

# UNNECESSARY CAUSES

By

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# UNNECESSARY CAUSES<sup>1</sup>

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If private law maintains that for a factor to be recognised as a “cause” it must bear a “but-for” relation to the existence of the relevant phenomenon, it will, in an important set of cases, fail to identify as “causes” factors that may be normatively important to the legal enquiry: namely, factors that made a positive contribution to the relevant mechanism by which the phenomenon came about but were unnecessary for it.<sup>2</sup> In such circumstances courts typically respond by recognising an ad hoc “exception” to the “but-for” requirement which allows the unnecessary contribution to be classed as a “cause”.

This article argues that a preferable approach for private law is a clear recognition of a general principle that all that is required before the relation between a factor and the existence of a phenomenon will be recognised as “causal” is that: either, but for the factor, the phenomenon would have been prevented; or the factor resulted in some positive contribution to the relevant mechanism by which the phenomenon came about. In other words, that, when determining what it means to be a “cause”, private law should adopt a notion of a “cause” that is wider than the relation of necessity that is encapsulated in the but-for test. For simplicity the discussion will focus primarily on claims in the tort of negligence where the factor of interest is a defendant’s breach of a duty of care and the relevant phenomenon is the occurrence of an injury that has followed that breach.

In this and other contexts the suggested approach facilitates separation of two distinct issues: whether the breach contributed to the occurrence of the injury of which complaint is made (the “factual cause” issue); and whether that injury represents “damage” relative to the benchmark of where the victim would have been had he not been the victim of tortious conduct. This brings a number of benefits. In the future it will allow a clearer characterisation and analysis of the nature of the problem in a number of important types of case. It allows a more straightforward understanding of the issue in landmark cases such as *Hotson v East Berkshire HA*,<sup>3</sup> and the flaw in the reasoning in the important case of *Bailey v Ministry of Defence*.<sup>4</sup> It exposes an important but under-analysed choice of benchmark against which compensatory tort damages are to be awarded. Finally, it pinpoints a future question that the doctrine in *Fairchild v Glenhaven Funeral Services Ltd*<sup>5</sup> must be developed to resolve.

<sup>1</sup> This article is an expanded version of the Richard Davies Q.C. Memorial Lecture delivered in Inner Temple Hall to the Personal Injuries Bar Association, November 17, 2011.

<sup>2</sup> Specifically, it was unnecessary for the existence of the “phenomenon” as it is specified by the law: see text at fn.19.

<sup>3</sup> [1987] 1 A.C. 750 CA; 770 HL.

<sup>4</sup> [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.

<sup>5</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32.

## I. The Nature of the Relevant Step in the Mechanism

### *(a) Where the relevant step in the injurious or preventative mechanism is known to be binary*

It is often clear from our knowledge of the way an injury came about in an individual case that the breach would have been either necessary for the occurrence of the injury, or it would not have been involved in that occurrence in any way at all. In one set of such cases, a positive element within the mechanism by which injury occurred is in issue: for example, where in breach of duty A and B carelessly shoot towards a person who is hit by only one bullet, we know that A's breach would either have made a positive and necessary contribution to the occurrence of the injury (i.e. it was A's bullet that hit), or it would have been completely uninvolved.

In another set of cases, what is in issue is an incomplete prevention mechanism: where the breach resulted in the absence of a part of a potential prevention mechanism, the law only regards the breach as "contributing" to the injury where all other elements of that prevention mechanism would have been present so that the only thing that stopped the prevention mechanism operating was the breach<sup>6</sup>; thus where the breach is formulated as the failure of an employer to supply a safety harness, the law determines whether that breach "contributed" to the injury by determining whether the employee would have used the harness or not.<sup>7</sup>

In both of these sets of cases it is because we know that the step at issue in the relevant mechanism was binary, an either/or step, that we are justified in applying to such an individual case the simplified approach to factual causation represented by the but-for test. In the past most cases were, or were perceived to be, like this. Since the but-for test of necessity is an adequate test for whether there was any connection between breach and injury where the relevant step in the mechanism is known to be binary, it was understandable that lawyers came to assume that it was adequate in all cases: in other words, that it was an appropriate general principle for the law to require necessity before it would recognise the relation between breach and injury as "causal".

### *(b) Where the relevant step in the injurious mechanism is known to involve a threshold*

But what if our knowledge of the way the class of injury comes about does not let us conclude that the breach was either necessary for the occurrence of the injury or made no contribution to it at all? What if we know that the relevant step in the mechanism was such that a factor could, in some sense, have contributed to the occurrence of the injury without being necessary for it?

Increasingly courts are confronting an important set of indivisible<sup>8</sup> injury cases. These are where the relevant step in the mechanism by which the injury is known

<sup>6</sup> Where another element of the prevention mechanism was also absent the law will not speculate or pretend that it was present, but it will instead recognise that a defendant is entitled to take the world as he finds it. Thus a defendant's culpable failure to read a product label will be seen as having no relevant impact on the world where it is known that the label did not contain the relevant warning.

<sup>7</sup> *McWilliams v Sir William Arrol & Co Ltd* [1962] UKHL 3; [1962] 1 W.L.R. 295.

<sup>8</sup> Examples include death, a bone fracture, a bullet wound and a cardiac arrest.

to occur requires a certain amount of an element, but does not require more and is not affected if there is more: I will call this phenomenon a “threshold” step. In an individual case such a threshold might have been “over-subscribed”, that is there may have been more of that element than was required to reach the threshold. This raises the possibility that, though the defendant’s breach made a positive contribution to the total of the element actually present, that contribution was unnecessary for the threshold point to be reached. In other words, where the relevant step in the mechanism involves a threshold it is possible that, absent the contribution resulting from the breach, the threshold would have been reached by the other contributions anyway: the breach would, in this sense, have contributed to the mechanism but been unnecessary for its completion.

This article argues that, were private law in these indivisible injury cases to insist on a relation of necessity between breach and the occurrence of the injury before it would designate the breach a “cause” of the injury, it might be frustrated in its normative endeavours.<sup>9</sup>

## II. Choosing which Relation to Designate as “Causal”

It is worth remembering at this point that, like any specialist discourse, the law can choose what a term will mean for its own purposes. For example, lawyers are well aware that they give the word “proved” a rather special meaning<sup>10</sup> Similarly the law has found it convenient to give words such as “duty”, “trust” and “consideration” a meaning distinct from ordinary usages. The same can be true of the term a “cause” whose meaning in law need not attempt to track the varied meanings it may convey in ordinary discourse or those of scientists or philosophers. As Glanville Williams noted, “when the lawyer uses the concept of causation, he is not bound to use it in the same way as a philosopher, or a scientist, or an ordinary man”.<sup>11</sup>

What it means when we as lawyers say that a factor bears a “causal” relation to an injury depends on what type of relation in the world we have chosen to designate as a “causal” relation.<sup>12</sup> There are many relations in the world between factors and phenomena. To demonstrate how any particular discourse may choose which of those relations it is going to designate as “causal”, consider the choice made by a considerable number of philosophers. They do not recognise omissions as “causes”. Of course, once such a philosopher has stipulated that he is only prepared to label as “causal” a relation involving the “real driving force of nature,”<sup>13</sup> he will be indifferent to another’s objection that ordinary folk and legislatures<sup>14</sup> say, for instance, that a mother’s omission to feed her baby can be a “cause” of the death of her child.

<sup>9</sup> Unnecessary “causes” pose comparable problems for political philosophy (see e.g. A. Goldman, “Why Citizens Should Vote: a Causal Responsibility Approach” (1999) 16 Soc. Pol. and Phil. 201) and moral philosophy (see e.g. D. Parfit, *Reasons and Persons* (USA: Oxford University Press, 1984), Ch.3; S. Kagan, “Do I Make a Difference?” (2011) 39 Phil. and Public Affairs 105).

<sup>10</sup> *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 229 at [9] per Lord Phillips of Worth Matravers.

<sup>11</sup> G. Williams, “Causation in the Law” [1961] C.L.J. 62 at 75–76.

<sup>12</sup> J. Stapleton, “Choosing What we Mean by ‘Causation’ in the Law” (2008) 73 Missouri L. Rev. 433.

<sup>13</sup> D. Armstrong, “The Open Door: Counterfactual vs. Singularist Theories of Causation” in H. Sankey (ed.), *Causation and Laws of Nature* (New York: Springer, 1999), at p.177.

<sup>14</sup> Infanticide Act, 1 and 2 Geo. VI, c. 36 (1938) (UK) s.1(1).

What then is the minimum character that a relation between a specified factor and the occurrence of a particular injury needs to have before private law should be prepared to call it a causal relation? Certainly there are many statements in judgments<sup>15</sup> and academic commentary that this minimum characteristic is that the factor must bear a but-for relation to the occurrence of the injury. This would mean, for example, that in the tort of negligence the claimant must show that, but for the defendant's breach of duty, he would not have suffered the injury of which he complains. Lawyers concede that on rare occasions this requirement of necessity can be inadequate and over-exclusionary because there are two factors each of which was sufficient for the occurrence of some indivisible injury.<sup>16</sup> One example is where two hunters carelessly shoot into a forest and both bullets simultaneously hit a walker who dies, the medical evidence being clear that either shot would have been sufficient to kill the walker instantly. Another is where two physical forces act upon and move an object where either force acting alone would have moved the object.<sup>17</sup> Yet another is where a decision is taken on the basis of two independently sufficient reasons. Another important class of factors that the but-for test fails to identify, a class lawyers have tended to ignore,<sup>18</sup> are those that are not only unnecessary but also insufficient for the occurrence of an injury but which in some sense made a contribution to the mechanism by which it occurred.

Using examples of this latter kind, Part III suggests that private law may well be normatively interested in a factor which made a positive contribution to the relevant step in the mechanism by which an indivisible injury occurred even though its relation to the occurrence of the injury was unnecessary. If this is the case, it follows that unless law clearly designates that such relations are causal, it will either be frustrated in its normative endeavours or, as seems now to be occurring in complex medical negligence and toxic tort cases, the law will become riddled with apparently random "exceptions" to the but-for "rule".

### *A note on necessity*

It is important to note that whether a factor qualifies as having been necessary for the existence of a phenomenon depends on the specification of the phenomenon. The more minutely the phenomenon is specified,<sup>19</sup> the more factors will qualify as having been necessary for it. For example, if the phenomenon is specified as "the walker's death by two bullets at the particular time and place", each hunter's carelessness will qualify as necessary. But the law does not resort to this device to render the but-for test an effective way of identifying the contribution of the factors being discussed herein. For law what is seen as the significant phenomenon is simply the walker's death at the particular time and place: the possibility that

<sup>15</sup> See e.g. *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [16] per Lord Phillips and [176] per Lord Brown of Eaton-under-Heywood; *Clements v Clements* [2012] SCC 32; 346 D.L.R. (4th) 577 at [8] per McLachlin C.J.C.

<sup>16</sup> See e.g. *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19; [2002] 2 A.C. 883 at [73] per Lord Nicholls of Birkenhead; *Strong v Woolworths* [2012] HCA 5 at [28] per French C.J., Gummow, Crennan and Bell JJ.

<sup>17</sup> *Price Waterhouse v Hopkins* 490 U.S. 228 at 241 (1989) (Brennan J.'s plurality opinion).

<sup>18</sup> An important exception is Richard Wright who, since his landmark article "Causation in Tort Law" (1985) 73 Cal. L. Rev. 1735, has urged lawyers to concern themselves with insufficient causal contributions. See also David Fischer, "Insufficient Causes" (2005) 94 Ky. L.J. 277.

<sup>19</sup> "Individuated" in philosophical terms.

this may be oversubscribed is not reflected in how the law specifies the phenomenon.

### III. A Positive Contribution which might be Unnecessary

The following illustrations demonstrate the striking outcomes that would flow if the law refused to recognise as “causal” a positive contribution, albeit unnecessary, to the relevant step in the mechanism by which an indivisible injury occurred. Suppose:

A, B and C, acting independently but simultaneously, each negligently lean on Paul’s car, which is parked at a lookout at the top of a mountain. Their combined force results in the car rolling over a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by the push of any one actor would have been insufficient to propel Paul’s car past the curbstone, but the combined force of any two of them is sufficient.<sup>20</sup>

No individual was necessary for the destruction of the car, yet it seems plausible that the law would want to identify their role. If the law required a factor to satisfy the but-for test before it would be recognised as a factual “cause”, the striking result would be that, while it would be known exactly what happened and by what agency, the law would not identify any of these three individuals as a “cause” of the car’s destruction.

It is true that a legal system might choose this course. It might then leave the court in an individual case to decide whether the individual “should be taken to” be a “factual cause” on the basis of a normative judgment about “whether and why responsibility for the harm should be imposed on the tortfeasor”.<sup>21</sup> But this obfuscates the analysis because it conflates the fact that A pushed the car with the separate issue of whether A ought to be held legally responsible for its destruction. Legal analysis would not be reflecting physical reality if A’s indisputable physical role in the occurrence is only to be acknowledged if the court determines that A should be responsible for the harm. A more transparent and therefore preferable approach is for the law to designate the relation each pusher has to the destruction of the car as a factual “cause”. Each can then be subjected to the separate normative investigation concerning legal responsibility.

A second illustration is adapted from the facts of a case heard by the German Federal Supreme Court in 1990.<sup>22</sup> Suppose:

A company produced a leather-spray to be used by consumers on their leather clothing. The company discovered that the spray was extremely toxic for certain elderly people and others with respiratory conditions. The relevant group of executives voted unanimously to market the product (the voting rule required only a majority of votes.) Subsequently the product killed a number of consumers.

<sup>20</sup> *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (St Paul, MN: American Law Institute Publishers, 2010), § 27, illust.3.

<sup>21</sup> See e.g. Civil Liability Act 2002 (WA) s.5C(2) and parallel provisions in other Australian civil liability legislation.

<sup>22</sup> 37 BGHSt 106, 6 July 1990.

Consider the vote of one of the executives. In relation to the consumer deaths their vote to market the product had not been necessary. If the law reserved the term “a cause” for only factors that were but-for factors, each individual executive would escape any personal criminal or civil liability that required him to have been a “cause” of the consumer deaths, because none was a but-for factor.<sup>23</sup> Again, a preferable approach is for the law to designate the relation each vote has to the deaths as a factual “cause”. Each executive can then be subjected to a separate normative investigation concerning his legal responsibility.

Another area in which unnecessary factors are important is pollution. Consider this scenario:

A number of factories each independently and in breach of duty discharge oil into a bay. Under a regulatory standard, fishing in the bay is forbidden if the concentration of oil is greater than a particular level. By the time the pollution is detected the concentration far exceeds this level. The ban is triggered and results in grave economic injury to local commercial fishermen. Suppose the discharge from no one factory would alone have been sufficient to result in the regulatory threshold being exceeded and that, given the other contributions, no one contribution was necessary for the threshold to be reached.<sup>24</sup>

Again if we require a factor to be necessary for an outcome before we are prepared to recognise it as “causal”, we would have the striking situation of knowing exactly what happened and by what agency but the law would not identify any of the polluters as a “cause” of the economic injury to the fishermen.

The same issue presents itself outside the tort of negligence. For example, it has long been accepted that a person may commit a nuisance where their contribution alone was unnecessary for the relevant obstruction to be a nuisance. A well-known illustration was given by Sir W.M. James L.J.:

“Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.”<sup>25</sup>

Here, assuming that 99 wheelbarrows would still have created serious inconvenience, the contribution of the one wheelbarrow was unnecessary but nevertheless actionable. This principle, which has been applied in many contexts, including where multiple tortious sources contribute to the pollution of

<sup>23</sup> This is exactly what each executive in the leather-spray case did argue when each was prosecuted individually in relation to being a “cause” of those injuries. The argument was rejected and the criminal convictions of each executive were upheld by the Federal Court of Justice of Germany. See also the pornography case discussed in the text at fn.102 below. On the interest of the law in an unnecessary vote in another context see *Goldwater v Carter* 617 F.2d 697 at 711 (CA DC 1979) “a legislator whose vote contributed to the legislative action will have standing”.

<sup>24</sup> Similarly, consider where either of two polluter’s conduct would have caused the same clean-up costs, see *Boeing Co v Cascade Corp* 207 F.3d 1177 (9th Cir.2000).

<sup>25</sup> *Thorpe v Brumfit* (1872–73) L.R. 8 Ch. App. 650 at 656–657. See also *Sadler v Great Western Railway Co* [1895] 2 Q.B. 688 at 695 per Rigby L.J. “the acts of a plurality of people might, when concurrently done, create a nuisance, where the act of each one of those individuals taken alone would be no nuisance at all”. Compare *Gillingham BC v Medway (Chatham Docks) Co Ltd* [1993] Q.B. 343; [1992] 3 All E.R. 923 at 938 per Buckley J. on the right to use the highway “reasonably” even where someone else’s excessive use amounts to a public nuisance.

watercourses,<sup>26</sup> supports the argument made here: that the law may be normatively interested in a factor that contributed to the existence of a phenomenon even if unnecessary for it.

To return to negligence and to sum up the argument: the law may be normatively interested in factors that contributed to the mechanism by which an indivisible injury occurred but which were unnecessary for that occurrence. In order for the law to subject such factors to a normative investigation, legal analysis should first have identified them as a factual cause of that injury. In other words, private law should adopt a notion of a “cause” that is wider than the relation of necessity that is encapsulated in the but-for test.

#### IV. “Caused or Contributed”

At this point it is relevant to note that one reason many lawyers have embraced the but-for test unthinkingly is because they have, at the outset, framed the factual cause question in terms of: “what caused the injury” in issue; or “was the injury caused by the breach”? Such formulations give the impression that only necessary factors are of interest with the result that unnecessary factors would not be identified as answers to that question. For example, in the leather-spray case we might well balk at saying that the vote of one executive “caused” the consumer deaths.

It follows that if, as argued above in III, such positive, albeit unnecessary, contributions to the relevant mechanism by which an indivisible injury occurred should be identified by the law as factual “causes”, our “causal” question must not be framed in terms of whether the particular factor “caused” the claimant’s injury. Rather it should be framed as no more than whether that factor was “a cause” of the injury. This catchment is also neatly achieved by the well-known phrase “caused or contributed to”. The word “caused” will easily identify necessary factors and the phrase “contributed to” also accommodates the positive, albeit unnecessary, contributions being discussed here.

This, of course, is the form of many statutory phrases such as the provision that, where under a duty to remove an obstruction, a highway authority may recover its reasonable expenses “from the owner of the thing which caused or contributed to the obstruction”.<sup>27</sup> A highway may be obstructed with a large pile of litter. An individual’s piece of litter may contribute to the obstruction without having “caused” it in the sense of that piece of litter being necessary for the total pile to constitute an obstruction. Nevertheless it contributed to it.

The dual formulation is particularly valuable where the specified factor is a reason that might have contributed to human decision-making. This is because decision-making is often “over-subscribed”, that is, the decision-maker had more than enough reasons for making their decision; this presents the possibility that,

<sup>26</sup> See D. Nolan, “Nuisance”, in K. Oliphant (ed.), *The Law of Tort*, 2nd edn (London: Butterworths, 2007), at [22.74] citing, inter alia, *Crossley & Sons Ltd v Lightowler* (1866–67) L.R. 2 Ch. App. 478; *Blair v Deakin* (1887) 57 L.T. 522; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All E.R. 1326; [1952] 1 T.L.R. 1013; and *Lambton v Mellish* [1894] 3 Ch. 163. For early Scottish cases see S. Steele and D. Ibbetson, “More Grief on Uncertain Causation in Tort” [2011] C.L.J. 451. See also *Warren v Parkhurst* 92 N.Y.S. 725 (N.Y.Sup.Ct.1904).

<sup>27</sup> Highways Act 1980, Ch.66, s.150(4)(c). See also Defamation Act 1996, Ch.31, s.1(5) “that what he did caused or contributed to the publication of a defamatory statement”; Prevention of Oil Pollution Act 1970 Ch.60, s.6(3) “unless the court is satisfied that the fouling was not caused or contributed to, by oil contained in any effluent discharged at or before that time”.



though the reason in issue in an individual case contributed to the decision, its weight was not a decisive, but-for, factor: without it, the same decision would have been made.<sup>28</sup> For example, in the context of challenges under Title VII of the Civil Rights Act of 1964,<sup>29</sup> the United States Supreme Court explicitly recognised that a factor that was one of the motivations of an employer's employment decision has "causal significance" even if it was not a but-for factor due to the presence of other motivations.<sup>30</sup> The Civil Rights Act of 1991 explicitly confirmed this approach and laid down that, if the employer could show that he would have taken the same action even without the culpable motive (because of the presence of those other reasons), this showing would not avoid liability for their violation of the plaintiff's rights but merely limit the remedies available to the plaintiff.<sup>31</sup>

Of course, a particular cause of action may have an additional requirement, for example that the reason not merely contributed to but was also a but-for factor that had induced the decision<sup>32</sup>; but since it is important that the rationales for such individual requirements are explicated clearly they should be separately analysed and so lie outside the scope of this article.

## V. Determining Causal Contribution in Practice

What would the impact on legal analysis be if there were a clear recognition that a positive contribution to the relevant mechanism by which an indivisible injury occurred was a causal contribution, even if it had been an unnecessary contribution?

There would be no impact at all in most cases because in most cases it is known that the relevant step in the mechanism by which the injury came about was an either/or step, and as we have seen, it is this knowledge that justifies the continued application of the but-for test of causal connection in most cases. A classic example of this is where the mechanism involved the presence of an injurious agent and the claim is that the defendant's breach had brought that presence about: such as when the claimant asserts that the bullet that hit them had been a bullet carelessly shot by A (see I(a)). In *Barnett v Chelsea and Kensington Hospital Management Committee*<sup>33</sup> the mechanism by which the victim died of arsenic poisoning was, the trial judge found, a disturbance of his enzyme processes. But none of the allegations of breach against the defendant hospital (failing to see, examine, admit

<sup>28</sup> See, for example: *Barton (Alexander) v Armstrong (Alexander Ewan)* [1976] A.C. 104; [1975] 2 All E.R. 465 at 119A (Privy Council) (duress to the person) "if Armstrong's threats were 'a' reason for Barton's executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats"; fn.100 below; *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All E.R. 583 at 589 per Stephenson L.J., stating "... as long as a representation plays a real and substantial part, though not by itself a decisive part, in inducing a plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act [noting the trial judge's statement that 'you can be influenced by something even though if you had not been influenced you would have acted in the same way']"; *Henville v Walker* (2001) 206 C.L.R. 459 at 493 per McHugh J. It is a separate matter whether the decision led to "damage" for which compensatory damages may be sought: see VII below.

<sup>29</sup> 42 U.S.C. § 2000e-2000e-17 (2006).

<sup>30</sup> *Price Waterhouse v Hopkins* 490 U.S. 228 at 241 (1989).

<sup>31</sup> 42 U.S.C. § 2000e-2(m) (2006) confirming the approach; under § 2000e-5(g)(2)(B) a court may grant declaratory relief, certain injunctive relief, and certain attorney's fees and costs. Importantly, compensatory damages are not available, on which see text at fn.82 below.

<sup>32</sup> See e.g. *Huyton SA v Cremer GmbH & Co* [1998] EWHC 1208 (Comm); [1999] C.L.C. 230 at 250 per Mance J., a case concerning economic duress in contract (contrast duress to the person, fn.28 above). For a statutory requirement of causal necessity see Congenital Disabilities (Civil Liability) Act 1976 s.1(2)(b).

<sup>33</sup> [1969] 1 Q.B. 428; [1968] 2 W.L.R. 422; [1968] 1 All E.R. 1068.

and hydrate the man) related to that disturbance or any other operative step in the mechanism by which he died.<sup>34</sup>

Where, however, we know that the relevant step in the mechanism by which an injury occurred involved a threshold amount of some element and the breach allegedly made a positive contribution to the total amount of that element present, the but-for test should not be used as the test of factual causation. The positive contribution resulting from the breach may have been necessary for that threshold to have been reached; but if it was unnecessary its contribution to the relevant step in the mechanism by which injury occurred will not be identified by the but-for test. It follows from the argument made above that in cases where the relevant step in the injurious mechanism is known to involve a threshold the only causal question should be whether or not, on the evidence, the factor made the alleged positive contribution to that mechanism. Often this question can uncontroversially be answered in the affirmative, as in all the earlier illustrations: about the car being pushed off the mountain, about the voting by the executives and about the pollution of the bay.

It is important to note that the conclusion that a factor was a “cause” can be reached in such cases even where the extent of its positive contribution is disputed or unknown. We can conclude, for example, that one of the car pushers in the first illustration made a causal contribution to the car’s destruction even if we do not know how much force he exerted. Similarly we can conclude, for example, that one of the polluters made a causal contribution to the triggering of the ban without knowing the volume of pollution it contributed. Such evidentiary gaps do not prevent the relation being identified as “causal”.<sup>35</sup> This point is vital to a clear analysis of the well-known cases of *Hotson* and *Bailey* in both of which the breach resulted in the increased weakening of a structure, respectively the blood supply to a joint and a patient’s overall muscular strength.

## VI. Causal Contributions to the Weakening of an Entity

### *The bridge example*

To set the scene for the discussion of these cases, consider a structure which, if weakened beyond a certain threshold point, will be unable to cope with an external stress. Suppose the total contributions to the weakening of that structure well surpass the threshold *before* the external stress event arrives to complete the mechanism and an injury is suffered. Consider the following highly stylised illustration:

On a certain train line the trains weigh 10 units each; a bridge carrying the line was built to withstand a weight of 20 units. A train will pass across the bridge at noon. Before noon X deposits a weight of 6 units within the bridge structure, then Y deposits another 6-unit weight, then Z deposits another 6-unit weight. X, Y and Z act independently and are unaware of the conduct

<sup>34</sup> If the alleged breach had resulted in a positive increase in the disturbance of his enzyme processes, the analysis in this article would apply.

<sup>35</sup> As to whether the injury constitutes “damage”, see text to fn.93 below.

of each other. At noon the train attempts to cross the bridge which collapses, killing a passenger on the train.

Consider whether the weight deposited by Z contributed to the death of the passenger. With hindsight the passenger appears doomed once the second weight is placed on the bridge because together with the first weight it has weakened the structure to such an extent—a total of 12 units—that once the stress of the train’s weight—of 10 units—later arrives on the bridge the total weighing on the bridge is going to exceed the threshold for collapse.

But this dooming question is irrelevant to the question of whether the third weight physically contributed to the collapse or not. The force that the third weight exerts on the bridge is identical to that of each of the other two weights and must be as relevant to the factual cause question as they are. The law cannot ignore what it knows to be true: that the third weight was exerting its force on the bridge when the train arrived. The dooming question is relevant, but not to the factual cause issue. It is relevant at a later point in the legal analysis, namely when it addresses the question of whether the injury represented “damage” for the purposes of the “no better off” principle of compensatory tort damages (see VII below).

In the bridge example the mechanism by which the indivisible injury occurred involved a threshold point which had become “oversubscribed” well before an external stress came on the scene to complete the mechanism. If private law accepts that any positive contribution to the mechanism by which an indivisible injury occurred is a “causal” contribution, each of the weights, including the third weight, will be identified as having made a “causal” contribution to the death of the train passenger (even though none is a but-for factor in relation to the death<sup>36</sup>).

### *Hotson v East Berkshire HA*<sup>37</sup>

The facts of *Hotson* follow the pattern of those in the bridge example. The vitality of the part of a hip joint called the epiphysis depends on an adequate supply of blood. If more than a threshold number of the blood vessels that should supply it with blood fail to do so, the epiphysis will suffer an avascular necrosis producing permanent injury. When a boy was climbing a tree at school during lunchtime he fell 12 feet to the ground and a substantial number of these blood vessels were ruptured (agreed to be at least 20 per cent but no more than 70 per cent<sup>38</sup>). Within a few hours he was examined at a hospital but sent home. It was five days before he received adequate medical treatment. The boy eventually suffered an avascular necrosis of the epiphysis.

The trial judge, Simon Brown J., made a critical finding: not only had the fall weakened the blood supply to the hip, as was agreed, but the delay due to the breach had resulted in further weakening of that blood supply because it had resulted in the ruptured blood vessels bleeding into the joint, creating pressure which compressed and blocked the remaining intact vessels.<sup>39</sup>

<sup>36</sup> Of course each is a but-for factor in relation to the precise pattern of debris that resulted, but that is not how the law specifies the phenomenon of interest: see text at fn.19 above.

<sup>37</sup> [1988] UKHL 1; [1987] A.C. 750.

<sup>38</sup> *Hotson v Fitzgerald* [1985] 1 W.L.R. 1036 at 1041 per Simon Brown J.

<sup>39</sup> *Fitzgerald* [1985] 1 W.L.R. 1036.

In *Hotson* the hospital committed its breach against Hotson only a few hours after the fall. At that point the necrosis had not happened. Both the weakening of the blood supply due to the fall and the weakening resulting from the breach began to starve the hip joint of blood leading later to an avascular necrosis: that is, the necrosis only happened after Hotson's blood supply had been weakened by both the fall and the breach. Since the hospital's breach resulted in a positive increase in the weakening of the blood supply and it was inadequate blood supply that later produced the necrosis, such contribution should have been recognised as causal just as clearly as we should recognise as causal the contribution that one of the individual weights deposited on the bridge made to its collapse.<sup>40</sup> The fact that the contribution to the weakening of the blood supply resulting from the hospital's breach was probably unnecessary for the occurrence of the necrosis should not prevent the relation of that contribution to the occurrence of the injury being recognised as causal.

That the hospital's breach resulted in a positive contribution to the mechanism by which the necrosis came about was obscured by the deployment of the but-for test. Because the relevant step in the mechanism in *Hotson* involved a threshold, use of this test was inappropriate. As the earlier examples involving the pushed car, the executives' voting, the fishing ban and the weights on the bridge demonstrated, a threshold step might be oversubscribed. If so, a factor that had resulted in a positive contribution to that step but had been unnecessary for the threshold being reached, would not be identified by the but-for test.

It is true that the trial judge found that even with careful treatment there was a high probability (which he put at 75 per cent) that "the plaintiff's injury would have followed the same course as it in fact [did]".<sup>41</sup> In other words, at the moment just after the fall, the boy's state was probably like the state of the bridge just after the first two weights were deposited. The judge found that the structure, here the blood supply, had probably been so weakened by the fall that the boy was doomed to suffer necrosis even had there been no breach to further weaken the blood supply. But again, the fact that probably "the die was cast as soon as he had sustained his injury"<sup>42</sup> is irrelevant to the factual causation question of whether the hospital's breach had also resulted in a positive contribution to the mechanism by which the necrosis came about. With respect, Lord Bridge of Harwich erred in deducing that since

"on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the *sole cause* of the avascular necrosis."<sup>43</sup>

<sup>40</sup> As with any unnecessary cause, the contribution of the hospital can be represented abstractly with sets: R. Wright, "Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof" (2008) 41 *Loy. L.A. L. Rev.* 1295 at 1322–4; Stapleton "Choosing What We Mean by 'Causation' in the Law" (2008) 73 *Missouri L. Rev.* 433 at 475, n.148. But the non-technical approach set out in this article is easier to understand and thus of greater forensic utility than such algorithmic representations.

<sup>41</sup> *Hotson v Fitzgerald* [1985] 1 W.L.R. 1036 at 1040 per Simon Brown J.

<sup>42</sup> *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [27] per Lord Phillips. For a stark illustration of this irrelevance: suppose A injects a victim with a more than lethal dose of a poison with no antidote and then almost immediately B injects some more of the poison and the victim later dies of the poison. How is it relevant to the question of whether B contributed to the death to point out that by the time B acted there was already sufficient poison in the victim's system to kill? It is true that the die was cast at this point but this is irrelevant to whether B's poison also contributed to the death.

<sup>43</sup> *Hotson v East Berkshire HA* [1987] A.C. 750 at 782E (emphasis added). See also at 780E–F.

The factual causation question here, of whether the breach resulted in a positive contribution to the mechanism by which the indivisible injury occurred, must be kept distinct from a quite separate issue, namely whether that injury represented “damage” for the purposes of the “no better off” principle of compensatory tort damages.

*Bailey v Ministry of Defence*<sup>44</sup>

In this clinical negligence case a woman suffered brain damage as the result of cardiac arrest following inhalation of her vomit. It was agreed that it was because she had become so weak that she had been unable to deal naturally with her vomit (by coughing) and so had inhaled it.<sup>45</sup> The trial judge, Foskett J., found that two things contributed to her weakened state: one was her underlying pancreatitis and the other was the tortious conduct of the defendant. Since “each contributed materially to the overall weakness and it was the overall weakness that caused the aspiration”,<sup>46</sup> his Lordship found there was a causal link between the breach and the cardiac arrest,<sup>47</sup> and noted that the but-for test did not need to be satisfied before such a contribution could be recognised as having been a “cause” of the indivisible outcome.<sup>48</sup>

This approach is, with respect, to be welcomed because it recognises that, as advocated above in III, any positive contribution to the mechanism by which the injury occurred should be recognised as a “causal” contribution. Just like the mechanism in the bridge example, in *Bailey* a threshold point of physical weakness had become oversubscribed before an external stress, in this case the vomit, came on the scene to complete the mechanism leading to a single incident, namely aspiration of that vomit followed by cardiac arrest. The breach had resulted in a positive contribution to this weakened state and so should be recognised as having made a causal contribution to the mechanism by which this indivisible injury came about, regardless of whether it had been necessary for that threshold to be reached. Once it is acknowledged that such an unnecessary factor may contribute to the occurrence of an indivisible injury in this way, it becomes clear that no special rule was needed to assist the claimant in *Bailey* to establish that the breach was a “cause” of her brain damage.

The finding of causation was appealed. Regrettably the Court of Appeal, in a judgment by Waller L.J. with which Sedley and Smith L.JJ. concurred, accepted that the test of causation was the but-for test<sup>49</sup> and characterised the question to be, “was this a case in which the judge was entitled to depart from the ‘but for’ test?”<sup>50</sup> His Lordship stated two extraordinary propositions in relation to “cumulative cause cases”. In the first he stated that

“if the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any

<sup>44</sup> *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 W.L.R. 1052.

<sup>45</sup> *Bailey* 2008] EWCA Civ 883 at [32].

<sup>46</sup> *Bailey v Ministry of Defence* [2007] EWHC 2913 (QB) at [60] per Foskett J.

<sup>47</sup> And consequent brain damage: *Bailey* [2007] EWHC 2913 (QB) at [62] per Foskett J.

<sup>48</sup> *Bailey* [2007] EWHC 2913 (QB) at [57] per Foskett J., albeit citing the problematic dictum of Lord Bridge in *Hotson* discussed in the text at fn.85 below.

<sup>49</sup> *Bailey* [2009] 1 W.L.R. 1052 at [46].

<sup>50</sup> *Bailey* [2009] 1 W.L.R. 1052 at [36].

event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation.”<sup>51</sup>

With respect, this proposition is untenable: as the previous analysis demonstrated, a factor may result in a positive contribution to the mechanism by which an indivisible injury occurred even where other contributions would have been sufficient to complete that mechanism in any event.

His Lordship’s second proposition was that:

“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.”<sup>52</sup>

Since the Court characterised the case as one involving “cumulative causes”,<sup>53</sup> it held that it was governed by the second proposition and that therefore a departure from the but-for test was appropriate. With respect, this proposition is also untenable. First, the mechanism of injury in *Bailey* could only be characterised as one of “cumulative causes”<sup>54</sup> in the limited sense that the patient’s weakened state when she inhaled her vomit was due to the combination of the weakness due to her underlying condition and the weakness due to the breach. But His Lordship seems to have equated this feature of the facts in *Bailey* with a quite different feature in *Bonnington Castings Ltd v Wardlaw*.<sup>55</sup> In *Bonnington* it was in the nature of the disease (a pneumoconiosis) that, the more silica dust inhaled, the more insults the body suffers and the more severe the overall disability: because the overall condition of the victim is the result of the cumulative effect of separate insults to the body the disease as a whole is today described as “divisible”.<sup>56</sup> In contrast, the mechanism by which injury occurred in *Bailey* was not anything like this and it led to an indivisible injury, cardiac arrest.

Having equated *Bailey* with *Bonnington*, Waller L.J. felt free to apply what he took to be a special rule of causation supposedly created in the latter case. Whether *Bonnington* laid down any special rule is a matter of disagreement, even at the highest level.<sup>57</sup> The case certainly stands for the orthodox proposition that the burden of proof of factual causation rests on the claimant.<sup>58</sup> The case also clearly stands for the entirely orthodox proposition that, where the victim suffers from a total condition that is divisible, the claimant does not have to prove that the defendant contributed to each and every part of the overall condition: so long as the claimant can show the defendant was responsible for some material insult to the body, he can recover at least some damages. Consider a simplified example of a divisible overall condition: suppose X fired a bullet that hit the victim’s arm and Y fired a bullet that hit the victim’s leg. When the victim sues X he does not have to prove that X wounded both their arm and their leg. Of course, the victim does have to prove that X was a “cause” of the bullet wound to the arm (but under

<sup>51</sup> *Bailey* [2009] 1 W.L.R. 1052 at [46].

<sup>52</sup> *Bailey* [2009] 1 W.L.R. 1052 at [46].

<sup>53</sup> *Bailey* [2009] 1 W.L.R. 1052 at [47].

<sup>54</sup> *Bailey* [2009] 1 W.L.R. 1052 at [47].

<sup>55</sup> [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

<sup>56</sup> *Stenkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [17] per Lord Phillips.

<sup>57</sup> Compare *Stenkiewicz* [2011] 2 A.C. 229 at [17] per Lord Phillips and [176] per Lord Brown.

<sup>58</sup> *Bonnington Castings Ltd v Wardlaw* [1956] A.C. 613 at 620 per Lord Reid.

orthodox rules X's liability is limited to that distinct injury<sup>59</sup>). Earlier we saw why it is that, because we know the mechanism by which the limbs were shot was binary, it is permissible to frame this factual causation question using the simplified approach represented by the but-for test (see I(a)). In other words, orthodoxy requires this victim to prove that, but for X, he would not have suffered the bullet wound to the arm. There is nothing in *Bonnington* that suggests it modified this orthodox requirement<sup>60</sup>: the pursuer's task was to prove that but for the breach he would not have suffered part of his total condition. There was no doubt that the pursuer could satisfy this causal requirement because the defender's breach had clearly been a but-for factor of Wardlaw inhaling a material volume of silica which would have resulted in some of the bodily insults he suffered.

The ambiguity left by *Bonnington* lay elsewhere, in quantification: the pursuer recovered damages for his total condition, even though it was known that the inhaled particles acted cumulatively and not all of them were due to the defender's breach. This can be read two ways. A plausible explanation is that the Lords simply did not address the apportionment issue because, as in *Fairchild*, the defender had not raised the point, it being their case that they were not liable to Wardlaw at all.<sup>61</sup>

Alternatively, it might be interpreted as a departure from the orthodox approach to quantification in the context of divisible injuries. Under that approach the claimant may not simply formulate their complaint in terms of the total condition and point to the fact that absent the breach this precise total condition would not have been suffered (since fewer inhaled particles would have produced a later and/or less severe pneumoconiosis).<sup>62</sup> Instead, as we have seen, the law takes account of what it knows to be the case, namely that only part of the total condition suffered by the victim was the defendant's fault. So the orthodox approach is: the complaint must be limited to that part, the causal question will relate to only that part of the divisible injury and in fairness to the defendant he is held liable only to the extent of that contribution.<sup>63</sup> *Bonnington* may represent a departure from the latter quantification step of this orthodox approach in the context of a particular evidentiary gap: namely, where it is known that the victim's total condition is a divisible one but there is no acceptable evidentiary basis on which the disability due to the separate insults to the body could be apportioned to the individual sources, the claimant is allowed to recover for the total condition.<sup>64</sup> This is not an unknown approach in the common law world; it is, for example, the approach of US courts in asbestosis claims<sup>65</sup> and might be especially attractive where all sources

<sup>59</sup> *Associated Newspapers Ltd v Dingle* [1961] 2 Q.B. 162; [1961] 2 W.L.R. 523; [1961] 1 All E.R. 897 at 189.

<sup>60</sup> In other words, the fact that in establishing a causal link between breach and an injury the pursuer did not need to prove that, but for the breach, he would not have developed any degree of pneumoconiosis *at all*, is not equivalent to the law failing to apply the "but-for test of causation": contrast *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32 at [129] per Lord Rodger of Earlsferry; *Bailey v Ministry of Defence* [2009] 1 W.L.R. 1052 at [36] per Waller L.J.; *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [17] per Lord Phillips.

<sup>61</sup> *Holtby v Brigham and Cowan (Hull) Ltd* [2000] EWCA Civ 111; [2000] 3 All E.R. 421 at [15] per Stuart-Smith L.J.; *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [176] per Lord Brown.

<sup>62</sup> Contrast S. Bailey, "Causation in Negligence: What is a Material Contribution?" (2010) 30 L.S. 167 at 177.

<sup>63</sup> *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 Q.B. 405; [1984] 2 W.L.R. 522; [1984] 1 All E.R. 881 at 443 per Mustill J.; *Holtby v Brigham and Cowan (Hull) Ltd* [2000] EWCA Civ 111 at [21]. This is how British courts today handle the sort of pneumoconiosis: M. Hogg, "Causation and Apportionment of Damages in Cases of Divisible Injury" (2008) 12 Edin. L. Rev. 101.

<sup>64</sup> J. Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002) 10 Torts L. J. 276 at 283 onwards.

<sup>65</sup> J. Stapleton, "The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims" (2009) 74 Brooklyn L. Rev. 1011.

which did contribute<sup>66</sup> or might have contributed<sup>67</sup> to the divisible total injury<sup>68</sup> were tortious (because the unshiftable burden of apportionment would at least then rest only on culpable shoulders). Of course, some might regard it as surprising that the House of Lords would intend to authorise this as a generally available approach to quantification without careful analysis of key issues such as the degree to which a rough and ready apportionment of the divisible total condition between sources might be acceptable. But the important point here is that, even if the Lords were adopting such a rule in *Bonnington* it is, with respect,<sup>69</sup> misleading for us today to frame it as one which modifies the factual causation requirement: the pursuer could prove an orthodox causal connection between breach and a part of the divisible injury, he just could not quantify it. Nor is it helpful to frame the result as the law allowing the claimant to reformulate the complaint as being about the total condition<sup>70</sup> because this suggests the law is accepting what it knows to be a fiction, namely that the total condition was indivisible.

One way in which Waller L.J.'s reasoning in *Bailey* went astray should, with respect, now be clear. While his Lordship seemed to appreciate that the weakness of Ms Bailey that had resulted from the breach contributed to the mechanism by which she was injured, he was unable to analyse this role clearly because he started his analysis with an assumption that, to qualify as a "cause", a contribution must satisfy the but-for test of necessity. Thus hamstrung, his Lordship failed to enunciate how a possibly unnecessary factor may contribute to the occurrence of an indivisible injury such as cardiac arrest and failed to appreciate that, since this was undeniably what had happened in this case, there was no need to resort to exceptional rules in order to conclude that the patient had established that the breach had been a factual cause of her cardiac arrest. Instead his Lordship seized on what he read as an exception to the but-for "test" in the "cumulative cause" case of *Bonnington*, and then drew a flawed analogy between that case (which involved a material contribution to a divisible disease) and the quite different facts of *Bailey* (which involved a material contribution to a step in the mechanism by which an indivisible injury occurred).<sup>71</sup>

With respect, the court should, at the outset, have considered the mechanism by which the cardiac arrest occurred. Since this clearly involved a threshold step, namely a point of physical weakness beyond which the patient would have been unable to deal with her vomit, the but-for test was inadequate to identify whether

<sup>66</sup> See e.g. *Landers v East Texas Salt Water Disposal Co* 248 S.W.2d 731 at 731–32 (Tex.1952), discussed in Stapleton, "The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims" (2009) 74 Brooklyn L. Rev. 1011; *Restatement (Third) of Torts* (2010) § 28(b) cmt d(1).

<sup>67</sup> See e.g. *Maddux v Donaldson* 108 N.W.2d 33 (Mich.1961) (victim suffered facial cuts, internal injuries, fractures of leg, arm, and knee after being hit in rapid succession by the vehicles of the two defendants); obiter to this effect in *Summers v Tice* 199 P.2d 1 at 5 (Cal.1948).

<sup>68</sup> For the parallel issue where the injury is indivisible and all possible causes were tortious see *Fitzgerald v Lane* [1987] Q.B. 781 CA; [1987] 3 W.L.R. 249; [1987] 2 All E.R. 455 (a fracture resulting in tetraplegia) and *Cook v Lewis* [1952] 1 D.L.R. 1 (a gunshot).

<sup>69</sup> See fn.60 above.

<sup>70</sup> Contrast the view of Professor Bailey, fn.62 above.

<sup>71</sup> In delivering the judgment of the Court of Appeal in *B v Ministry of Defence* [2010] EWCA Civ 1317 at [150], a member of the *Bailey* court, Smith L.J., stated that the special rule in *Bailey* and *Bonnington* did not apply to the cancer claims of the atomic veterans because that rule applied "only where the disease or condition is 'divisible'", that is "where the severity of the disease is related to the amount of exposure" (at [134]) and that whereas Miss Bailey's "weakness [was] divisible ... cancer is an indivisible condition; one either gets it or one does not" (at [150]). With respect, the injury in *Bailey* was cardiac arrest which is indivisible, one either gets it or one does not. Contrast her Ladyship's apparent acknowledgment in *Dickins v O2 Plc* [2008] EWCA Civ 1144 at [42] that *Bailey* involved an "indivisible injury".



the breach had contributed to the mechanism by which the patient suffered her cardiac arrest. The question should simply have been: did the breach result in some positive contribution to the relevant mechanism by which this indivisible injury occurred.

It is important to emphasise that the inadequacy of the but-for test here is conceptual not, as suggested by Waller L.J. and others,<sup>72</sup> merely evidentiary. That test is as inadequate a test of factual causation in the executives' voting case and the bridge case (where there are no evidentiary gaps at all) as it is in *Hotson* and *Bailey*. It is true that the extent of the breach's contribution to the weakness of the relevant structure in the latter cases could not be assessed. But this does not prevent the conclusion that the breach did contribute to the overall weakened state (of the blood supply and of the patient respectively) and thereby to the indivisible injury which that structure was too weak to prevent (necrosis and cardiac arrest respectively).

### *Two distinct forms of causal contribution: terminology*

The central argument of this article is that a factor that contributed to a threshold step in the mechanism by which an indivisible injury occurred should be identified as a factual cause of that injury even if the contribution was unnecessary because the step was oversubscribed. As the problematic reasoning in *Bailey* attests, this way in which a factor's contribution may be a factual cause should not be confused or conflated<sup>73</sup> with the way the defendant's tortious contribution of dust was a factual cause of Wardlaw's divisible total condition in *Bonnington*. In our terminology we need carefully to distinguish:

- a (possibly unnecessary) contribution to the occurrence of an indivisible injury (such as the cardiac arrest in *Bailey*); and
- a contribution to the occurrence of a divisible injury (such as the pneumoconiosis in *Bonnington*).

## **VII. Did the Injury Represent “Damage” for the Purposes of the “No Better Off” Principle of Compensatory Tort Damages?**

In the cases under discussion a significant source of confusion has been the failure to distinguish two distinct matters. One is the factual causation issue of whether the breach was a cause of the injury. A quite separate issue is whether this injury is one for which compensatory damages can be claimed.

It is a defining and well-known principle of the approach the law of torts takes to the assessment of compensatory damages<sup>74</sup> that it should not make a claimant

<sup>72</sup> For example *Clements v Clements* [2012] SCC 32; 346 D.L.R. (4th) 577 at [13]–[15] per McLachlin C.J.C.

<sup>73</sup> Contrast *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [13], [17] and [75] per Lord Phillips.

<sup>74</sup> See e.g. *Athey v Leonati* [1996] 3 S.C.R. 458; 140 D.L.R. (4th) 235 (S.C.C.) at [32] per Major J. “the plaintiff is not to be placed in a position better than his or her original one”; *Abbey National Plc v Chagger* [2009] EWCA Civ 1202; [2010] I.C.R. 397 at [56] “that race is a significant factor in the decision is sufficient to establish liability for that loss, but that fact does not assist one iota in determining the measure of that loss” (race discrimination); see also *Polkey v AE Dayton Services Ltd* [1988] A.C. 344; [1987] 3 W.L.R. 1153; [1987] 3 All E.R. 974 (unfair dismissal). See also *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 W.L.R. 671 at [95] per Lord Dyson and [176] per Lord Hope of Craighead, refusing compensatory damages for false imprisonment because, absent the “deplorable” conduct of the Home Office, the claimants would have been detained lawfully. The approach advocated in this article would recognize the conduct of the Home Office as a “cause” of the actual imprisonment being unlawful, while also recognizing that the claimant had, as a result of the unlawfulness of

better off than he would have been had he not been the victim of tortious conduct.<sup>75</sup> A convenient way of expressing this “no better off” principle is that the injury must represent “damage” relative to the benchmark of where the victim would have been absent tortious conduct.<sup>76</sup> Thus, even if a defendant’s breach was a cause of an injury, he is not liable to pay compensatory damages if the same or an equivalent injury<sup>77</sup> would have occurred in the absence of tortious conduct: though the claimant has suffered an injury at the hands of the defendant he has not suffered “damage” to what would have been their prospects absent tortious conduct. It is at this latter, “damage”, stage of the legal analysis that we should be considering if the victim had been doomed anyway.

The application of this principle is of great importance in indivisible injury cases in which the relevant step in the injurious mechanism is known to be a threshold step (that is, one that requires a certain amount of an element<sup>78</sup>). This is because it may well be that, while the defendant’s breach made a positive contribution to the total of that element present, thereby qualifying under the above analysis as a “cause”, there had also been innocent contributions of that element. If the innocent contributions alone would have been sufficient to reach the threshold, the injury would still have occurred absent tortious conduct. In such a case compensatory damages are barred because they would make the claimant better off. Though the defendant was a “cause” of the injury, the injury did not represent “damage”.

To illustrate the difference, consider a case where a patient received an appropriately prescribed dose of a medication, then a nurse carelessly administered yet more of the medication and later as a result of an adverse reaction to that substance the patient suffers the indivisible injury of death. According to the approach advocated above, and in contrast to a controversial dictum of Lord Phillips in *Sienkiewicz v Greif (UK) Ltd*,<sup>79</sup> when the patient’s estate sues the nurse in the tort of negligence it should have no difficulty in establishing that the excess medication above the prescribed dose made a causal contribution to the patient’s death: the mechanism by which the indivisible injury occurred involved a threshold point (a concentration of the medication that was sufficient to kill the patient) and the breach had resulted in a positive contribution to the volume of the medication in the victim’s body. But the estate must also establish, *inter alia*, that the death represents “damage”: the patient is not entitled to be better off than he would have been in the absence of tortious conduct.

that detention, suffered no “damage” for the purposes of compensatory damages (contrast *SK (Zimbabwe) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 W.L.R. 1299 at [88] where Lord Kerr interpreted *Lumba* as holding that “causation is not a necessary ingredient for liability [in the tort of false imprisonment]”).

<sup>75</sup> Of course it is often the case that when a party complies with its tort obligations this will improve the position of another party, for example when the exercise of reasonable care by a doctor leads to the detection and successful cure of a disease afflicting a patient, or when a lawyer’s timely and careful drafting of a will allows an intended beneficiary to inherit under it.

<sup>76</sup> J. Stapleton, “Cause-in-Fact and the Scope of Liability for Consequences” (2003) 119 L.Q.R. 388 at 412–413.

<sup>77</sup> For example; where non-tortious factors did later produce an equivalent duplicate injury as in *Jobling v Associated Dairies* [1982] A.C. 794; and *Victorson v Milwaukee and Suburban Transport Co* 234 N.W.2d 332 (Wis.1975); or where, absent the actual injury, an equivalent injury would have been suffered as where, had the victim not been killed where and when he was, he would have died seconds later: *Dillon v Twin State Gas & Elec. Co* 163 A. 111 (N.H.1932); see also *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427; [2009] Ch. 330.

<sup>78</sup> See text at fn.8 above.

<sup>79</sup> [2011] UKSC 10; [2011] 2 A.C. 229 at [91] criticized in J. Stapleton, “Factual Causation, Mesothelioma and Statistical Validity” (2012) 128 L.Q.R. 221 at 228–229.

It is the claimant who bears the burden of proving that the injury to which the breach contributed represents “damage” in the sense set out above. Because in the cases under discussion this issue depends on an actual fact that existed in the past, namely the extent of non-tortious contributions to the relevant threshold step in the mechanism, the “damage” issue must be proved on the balance of probabilities.<sup>80</sup> Specifically, the claimant must prove that, more likely than not, the victim would have escaped the indivisible injury had there been no tortious conduct because the non-tortious contributions to the threshold step would alone have been insufficient to reach the threshold. So if, in the overdose case, it were clear that the prescribed dose alone would have been sufficient to kill this particular patient, the conclusion would be that while the tortious increment of the overdose was a “cause” of the death, that injury did not represent “damage”, so no damages are recoverable. (The same analysis applies if the overdose was administered simultaneously with the prescribed dose: therefore and with respect, Lord Phillips was in error to assert, in another controversial dictum in *Sienkiewicz* that “where the [condition] is indivisible ... a defendant who has tortiously contributed to the cause of the [condition] will be *liable in full*”.<sup>81</sup>)

This analysis is particularly important in the context of decision-making. So for example, if a claimant had made a decision, such as entering an injurious commercial transaction, on the basis of two reasons, one due to the tort of the defendant and one unrelated to tortious conduct, his claim for compensatory damages will fail if, absent tortious conduct, he would still have entered the transaction because of the weight he placed on the other non-tortious reason.<sup>82</sup>

This analysis reveals that the problem facing the claimants in both *Hotson* and *Bailey* was not establishing that the breach contributed to the occurrence of the indivisible injury, but was because the claimants in these cases could not prove that, on the balance of probabilities, this injury represented “damage”.

### *Impossibility of proving “damage” in Hotson*

*Hotson* not only had to prove that the additional disruption of blood supply resulting from the breach by the hospital contributed to the occurrence of his necrosis: the factual cause issue. He also had to prove that, on the balance of probabilities, his necrosis represented “damage”. Since on the facts as found, there was only one tortious contribution to the starving of the hip of blood supply, the claimant had to prove that, on the balance of probabilities, after the fall there remained sufficient intact blood vessels to keep the epiphysis alive. But the trial judge thought it was 75 per cent probable that after the fall there were no longer sufficient intact blood

<sup>80</sup> *Mallett v McMonagle* [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178. Contrast the extraordinary assertion by Wright, “Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof” (2008) 41 Loy. L.A. L. Rev. 1295 at 1324 that in *Hotson* “the 75 per cent probability that the permanent injury would have occurred anyway is, I believe, not sufficient to justify letting the defendant health authority off the hook for the injury that it negligently caused”.

<sup>81</sup> *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [90] emphasis added.

<sup>82</sup> Though remedies other than compensatory damages may be available. A similar analysis applies where it is the wrongdoer’s decision in issue: see, for example the availability of non-compensatory remedies in the US in vindication of statutory civil rights: fn.31 above.

vessels. In other words, but for the tortious contribution to the starving of the joint of its blood supply, it would still probably have suffered an avascular necrosis.<sup>83</sup>

So *Hotson* was a case where, on the facts, the breach should have been recognised as having been a contributing cause of the necrosis, but it could not be shown that, on the balance of probabilities, the necrosis represented “damage”<sup>84</sup> It is well known that the claimant in *Hotson* attempted to avoid orthodoxy by reformulating the complaint, complaining not about the necrosis but about the loss of a chance of avoiding it. The foregoing analysis reveals that this radical move was not necessitated by the impossibility of proving that the breach contributed to the occurrence of the necrosis; rather it was because the claimant could not prove that the necrosis represented “damage” relative to what had been his prospects absent tortious conduct.

Standing in the way of this clarification of the law is the following dictum of Lord Bridge in *Hotson*:

“... if the plaintiff had proved on a balance of probabilities that the authority’s negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed.”<sup>85</sup>

With respect, this is an untenable approach. In the overdose case, for example, it would mean that even if the individual patient would have died from a fraction of the innocent prescribed dose, his estate would nonetheless been able to recover full damages from the nurse. This contravenes the “no better off” principle of compensatory tort damages: the court will not speculate about past facts when it knows them and it will take into account that, absent the defendant’s tortious contribution to the injury, the victim would have suffered the injury in any event due to the non-tortious factors that had actually been present.<sup>86</sup>

### *Impossibility of proving “damage” in Bailey*

In *Bailey* the evidentiary gap was even wider than in *Hotson*. In *Hotson* there was some evidence on which the trial judge could make an estimate of the likelihood that the threshold would have been met by non-tortious contributions alone: unfortunately for the claimant, he put this likelihood at 75 per cent. In *Bailey* there was no evidence to show whether the weakening due to her underlying condition alone would or would not have prevented her dealing successfully with her vomit.<sup>87</sup> It may have been that the pancreatitis alone would have weakened her so much that she would have been unable to deal with it successfully. So *Bailey* was like *Hotson*. It was a case where, on the approach advocated above in III, the breach should be recognised as having been a contributing cause of the cardiac arrest. But

<sup>83</sup> Contrast *Oakes v Neining* [2008] EWHC 548 (QB); (2008) 101 B.M.L.R. 68 at [38], in which Akenhead J. found that, on the balance of probabilities, had there not been a negligent delay in treatment the victim would not have reached the relevant threshold (cauda equina syndrome with retention) which led to injury.

<sup>84</sup> Note the conflation of these two issues in Waller L.J.’s first proposition, fn.51 above.

<sup>85</sup> *Hotson v East Berkshire HA* [1987] 1 A.C. 750 at 783.

<sup>86</sup> See fn.77 above.

<sup>87</sup> See *Dickins v O2 Plc* [2008] EWCA Civ 1144 at [40].

it could not be shown that, on the balance of probabilities, the cardiac arrest represented “damage” relative to what had been the claimant’s prospects absent tortious conduct. That the claimant in *Bailey* succeeded might then be explained on the basis that the defendant had not raised the issue of whether the cardiac arrest represented “damage” relative to what had been her prospects absent tortious conduct.<sup>88</sup>

But what if, in a future case presenting equivalent facts, the defendant were to raise this “damage” issue? The claimant would be unable to prevail on the point unless the court created a special new rule to assist her in showing that the injury represented “damage” to her.<sup>89</sup> With respect, the reasoning in *Bailey* itself will not assist such a claimant. Though the second proposition set out by Waller L.J. (see above) might superficially seem to sketch such a special rule, the analysis on which it drew is, with respect, confused because it conflated the factual causation issue and the “damage” issue.<sup>90</sup> Moreover, and unfortunately, until that flawed proposition is disapproved it threatens to have an explosive impact in the field of medical negligence. This is because, for example, it may often be the case that a breach by a medical provider increases the weakness of a patient, by some non-negligible but un-assessable degree, before the patient suffers an indivisible injury that would have been avoided had the patient been of adequate strength. In such circumstances “medical science cannot establish the probability that ‘but for’ [the breach] the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible” so the parameters of Waller L.J.’s second proposition are satisfied. Clearly, if such claimants are entitled to succeed under that proposition it would expose medical providers to a radically expanded realm of liability.

### VIII. The “No Better Off” Principle of Compensatory Tort Damages: Choice of Benchmark

At this point it might seem that the traditional but-for test has simply been re-introduced albeit at the stage when the legal analysis asks if the injury represented “damage”. But this is not the case.

The question of whether the injury represents “damage” relative to what had been the victim’s prospects “absent tortious conduct” is ambiguous in cases in which: the mechanism by which an indivisible injury occurred involved a step requiring a threshold concentration of some element; there were multiple wrongful contributions of that element; and the threshold had been oversubscribed. Here tort law has a choice whether the “no better off” principle mentioned earlier is that compensatory damages should not make a claimant better off relative to:

- (i) where he would have been but for the individual defendant’s tortious contribution; or

<sup>88</sup> *Dickins v O2 Plc* [2008] EWCA Civ 1144.

<sup>89</sup> An example of such a rule in relation to an indivisible injury is the merged fire rule that lingers in the US: where a fire resulting from the defendant’s tort merges with another and the combined fire destroys a building many jurisdictions shift the burden of proof to the defendant to show the origin of the other fire was not culpable but was, for example, from a natural cause such as lightning (e.g. *Kingston v Chicago & N.W. Ry. Co* 211 N.W. 913 (Wis.1927)). Parallel special rules relating to proof of “damage” in certain cases of divisible injuries are noted at fnn.66 and 67 above.

<sup>90</sup> See fn.84 above.

- (ii) where he would have been but for all the tortious contributions.<sup>91</sup>

The choice of benchmark will be critical to the outcome of the many medical negligence and toxic tort claims where: but for the defendant's individual contribution, the threshold would still have been reached and the injury would still have occurred; but in the absence of all wrongful contributions it would not have been reached and the injury would not have occurred.

If tort law chose the first benchmark, (i), for assessing whether the injury represented "damage" to the victim's prospects, the same sort of problematic results would appear at this stage of the analysis as we saw were generated under the but-for test of factual causation (see above in III). For example in the leather-spray case it would mean that, even if an executive conceded that his vote was a contributing cause of the consumer deaths, he would be able to argue that he should escape liability on the basis that his vote did not damage the consumer because, but for his single vote, the fate of the consumer would have been the same because the other votes in favour of marketing the dangerous product would have passed the threshold of a majority of votes. The identical argument could be made by the individual pushers of the car, the polluters of the bay and the depositors of the weights on the bridge. Each could concede that they causally contributed to the injury, but escape liability by pointing a finger at the contributions made by other wrongdoers and noting that the claimant could not establish that, but for their individual tortious contribution, the indivisible injury would not have happened.<sup>92</sup>

How the different benchmarks might generate different results is especially noteworthy where there are evidentiary gaps in relation to the extent of contributions. Suppose one actor carelessly pollutes a drinking well with arsenic, later a second actor independently and carelessly pollutes the well with more arsenic, then a person drinks from the well and dies of arsenic poisoning. The victim's estate sues the second actor in negligence. If the compensatory principle used benchmark (i), the estate would be unable to show the death represented damage because the volume of arsenic from the first polluter might alone have been sufficient to pass the threshold concentration required to kill. The estate would likewise fail against the first actor: an overall result that the law would presumably find normatively intolerable.

In contrast, were the law to adopt benchmark (ii), the estate would be able to show that the death represented "damage" relative to it because, but for the tortious conduct of the two polluters, the victim would not have ingested any arsenic at all and therefore would not have died as he did. In short, there would be no difficulty proving both that each polluter was a contributing cause of the death<sup>93</sup> and that this injury represented damage to the victim. Significantly, the estate would succeed despite the evidentiary gap concerning estimates of the extent of the relative tortious contributions.

<sup>91</sup> Of course, compensatory damages must also take account of other matters, for example: that non-tortious factors did later produce or would have produced a duplicate injury (see fn.77 above); that the individual victim had been subject to the risk of a comparable injury because of biological susceptibility (*Smith v Leech Brain & Co* [1962] 2 Q.B. 405; [1962] 2 W.L.R. 148; [1961] 3 All E.R. 1159 at 416 per Lord Parker C.J.) or his line of work (*Heil v Rankin* [2001] P.I.Q.R. Q3 at 6–10 per Otton L.J.).

<sup>92</sup> See text at fn.114 below.

<sup>93</sup> See text at fn.35 above.

### *Supporting grounds for (ii)*

The discussion so far has shown that, where the relevant step in the mechanism by which an indivisible injury occurred involved a threshold, the but-for test is inadequate to identify whether a factor contributed to that occurrence. Failure to appreciate this has also prevented courts from distinguishing the factual cause issue from the question, critical to the compensatory principle, of whether the injury represents damage to the victim. Courts have, therefore, not often squarely confronted the normative choice that tort law has in relation to the latter. Nonetheless, there is support for the view that tort law would adopt benchmark (ii) so that if, but for all the tortious contributions, the victim would not have suffered the injury, then the injury would be regarded as damage.

Consider multiple simultaneous tortious factors which contribute to an indivisible injury such as where two persons independently and in breach of duty search for the source of a gas leak with the aid of lighted candles which simultaneously ignite the gas, causing injury.<sup>94</sup> In such cases courts around the common law world regard it as proper to hold the defendant liable for compensatory damages even though, but for his breach, the same injury would have happened anyway due to the other tort.<sup>95</sup> This supports the view that the “no better off” principle of compensatory tort damages is to be measured against the benchmark of where the victim would have been but for all the tortious contributions to the relevant step in the mechanism.

There is no reason to think courts would take a different view in cases where the defendant’s tortious contribution was not only unnecessary for the threshold to have been reached but was also insufficient for it to be reached, such as the scenarios discussed earlier involving the voting executives, the pushers of the car and the weakening of a structure. A parallel here might be drawn with cases awarding damages against a defendant whose culpable obstruction<sup>96</sup> or discharge of pollutant<sup>97</sup> was insufficient alone to constitute a nuisance and was, on the facts of the case, also unnecessary for the aggregate of culpable obstructions/pollutions to be actionable. There could be no such award if the benchmark for the “no better off” principle was where the victim would have been but for the individual defendant’s tortious contribution. Again, the award of damages supports the view

<sup>94</sup> G. Williams, “Causation in the Law” [1961] C.L.J. 62 at 75, cited by Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19; [2002] 2 A.C. 883 at [74].

<sup>95</sup> See e.g. *March v E&MH Stramare Pty* (1991) 171 C.L.R. 506 at 516 per Mason C.J.; *U.S. v Johnson* 380 F.3d 1013 at 1016 (7th Cir.2004) per Posner J., “the tortfeasor cannot avoid liability by pointing to an alternative *unlawful* cause of the damage that he inflicted”; *Restatement (Third) of Torts* (2010) § 27, illust.1 giving the example of two campers who independently and negligently fail to contain their fires which merge and destroy a building; *Maxwell v KPMG LLP* 520 F.3d 713 at 716 (7th Cir.2008) and cases cited therein. See Stapleton, “Cause-in-Fact and the Scope of Liability for Consequences” (2003) 119 L.Q.R. 388.

A distinct though related normative impulse supports holding a defendant liable for compensatory damages for his contribution to the occurrence of the injury even though a separate but duplicative injury was produced by a subsequent tortfeasor (who would escape liability under the principle that he was entitled to take the victim as he found him), see *Baker v Willoughby* [1970] A.C. 467. Though the stated reasoning of *Baker* is problematic, its result is widely regarded as sound: see e.g. *Jobling v Associated Dairies Ltd* [1982] A.C. 794 at 815 per Lord Keith of Kinkel “... in proceedings against the first tortfeasor alone, the occurrence of the second tort cannot be successfully relied on by the defendant as reducing the damages which he must pay”; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 at [66] per Dyson L.J.; *Penner v Mitchell* [1978] 5 W.W.R. 328 at [25] per Prowse J.A.

<sup>96</sup> For example, in the wheelbarrow example given in *Thorpe v Brumfit* (1872–73) L.R. 8 Ch. App. 650, fn.25 above, but for the individual’s wheelbarrow there would still have been an actionable nuisance.

<sup>97</sup> In *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All E.R. 1326 at 1333 Harman J. noted that a polluter would be liable even if his culpable discharge was insufficient alone to be actionable and another’s culpable discharge was alone sufficient to be actionable.

that the “no better off” principle adopts the benchmark of where the victim would have been but for all the tortious contributions to the obstruction/pollution.

Support for benchmark (ii) is also available from other common law jurisdictions. For example in a Maryland case, the court noted that “one drop of poison in a person’s cup, may have no injurious effect. But when a dozen, or 20, or 50, each put in a drop, fatal results may follow. It would not do to say that neither was to be held responsible”.<sup>98</sup> Similarly, when several polluters independently and culpably discharged crude oil into a river, and the oil ignited and destroyed a barn, the Supreme Court of Oklahoma held each liable in negligence for the destruction even though it could not be shown that, but for his individual discharge, the barn would not have been destroyed anyway.<sup>99</sup> Yet another example from US common law, this time involving over-subscribed human decision-making, is set out in the Restatement (Second) of Torts:

“A, B and C all make the same [fraudulent misstatement] to D in order to induce him to buy land. D buys the land. In deciding to do so, he is substantially influenced by all three representations, although any two of them would have been sufficient to induce him to act. A, B and C are all subject to liability to D for pecuniary loss that he suffers through the purchase of the land.”<sup>100</sup>

Particularly striking is *United States v Kearney*<sup>101</sup> in which a defendant had, via the internet, possessed and re-distributed pornographic images of a 10 year old, “Vicky”. In response to a motion filed by the government for an award of statutory restitution to be made to “Vicky” (in relation to the substantial mental-health treatment she will require as a result of her reaction to the knowledge that her images were circulating in this way) the defendant appealed on the basis inter alia that because so many others had seen the pornography his contribution to her situation could not be said to have caused any harm.<sup>102</sup> The First Circuit rejected the argument noting that it was enough that Kearney had contributed to a state of affairs which “taken as a whole” had caused losses to “Vicky” which would not have been suffered had none of the wrongdoers acted improperly.<sup>103</sup>

Finally, firm support for benchmark (ii) comes from the House of Lords decision in *Kuwait Airways Corp v Iraqi Airways Co (No.6)*<sup>104</sup> concerning successive conversions of goods. It was held that where a defendant receives the goods from a thief and is then sued by the owner of the goods, he is liable for compensatory damages even though “the owner is no worse off as a result of the acts of the person who acquired the goods from the thief”.<sup>105</sup> In other words, the relevant benchmark is not where the owner would have been had the defendant not converted the goods, but where the owner would have been had the goods not been converted by any of the converters but had been retained by the owner.

<sup>98</sup> *Woodyear v Schaefer*, 57 Md. 1 at 10 (1881).

<sup>99</sup> *Northup v Eakes*, 178 P. 266 at 268 (Okla. 1919).

<sup>100</sup> *Restatement (Second) of Torts* (1977) §546 illus. 1.

<sup>101</sup> 672 F.3d 81 (1st Cir. 2012).

<sup>102</sup> Echoing the equivalent argument of the individual executives in the leather-spray case, fn.23 above.

<sup>103</sup> At 99, quoting *Prosser and Keeton on Torts*, 5th edn (1984), at pp.268–269. Also citing the *Restatement (Third) of Torts* (2010) § 27, reporters’ note cmt. i. and Wright, “Causation in Tort Law” (1985) 73 Cal. L. Rev. 1735.

<sup>104</sup> [2002] UKHL 19; [2002] 2 A.C. 883. Though, unfortunately, the Lords did not draw a clear distinction between the factual cause issue and the normative “damage” issue, the benchmark they adopted for the latter is clear.

<sup>105</sup> *Kuwait Airways* [2002] UKHL 19; [2002] 2 A.C. 883 at [82]–[83] per Lord Nicholls.



## XII. *Clements v Clements* (2012) SCC

Two aspects of a recent case in the Supreme Court of Canada are of relevance to this discussion. In *Clements v Clements* (2012)<sup>106</sup> the defendant was driving a motor bike with his wife, the claimant, riding behind on the passenger seat. The bike was about 100lb overloaded. Unbeknownst to the couple, a nail had punctured the bike's rear tire. Though the defendant was travelling in a 100km/h zone, he accelerated to at least 120km/h in order to pass a car but as he began this passing manoeuvre, the nail fell out, the rear tire deflated, and the bike began to wobble. The defendant was unable to bring the bike under control and it crashed severely injuring the claimant.

The first aspect of the case that is of interest here is that Chief Justice McLachlin, writing for the majority, held that the appropriate test of factual causation was the but-for test, albeit in applying this “a trial judge is to take a robust and pragmatic approach”.<sup>107</sup> The previous discussion in this article has suggested that there is, with great respect, a preferable account of why this particular claimant should lose if she cannot prove her husband's breach was a but-for factor in relation to her injury. It is clear that the relevant aspect of the mechanism by which the crash occurred was the instability of the bike due to its total weight and speed. It is equally clear that there had been a threshold point of instability below which the defendant would have been able to regain control and above which he would have been unable to do so.<sup>108</sup> Clearly the threshold point of instability had been surpassed because he was unable to regain control and the crash resulted.

On the approach advocated in this article the defendant's breach would be recognized as having made a causal contribution to the crash because that breach (i.e. the speed and weight in excess of what was reasonable in the circumstances) had indisputably contributed to the oversubscribed threshold of instability leading to the crash. However, in order to be awarded compensatory damages the claimant would also have to prove that her injury represented “damage”. This article has advocated that, in oversubscribed threshold cases, the appropriate benchmark for this assessment is benchmark (ii), where the victim would have been but for all tortious contributions to that threshold. Where, as in this case and many others such as *Hotson* and *Bailey*, there had been only one tortious contribution to the relevant threshold (here the instability of the bike), this question simplifies to where the victim would have been but for the tortious conduct of that individual defendant. In other words, the preferable basis for the view that Mrs Clements should lose if she cannot prove that her husband's breach was a but-for factor in relation to her injury is that her injury does not represent “damage” for which she is entitled to claim compensatory damages even though the breach did make a positive causal contribution to the mechanism by which that injury occurred.

The second aspect of the case relevant here is Chief Justice McLachlin's discussion of the “material contribution to the risk” rule that the Canadian Supreme Court has recognized in cases involving certain evidentiary gaps. This rule permits a claimant to succeed against a defendant even though the claimant is unable to establish, due to such a gap, that the defendant's breach satisfied the Court's test

<sup>106</sup> [2012] SCC 32; 346 D.L.R. (4th) 577.

<sup>107</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [46] per McLachlin C.J.C.

<sup>108</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [57] per LeBel J.

of factual causation to the injury, namely the “but for” test. Chief Justice McLachlin noted that the requirements of the “material contribution to the risk” rule are demanding so that successful recourse to it would necessarily be rare.<sup>109</sup> Of relevance here is that, not only must the claimant show that the defendant’s breach resulted in a “material contribution to the risk” of the injury that occurred, but the impossibility of establishing factual causation must be because it was

“impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it ...”<sup>110</sup>

A classic illustration of such a multiple tortfeasor case is *Cook v Lewis*<sup>111</sup> in which two hunters carelessly fired towards the victim but only one shot hit him.

The Canadian “material contribution to risk” rule is more radical than anything promoted in this article, for it assists the claimant over an evidentiary gap in relation to proving whether the defendant made any contribution to the mechanism by which injury occurred: it would, for example, permit the imposition of liability on all tortfeasors even where it was positively known that one made no contribution to the mechanism of injury at all, as in *Cook v Lewis*. In contrast, this article has only discussed situations where we know not only the basic mechanism by which an indivisible injury occurred but that the breach in issue did in fact make a contribution to the relevant threshold step in the mechanism. But Chief Justice McLachlin’s rationale for the special rule and its limit to multiple wrongdoer cases is of importance here because it runs parallel to the normative concern that would, I have argued, lead the law to select benchmark (ii) as the appropriate one by which to judge if an indivisible injury represented “damage” to the claimant. Chief Justice McLachlin argued that Canada’s “material contribution to the risk” rule was justified in the relevant multiple wrongdoer cases because fairness and other “goals of tort law ... require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer”<sup>112</sup> where it is known that “the plaintiff would not have been injured ‘but for’ [the negligence of the other tortfeasors] viewed globally”.<sup>113</sup>

As I have argued,<sup>114</sup> where multiple tortfeasors are known to have each contributed to an oversubscribed threshold there is an equivalent objection to allowing one tortfeasor to argue that the injury to which he contributed nevertheless did not represent damage by pointing to other tortious contributions whose presence meant that the threshold would have been met anyway. In such contexts I have argued that an injury should be regarded as “damage” if but for all the tortfeasors’ contributions to the occurrence of the injury, that is but for all tortious contributions “viewed globally”, it would not have happened.

<sup>109</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [16].

<sup>110</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [13].

<sup>111</sup> [1951] S.C.R. 830; [1952] 1 D.L.R. 1. though in that case the majority of the Supreme Court of Canada couched their approach in terms of reversing the onus, *Clements* [2012] 346 D.L.R. (4th) 577 at [18].

<sup>112</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [13]. On fairness see [16], [19], [21], [25], [32], [41] and [45].

<sup>113</sup> *Clements* (2012) 346 D.L.R. (4th) 577 at [39]. See also [40], [46] and [50].

<sup>114</sup> See text at fn.92 above.

### XIII. Implications for Mesothelioma Claims

As just noted, this article has focused on situations where we know the basic mechanism by which an indivisible injury occurs and that the breach in issue made a contribution to it. Where the mechanism is itself unknown a claimant cannot show the breach was a factual cause on orthodox principles unless he can show that, whatever the mechanism, the breach would, on balance of probabilities, have contributed to it.<sup>115</sup>

UK law regards the mechanism by which mesothelioma occurs as unknown.<sup>116</sup> This prompted a special regime known as the *Fairchild* doctrine.<sup>117</sup> In *Sienkiewicz v Greif (UK) Ltd*<sup>118</sup> Lord Phillips framed the doctrine as being that a defendant who in breach of duty exposed the victim to a significant quantity of asbestos thus creating a “material increase in risk” of the victim contracting mesothelioma will be held liable (jointly and severally by virtue of s.3 of the Compensation Act 2006<sup>119</sup>) for causing the disease. *Sienkiewicz* confirmed that the doctrine applies even where a very large majority of inhaled fibres might have been non-tortious.

This article has argued in favour of a clear separation of the factual causation issue from the “damage” issue. This separation reveals an important unaddressed issue in mesothelioma cases. What if, in a *Sienkiewicz*-type case the defendant raises the “damage” issue? Since the aetiology of mesothelioma is treated as unknown, a claimant in such a case will be unable to show that, absent all the tortious inhaled fibres,<sup>120</sup> he would probably not have suffered the mesothelioma. After all, if the mechanism involves a threshold, it might be that in the instant case that this would have been reached by the much greater volume of non-tortious fibres alone; in other words it is possible that even in the absence of any tortious conduct the victim would have suffered his mesothelioma anyway. The claimant would be unable, at common law, to prove that his mesothelioma represents “damage”. Such a claimant will fail unless the Supreme Court either develops the *Fairchild* doctrine so that it also relieves the claimant from proof of “damage”, or holds that the wording of s.3 of the Compensation Act 2006 somehow achieves the equivalent result.

### XIV. Summary

1. In most cases it is clear from our knowledge of the general way the injury came about that the breach would have been either necessary for the occurrence of the injury, or it would not have been involved in any way at all. It is this knowledge about the relevant mechanism

<sup>115</sup> See Stapleton, “Factual Causation, Mesothelioma and Statistical Validity” (2012) 128 L.Q.R. 221 at 226.

<sup>116</sup> Contrast the disarray in Australian courts: J. Stapleton, “Factual Causation and Asbestos Cancers” (2010) 126 L.Q.R. 351.

<sup>117</sup> Named after *Fairchild v Glenhaven Funeral Services Ltd*. [2002] UKHL 22; [2003] 1 A.C. 32.

<sup>118</sup> [2011] UKSC 10; [2011] 2 A.C. 229 at [1]. On *Sienkiewicz* see Stapleton, “Factual Causation, Mesothelioma and Statistical Validity” (2012) 128 L.Q.R. 221.

<sup>119</sup> c.29.

<sup>120</sup> Here I am assuming the law would adopt approach [ii] to the “damage” issue, which is the more claimant-friendly. Applying that approach, the claimants in *Fairchild* itself, once allowed to jump the evidentiary gap in relation to factual cause, would have been able to prove that their mesothelioma represented “damage” because the House of Lords had assumed that all the asbestos fibres they had inhaled were tortious: see Stapleton, “Lords a’Leaping Evidentiary Gaps” (2002) 10 Torts L. J. 276 at 281. See also Lord Phillips in *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229 at [105].

- in play that justifies the simplified approach to factual causation represented by the but-for test.
2. Where, however, we know that the mechanism by which an indivisible injury occurs involves a threshold concentration of some element (that is, it requires a certain concentration of the element but does not require more and is not relevantly affected if there is more), the but-for test should not be used as the test of factual causation. This is because it prevents the law identifying a relation that may be of normative interest, namely the relation between the occurrence of the injury and an actual contribution of some of that element which contribution, however, had not been necessary for the threshold to have been reached.
  3. It should, therefore, be a general principle of private law that a breach will be recognised as a “factual cause” of the occurrence of an injury whenever:
    - either, but for the breach, the injury would have been prevented<sup>121</sup>;
    - or, the breach resulted in some positive contribution (even if unnecessary) to the relevant threshold step in the mechanism by which the indivisible injury came about.
  4. The “no better off” principle requiring that compensatory tort damages do not make a claimant better off than he would have been had he not been the victim of tortious conduct, can be expressed as the requirement that the injury represent “damage” relative to the benchmark of where the victim would have been absent tortious conduct.
  5. As a matter of legal analysis tort law should distinguish: whether the breach made a causal contribution to the occurrence of the indivisible injury of which complaint is made (the “factual causation” issue); from whether that injury represents “damage”. Forensically these questions should be dealt with separately since the evidence relevant to each may be different, as in oversubscribed threshold cases.
  6. The phenomenon of unnecessary causes of an indivisible injury reveals that tort law has a choice of benchmarks in assessing the “damage” issue: (i) where the victim would have been but for the tortious conduct of the individual defendant; or (ii) where the victim would have been but for all tortious contributions to the occurrence of the injury. Benchmark (ii) is normatively superior. ☞

<sup>121</sup> Either because the breach made a positive and necessary contribution to the mechanism by which injury occurred (e.g. the straw that broke the camel’s back) or because the breach resulted in the absence of part of a prevention mechanism which would have operated had that part been present (e.g. a failure to secure dangerous Borstal trainees); see text at I(a).

☞ Causation; Contribution; Negligence; Personal injury