Personal injury / Medical negligence

A moving target?

David Regan considers the malleability of the language of causation

IN BRIEF

- The courts have shown an increasingly flexible approach to questions of causation in clinical negligence actions.
- They have imported concepts from cases of industrial disease.

The determination of causation in clinical negligence proceedings leaves the court heavily reliant on expert evidence. The views of the expert witnesses will be grounded in the available clinical research. This will almost certainly not have been produced with the requirements of litigation in mind and is highly likely to be statistically based. It may very well also be in flux. Healthy scientific debate and the proliferation of research are likely to lead to views changing with time. Where those views relate to issues of breach of duty, this creates few problems: the clinician can and should only be judged against a standard contemporary to the treatment. However, where they relate to issues of causation they attempt to address a more absolute issue. Changes in the balance of scientific opinion may produce different results with time:

Early development of the law

The limitations of available clinical evidence have led the court to tailor the questions it asks to those that can be answered. This is not a new process. The requirement to prove on the balance of probabilities that a particular factor caused a particular consequence was relaxed by the House of Lords at least as long ago as 1973 in cases of industrial disease. Where it was not possible to tell whether pneumoconiosis was caused tortiously by a failure to ventilate or non-tortiously by the action of the machinery causing the dust, to make out causation it was enough for the tortious cause to be found to act as a "material contribution" to the development of the condition, *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615. The competing causative agents operated in *Bonnington Castings* concurrently, but the principle was logically extended to competing consecutive causal agents (see *McGhee v NCB* [1972] 3 All ER 1008).

The limitations of statistical evidence gave rise to more recent and more dramatic developments of the law in relation to the cause of mesothelioma, where the available scientific evidence is that the disease may be caused by a single fibre of asbestos: as a consequence science cannot judge between competing causes (see *Fairchild v Glenhaven* [2002] UKHL 22, [2002] All ER (D) , *Barker v Corus* [2006] UKHL 20, [2006] All ER (D) 23 (May)).

The malleability of the test of causation

However, the language of the law of causation continues to be proved to be malleable. Neither the words "caused" nor "but for" necessarily imply a factor required to be the sole cause. Nevertheless the court has until recently proved resistant to applying the relaxation of the requirements to prove causation in the sphere of industrial disease to that of clinical negligence. Faced with five concurrent potential causes, only one of which was in breach of duty—a close parallel to the situation in *Barker v Corus*—the House of Lords declined to impose liability for the development of retrolental fibroplasia in *Wilsher v Essex AHA* (1988) 3 BMLR 37, [1988] 1 All ER 871, reasoning that all that it had done in *McGhee* was to conclude that in the latter case it was a "legitimate inference of fact" that the defender's negligence had materially contributed to the pursuer's injury.

Lowering the bar

When, though, is the weight of one of several competing causes sufficient to draw such an inference? The bar which appeared in *Wilsher* to be set at a relatively high level has more recently been shown by a decision of the Court of Appeal to be far lower. A patient who suffered cardiac arrest and hypoxic brain damage having aspirated on her own vomit succeeded in making out causation even though the vomiting was probably caused by pancreatitis which was itself an inherent risk of the procedure being carried out, *Bailey v MOD* [2008] EWCA civ 883, [2008] All ER (D) 382 (Jul). The breach of duty was a failure to take proper care on her resuscitation (her fluid balance) following the procedure, rendering her weaker than she would otherwise have been. In dismissing an appeal by the defendant against a finding that this was sufficient to make out causation, Waller LJ held that: "One cannot draw a distinction between medical negligence cases and others." He went on: "In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."

The express application in cases of clinical negligence of the law of causation in cases of industrial disease is not without its limits. The tortious cause in *Bailey* operated cumulatively with the non-tortious causes to reduce the ability of the claimant to survive. This is a very different situation from the five entirely alternative potential causes of the claimant's RLF in *Wilsher*. *Bailey* certainly does not operate to import into the sphere of clinical negligence the "exception" to the law of causation adopted by the House of Lords in *Fairchild*. It does however set the bar for a "material contribution" at a relatively low level and expressly apply that test to the sphere of clinical negligence.

The field of clinical negligence is not without its own exceptions to the law of causation, vulnerable as it is to the court importing the strictures of the requirements of public policy. Most starkly, the House of Lords dispensed with the requirement to find causation entirely in cases of a failure to warn of the risks of a procedure, *Chester v Afshar* [2004] UKHL 41, [2004] All ER (D) 164 (Oct). Following surgery the claimant developed *cauda equina* syndrome; a catastrophic consequence. There was an inherent 1%–2% risk that this would occur. The surgery was found to have been performed skilfully but without warning of the risk. The claimant's evidence was that she would have undergone the surgery anyway but had she been warned she would not have done so on that day but made enquiries of surgeons with a view to identifying one in whom she had the most confidence. The procedure would still have carried the same risk. The majority of the House of Lords, dividing 3:2, recited that the failure to warn caused the injury that day but did not fall shy of recognising that this alone was insufficient, given that the claimant would fairly shortly have received the treatment with the same inherent risk. Lord Hope held explicitly that the "test of causation is satisfied" for the reason in public policy of giving the claimant a remedy, without which the requirement to warn of risks would be "a hollow one".

The limits of malleability

The malleability of the approach to causation is so great in *Chester* as almost to dispense with it. This malleability has its limits. A recorder's decision to apply the exception in *Fairchild* to a case of campbyobactor infection in employment was robustly set aside by the Court of Appeal which held that findings of fact on causation should be made wherever possible, *Sanderson v Hull* [2008] EWCA Civ 1211. This reluctance was expressed by the House of Lords in the sphere of clinical negligence where a claimant was unable to recover for the admitted nine-month failure to diagnose a malignant tumor for the reason that all he was able to prove was that his chance of surviving 10 years post diagnosis had been reduced from 42% to 25%—*Gregg v Scott* [2005] UKHL 2. The claimant was alive at the date of the trial: at law his damage was inchoate. If the expert evidence had sufficed to show that the delayed diagnosis had shortened the claimant's life by a specific period, he could have recovered for that damage. His action was forestalled by the conventional collated research on cancer survival rates measured as they are over a 10-year period. On such a limited statistical base the claim fell, although developing statistical evidence or analysis may come to be able to prove a material contribution to the likelihood of early death from delayed diagnosis. If the court has on occasions adapted its requirement to the availability of evidence, it remains necessary for the available evidence to be expressed so far as possible to meet the needs of the extant law. NLJ

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