Establishing Causation: Burdens of Proof and 'Judicial Benevolence'

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The word "causation" needs a careful degree of unpacking. There is *medical* causation: what injury does the Claimant prove he or she has been caused. There is *legal* causation: is it proved that such injury would not have been caused but for the breach or breaches of duty established. Allied to the latter, there is *factual* causation: what on the balance of probabilities would in fact have happened had it not been for the omission (to act) complained of. Such distinctions need to be borne in mind in the context of considering burden of proof.

In terms of medical causation, the personal injury lawyer needs to have in mind "Occam's Razor". Among competing hypotheses, the one with the fewest assumptions should be selected. Other, more complicated solutions or explanations might be correct but - in the absence of certainty - the fewer the assumptions that are made the better. As it is has been pithily put: "*if your hear hooves, look for horses, not zebras*". There is also the fundamental distinction to be drawn between correlation and causation. Only the latter suffices.

As regards legal causation, in a case where the Court considers there are a number of possible causes of damage, some negligent and some non-negligent, the Claimant must still establish that the negligent cause he puts forward was not just the most likely of several causes but was more likely than not to have been the cause of damage: *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 948.

At the level of principle, this has been repeatedly endorsed by the Court of Appeal as applicable in a personal injuries/clinical negligence context: *O'Connor v Pennine Acute Hospitals NHS Trust* [2015] EWCA Civ 1244 (per Jackson LJ); *Milton Keynes Borough Council v Nulty* [2013] 1 WLR 1183 per Toulson LJ at [34]-[37] and *Graves v Brouwer* [2015] EWCA Civ 595 per Tomlinson LJ at [24]-[30]. Where the causes are not improbable, it is a permissible exercise for a judge to analyse each cause in turn, adopting a process of elimination, so long as the Judge does not merely arrive at the least improbable cause: *Ide v ATB Sales Ltd* [2008] PIQR P13 per Thomas LJ at [4]-[6]. To find the "least improbable" cause proved would be to commit the *Rhesa Shipping* "*heresy*" (per Jackson LJ in *O'Connor* at [56]).

By way of a more recent application of this last point, note the High Court decision of HHJ Coe QC in *Collyer v Mid Essex Hospital Services NHS Trust* [2019] EWHC 3577. There were four hypotheses under consideration at trial as to how the injury complained of had been caused. The Judge considered each of these mechanisms individually and rejected them one by one. In short, where the Court could not find a non-negligent explanation for the severe injury which the Claimant suffered, the effect of the burden of proof was such that it was not incumbent on the Defendant to prove one. The burden of proof was on the Claimant and each of the hypotheses that had been advanced for damage was rejected by the Court as not being more likely than not to have happened and so the claim failed.

As to factual causation, this is an area where there is scope for so-called "*judicial benevolence*". When the Court is investigating and seeking to reach findings as to what would have happened if a particular step had been performed at a particular time, it is becoming well established that the Court will apply a degree of "*judicial benevolence*" which can help the Claimant to establish the necessary chains of causation: see *Younis v Dr Okeahialam* [2019] EWHC 2502 at [46], a decision of Rowena Collins-Rice sitting as a Deputy High Court Judge (appointed to the High Court bench as of 1 October 2020).

Younis is a difficult case for Defendants. In appropriate circumstances it could lead to greater investigation of factual issues to avoid benevolent speculations as to the likely outcomes had allegedly relevant steps been taken.