues.

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June 2020

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[10] [2008] EWCA Civ [25] [28]