

## MULTIPLE CAUSES OF INJURY: WHEN A DEFENDANT SHOULD JUSTLY BE HELD RESPONSIBLE

This article explores the question: should a defendant be held responsible for all or only part of a claimant's loss where concurrent, successive or supervening causes have combined to effect that loss? In doing so it undertakes a review of the case law back to the 19<sup>th</sup> century, much of it familiar, but some unfamiliar.

The following summarises the main issues covered:

- The decision in all the cases is made ostensibly with a view to achieving the main objective of the law of tort, namely that a claimant should be put in the position he would have been in had the wrong not been done to him.
- It is sometimes said that there is no general rule to resolve every case of concurrent or successive injury – but one useful broad principle is that the court must ensure that every tortfeasor should compensate the claimant in respect of the loss and damage for which he justly should be held responsible.
- The use of concepts such as the egg-shell skull, *novus actus*, or concurrent tortfeasors are only tools for use in the quest for justly attributing responsibility and should not be regarded as constricting rules.
- An established general rule is that the defendant is responsible for the whole of the loss if he materially contributes to it.
- The current law appears to be that, if a defendant disputes the extent of his contribution to the loss, the claimant must prove what proportion the defendant is responsible for. There is reason to think that this is erroneous and that the correct position, supported by authority, is that once the claimant has established that the defendant has materially contributed to his loss, he is entitled to succeed in full except if the *defendant* (not the claimant) proves that he has not caused a clearly distinct element of it: in deciding whether part of the loss is not attributable to a defendant, a court should only relieve him from responsibility for that part if the evidence clearly enables it to do so.

- The use of the terms “apportionment” or “divisibility” can be confusing – it would be better to describe what the court is doing as attributing liability to a defendant for the particular injury he has caused.

### **The difficulty of finding a principle:**

The issue of causation when there are multiple causes of injury has repeatedly given rise to difficulty of analysis – as recently demonstrated in *Fairchild v. Glenhaven Funeral Services*<sup>1</sup>, or in *Holtby v Brigham & Cowan*<sup>2</sup>. Although the problem tends to attract special attention in occupational injury cases such as these, it also commonly arises in more ordinary cases. Take, for example, a whiplash victim who then develops a severe psychiatric condition to which he is naturally pre-disposed; or an employee with an injured back through heavy lifting, who, whilst recuperating, has a car accident which so badly exacerbates the injury as to force him to give up employment; or a car accident victim who is then negligently treated by doctors and the injury made worse; or a person only slightly injured with some mild depression but who then suffers a bereavement, the combination causing the development of a permanent serious psychiatric condition. These are not uncommon experiences and yet remain troublesome to the practitioner because there is no simple guidance from the caselaw. Lord Hoffman has commented<sup>3</sup>:

“.....it is of course the causal significance of acts of third parties ....or natural forces that gives rise to almost all the problems about the notion of "causing" and drives judges to take refuge in metaphor or Latin.”

Often it is suggested that common sense is the answer – as Lord Salmon thought<sup>4</sup>:

"The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."

But the problem with common sense is that it is a highly subjective basis on which to provide a solution to a practical problem - a claimant’s perception of a “common sense” solution often tends to differ from that of a defendant. As Lord Hoffman says, “...there is sometimes a tendency to appeal to common sense in order to avoid having

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<sup>1</sup> [2002] 3 WLR 89

<sup>2</sup> [2000] 3 All ER 421

<sup>3</sup> *Environment Agency v. Empress Car Co. Ltd.* [1999] 2 AC 22

<sup>4</sup> *Alphacell Ltd. v. Woodward* [1972] A.C. 824

to explain one's reasons. It suggests that causal requirements are a matter of incommunicable judicial instinct.”<sup>5</sup>

The difficulty stems from the tension between on the one hand, the desire to be consistent and logical and, on the other hand, the recognition that the demands of justice sometimes do not enable the law to fulfil that desire. Mason C.J. in Australia said<sup>6</sup>:

“It has often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because "questions of cause and consequence are not the same for law as for philosophy and science", as Windeyer J. pointed out in *The National Insurance Co. of New Zealand Ltd. v. Espagne* (1961) 105 CLR 569, at p 591. In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage.”

Lord Wilberforce thought that “no general, logical, or universally fair rules can be stated which will cover, in a manner consistent with justice, cases of supervening events whether due to tortious, partially tortious, non-culpable or wholly accidental events”<sup>7</sup>.

But the difficulties and inconsistencies between cases should not obscure the fact that some assistance can be derived from the cases, even if it can be difficult to identify what particular approach should be adopted in the facts of a new case.

### **Just attribution of responsibility**

Any universally-applicable principle must of necessity be very wide in scope, but Laws L.J. in *Rahman v. Arearose Ltd*<sup>8</sup> gave what could arguably be the most useful guidance

“...The law is that every tortfeasor should compensate the injured claimant in respect of that loss and damage **for which he should justly be held responsible**. To make that

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<sup>5</sup> *Fairchild* [2002] 3 WLR 89 at para. 53

<sup>6</sup> *March v. Stramare* (1991) 171 CLR 506. At para. 13, Mason CJ gives a masterful exposition of the historical approach to causation, in a judgment cited in a number of the English cases

<sup>7</sup> *Jobling v. Associated Dairies* [1982] AC 794

<sup>8</sup> [2001] QB 351 at para. 29

principle good, it is important that the elusive conception of causation should not be frozen into constricting rules. “ [emphasis added]

This dictum was a reference made in the context of describing how other concepts were commonly deployed in these type of cases, as he went on to explain (at para. 33):

“. *Novus actus interveniens*, the eggshell skull, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered.”

This is a valuable insight: if these concepts are only “tools” in the search for attributing “just responsibility”, we can approach the facts of any given case with much greater flexibility than if the concepts were seen as free-standing rigid doctrines. If C breaks a leg in a road accident caused by A and then fractures his skull falling downstairs, the attribution of just responsibility to A for the fractured skull is not answered simply by labelling the event a *novus actus interveniens*. It may prove to be *just* to attribute the fractured skull to A if the fall occurred due to weakness in the leg as C walked slowly down a staircase, but it might be *unjust* to do so if it occurred because C decided to jump down ten flights of stairs in a hurry (or when he knew his leg was liable to give way<sup>9</sup>). The label *novus actus* is a shorthand way to articulate why it is unjust to blame A for it, and not used because it is a randomly chosen concept operating entirely at the whim of an individual judge.

This last example illustrates that the task of solving issues of multiple causation involves the selection of the right “tool” but always guided by an appreciation that the court’s primary objective is to decide for what the defendant should “justly be held responsible”.

A similar process of looking for the appropriate “tool” or approach underlies the speeches of Lords Bingham and Hoffman in *Fairchild*<sup>10</sup> where they justified a departure from the usual ‘but for’ causation test with the following reasoning:

[Lord Bingham]: “8..... The overall object of tort law is to define **cases in which the law may justly hold one party liable** to compensate another. ..9.... If the mechanical application of generally accepted rules leads to such a result [an unjust one], there must be room to question the appropriateness of such an approach in such a case...”

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<sup>9</sup> cf. *McKew v Holland & Hannen & Cubbitts* [1969] 3 All ER 1621 where the plaintiff sustained a leg injury from which he would have recovered within a week or two, but was said to have been guilty of unreasonable conduct in trying to descend a steep staircase with his leg in a damaged state.

<sup>10</sup> [2002] 3 WLR 89

[Lord Hoffman]: “52...The causal requirements for liability, sometimes subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations represent legal differences, **driven by the recognition that the just solution to different kinds of case may require different causal requirement rules**.... 54..... Once it is appreciated that the rules laying down causal requirements are not autonomous expressions of some form of logic, but creatures of the law, part of the conditions of liability, it is **possible to explain their content on the grounds of fairness and justice in exactly the same way as the other conditions of liability**. 55. In the law of negligence, for example, it has long been recognised that the imposition of a duty of care in respect of particular conduct depends on whether it is just or reasonable to impose it....56. The same is true of causation. **The concepts of fairness, justice and reason underlie the rules which state the causal requirements for liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious....”**

### **Responsibility for the whole of the loss**

The method by which the courts “justly attributed responsibility” in order to solve the multiple causation problems faced in earlier cases demonstrate that “fairness, justice and reason” were applied within the context of the overriding fundamental restitutionary principle as articulated in Lord Blackburn's familiar speech in *Livingstone v. Rawyards Coal Co.*<sup>11</sup>, namely that the measure of damages is “... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.” The primacy of this objective was at the forefront of the reasoning in these older cases and those cases are still binding authorities.

The clear rule was that a defendant’s “just responsibility” was for the *whole* damage despite the fact that there were competing contributory causes of the claimant’s injury. The consistent theme is that a defendant who is only *partly* responsible for the claimant’s condition is liable to compensate the claimant for the *whole* loss.

In *Mills v Armstrong* (“*The Bernina*”)<sup>12</sup>, two ships collided because of the negligence of the masters and crew of both ships resulting in the death of some crewmen and passengers. Lord Bramwell<sup>13</sup> expressed himself as returning to first principles and said:

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<sup>11</sup> (1880) 5 App.Cas. 25, 39

<sup>12</sup> (1888) 13 App.Cas. 1

<sup>13</sup> in the context that he had no confident view about the central issue in that appeal, namely a then controversial rule of law by which a passenger was identified with the acts of the driver of his vehicle so that if that driver was negligent (and despite the fact that the other vehicle driver was also negligent), he was barred from recovering (in those days, if a plaintiff was contributorily negligent, there was an absolute bar against recovery).

“A plaintiff in a case like these says truly, you, the defendant, or your servants, were guilty of your duty to the public. You drove or navigated negligently on the high seas where I had a right to be. If not precisely the cause, or sole cause of the harm that befell me – if not the *causa causans* – your tortious act was the cause without which I should not have sustained harm. Why am I to seek further or prove more? Perhaps someone else is liable to me. How does that affect my right to complain of you? You are a wrongdoer. Suppose the other wrongdoer is insolvent or dead. **You complain that you will be liable to damage that you have only in part caused; but if you succeed you will pay no part of that damage.** You have no right to confess you are a wrongdoer and yet contend there is no liability.....**The defendant is a wrongdoer; damage has resulted to the plaintiff which would not have resulted but for such wrongdoing. The plaintiff is not concerned with difficulties and hardships beyond his own....”** (p. 14)

[after agreeing that the Court of Appeal judgment should be affirmed] “..in such cases the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrongdoer who contributed to the damage; that as far as the sufferer is concerned it matters not whether that other wrongdoer was so in a joint or separate act.” (p.16)

At the Court of Appeal (whose judgments were approved in the Lords) numerous authorities were reviewed. Lindley L.J. said<sup>14</sup>:

“A may sue B and C in one action and recover damages against them both; or he may sue them **separately and recover the whole damage sustained against the one he sues: *Clark v Chambers* (3 *QBD* 327)** ...This is no doubt hard on the defendant who is alone sued....**But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. ....The rule which does not allow of contribution<sup>15</sup> among wrongdoers is what produces hardship in these cases, but the hardship produced by that rule...does not justify the court in exonerating one of the wrongdoers from all responsibility for his own misconduct or the misconduct of his servants”**

Why were joint or several tortfeasors held to be wholly responsible for all concurrent loss or damage? A number of comments should be made:

- The observation that the plaintiff is “not concerned with hardships beyond his own” is a trenchant assertion of the restitutionary principle: the court need give no consideration to the unfairness which might result to a defendant - a defendant “cannot be heard” to say that there is someone else who contributed to the damage because it is irrelevant to the application of the restitutionary principle: the focus of the court’s process was to deal with the plight of the claimant, since, by this stage in any hearing, it will have been proved that the defendant has been in default or in breach of some duty.
- However, there is nothing in this approach which prevents the court from determining – consistently with the restitutionary principle – that someone/something else was to blame for part of the loss *so long as it is*

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<sup>14</sup> (1887) 12 P.D. at 90

<sup>15</sup> there was no right to contribution between fellow tortfeasors until 1935

*satisfied that no element of that excluded part can be attributed to the defendant: to include the non-attributable part would be wrong because it would restore the claimant to a better position than he had been in before the tort was committed. Equally if one made any reduction for any part for which it was claimed others were to blame as well as the defendant, there was a significant risk that the plaintiff would not be fully compensated*

- When Lord Bramwell postulates on behalf of the plaintiff “Why am I to seek further or prove more?” it is plain that he is stating unequivocally that the plaintiff need not do so. The same point is put beyond doubt by the reference to the other tortfeasor being insolvent or dead – the plaintiff does not have to pursue two defendants to succeed in obtaining full recovery against one.

In *Grant v Sun Shipping Ltd*<sup>16</sup>, the House dealt with an accident on a ship during which a stevedore fell down a hatch in circumstances where both the employers (in not providing a safe place of work) and ship repairers (by leaving open a hatch) were at fault. Lord du Parc<sup>17</sup> described it as “well-settled” that:

“...when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them.... If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender...”

The recognition in this passage that there could be more than one successive cause of damage was described as exemplifying the “modern approach” by Mason CJ in *March v. Stramare*<sup>18</sup> by way of contrast to the previous approach whereby courts sought out a single “cause” – an approach heavily influenced by the fact that there was then no right to contribution between tortfeasors, and also by the fact that if the plaintiff himself was found to be guilty of contributory negligence, he was barred from relief. *Even if the defendant could prove that without someone else’s negligence the plaintiff would not have been injured, that would not exonerate him.*

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<sup>16</sup> .[1948] AC 549

<sup>17</sup> citing “the Bernina” as well as *Burrows v. March Gas & Coke Co.* (1872) LR 7 Ex. 96 where the defendant company which supplied a defective pipe failed to escape liability despite suggesting that a gas fitter (not a defendant) who at a later date negligently lit a candle should be held responsible rather than the company.

<sup>18</sup> (1991) 171 CLR 506

A modern, inexplicably little-known Court of Appeal case exploring the problem of successive causes of injury was *Rawson v. Clark*<sup>19</sup>. It is useful as an illustration (and modern re-affirmation) of the application of the “liable-for-whole-loss” principle in a situation which can arise in an everyday case. R, a driving test examiner, sued both a Mr. Bolton and a Mrs. Clark in negligence. In April 1973, R was testing Mr. Bolton when he drove the test car into a parked vehicle and caused R to suffer a whiplash injury. By September 1973, not yet fully recovered but sufficiently enough to resume work, R was testing a Mrs. Clark and asked her to do an emergency stop. This caused the car to skid, and the neck injury was made severe and forced R to retire up to 6 years early. Mrs. Clark successfully denied negligence. (The transcript does not reveal if either candidate passed their test!). It followed therefore that Mr. Bolton was the only tortfeasor and the subsequent neck exacerbation was caused by a non-tortious event. Payne J. at first instance had held Mr. Bolton liable only for the period from March to September and not subsequently on the ground that “the chain of causation was broken because in the second accident there was a human act, Mrs. Clark’s driving, supervening and breaking the sequence between the first accident and the loss flowing from the second accident so that Mr. Bolton is not liable for the damage attributable to the second accident.” He apportioned the damages accordingly. In the Court of Appeal, which allowed R’s appeal against the apportionment, the following views were expressed:

[Cumming-Bruce LJ]: “...the proper analysis of the situation is that the injuries sustained by Mr. Rawson in September were due to the operation of two concurrent causes which combined to produce the damage. Had Mrs. Clark been found negligent, the situation would have been that both Mrs. Clark and Mr. Bolton were liable for the whole of the damage and in contribution proceedings their respective apportioned responsibility would have been assessed. But as Mrs. Clark was not negligent the result in law is that Mr. Bolton, **the author of one of two concurrent causes, is responsible for the whole of the damage....**”

[Brandon LJ] “... If the negligence of Mr. Bolton leading to the first accident was one cause of the condition in which the Plaintiff found himself after the second accident, then he will be liable for the whole consequence of that condition even though there was another concurrent cause of the condition..... There are two possibilities: either that the first accident played no part in the condition of the Plaintiff after the second accident, in which case Mr. Bolton was only liable for such consequences as would have been suffered by the Plaintiff if the second accident had not occurred. Or the consequences of the first accident were still operative as a cause of the second accident in which case Mr. Bolton was liable for the consequences of both accidents ..... **It is only possible to say that the Plaintiff’s final condition was a result of both accidents. Had he damaged his hand in the second accident and his neck in the first there would have been no problem. What happened was that a neck made vulnerable by the first accident was further damaged in the second accident.**”

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<sup>19</sup> (1980) unreported 16<sup>th</sup> October 1980

[O'Connor LJ]: "...once it is shown that the injury ..in the first accident ..has been a **substantial cause** of his pain, suffering, disability and inability to work, then the defendant Mr. Bolton is liable for the whole of the damages..."

### **Material contribution and liability for whole loss**

The reference by O'Connor LJ to "substantial cause" was to the line of authorities of which *Bonnington Castings v. Wardlaw*<sup>20</sup> is the modern foundation (establishing the principle that proof that the defendant's negligence had made a "material contribution" to a claimant's injury was sufficient to enable him to succeed in proving causation). In *Wardlaw*, the issue which concerned the House was what degree of proof was necessary in circumstances where the evidence of the extent of the contribution to the injury of the "guilty" as opposed to "innocent" dust was uncertain; consequently, some have regarded the decision as not applicable generally and confined only to circumstances where proof of contribution was difficult<sup>21</sup>.

But the genesis of the reasoning in *Wardlaw* and later *Rawson*, is traceable back to the earlier cases such as the *Bernina* and *Grant v Sun Shipping*. Although their Lordships did not refer (nor were referred) to either of these cases, they would certainly have been aware of the principles applied - and in the later case of *McGhee v. NCB*<sup>22</sup>, Lord Reid (who had also been in *Wardlaw* 16 years earlier) commented:

"it has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender" (at 1010f)

A very recent affirmation of this approach comes from the Supreme Court of Canada in *Athey v Leonati*<sup>23</sup>. It was a case where C had suffered a spinal disc herniation caused by a combination of the injuries sustained in two motor accidents together with the plaintiff's pre-existing disposition to herniation. The issue in this appeal was whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury. Major J. (delivering the judgment of the 7-judge court) said:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury

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<sup>20</sup> [1956] AC 613

<sup>21</sup> for example see para.2-15 in Clerk & Lindsell on Torts, and Mustill J. in *Thompson v. Smith Ship Repairers* (further cited below)

<sup>22</sup> [1972] 3 All ER 1008

<sup>23</sup> [1996] 3 SCR 458 at para. 20

occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. **There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence....**

[He then quoted the above passage from Lord Reid in *McGhee*]....

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm.... It is sufficient if the defendant's negligence was a cause of the harm....

This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. **Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.**

Some might be argued that the earlier cases established principles only applicable in cases of concurrent *tortfeasors* (as opposed to those where one cause was tortious and the other non-tortious), but this was not in truth a material distinguishing feature as witness, for example, *Rawson* or, in the extract from *Dingle v. Associated Newspapers*<sup>24</sup> quoted below, nor in *Athey v Leonati*.

### **Divisibility of injury, apportionment and justice for the defendant**

As already remarked, it is not inconsistent with the liable-for-whole-loss principle for a court to conclude that a distinct element of the overall loss was not attributable to the defendant. A well-known illustration was given by Devlin LJ in *Dingle v Associated Newspapers*<sup>25</sup>:

"If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law."

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<sup>24</sup> [1961] 2 QB 162 at 188

<sup>25</sup> [1961] 2 QB 162 at 188

In a single claim involving several tortfeasors, it can therefore be appropriate to separate liability for particular *categories* of damage whilst at the same time maintaining joint liability for other categories. In Devlin L.J.'s example all four assailants were jointly liable for the loss of earnings. If A had broken the plaintiff's legs, and B injured his eye, then in these circumstances, A only, and not B, might be liable for the costs of a stair-lift or wheelchair needed because the plaintiff could not walk, whereas B only, and not A, might be liable for the lifetime cost of eye-drops rendered necessary by the eye injury. If the plaintiff incurred the cost of psychiatric treatment, then both A and B might each be liable for the whole of its cost.

The separation which sorts out the "consequences peculiar to the injury" caused by each tortfeasor is simple when the cause of each head of damage is distinct as in the example given. But if this separation cannot be effected, separate attribution of responsibility cannot be done – hence all are liable. Devlin L.J. was giving his example to contrast it with cases where the injury was indivisible as he described at p.188:

"Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts have also been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury..."

The last extract echoes Lord Du Parc's words in the *Grant v Sun Shipping* case, with the additional point that it did not matter whether others had a good defence (and thus confirming that their acts might not have been negligent and therefore non-tortious) – thus reaffirming the view that a defendant is liable for all the loss despite the fact that he did not in fact cause all of it.

It is clear from these two passages that it was important that a court was able factually to identify that a particular part of the plaintiff's loss *was not attributable to the defendant* before it could hold him not responsible for that element of the loss.

In *Thompson v. Smiths Shiprepairers Ltd.*<sup>26</sup>, Mustill J. was "not wholly convinced" that the last-quoted principle applied where the causes of the injury were not the acts of different persons but by the faulty and non-faulty acts of the same person: he was

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<sup>26</sup> [1984] QB 405

dealing with a number of test-cases of industrial deafness where all the deafness was caused by the same employers but only the later part was tortious because it was only from 1963 onwards that the employers should have taken but failed to take reasonable steps to protect the men from hearing loss.

His approach resulted in what he expressed to be an “apportionment” of the damages, reasoned in this way:

“...it is instructive at least to begin by adopting the primary rule [restore the plaintiff to the position in which he would have found himself but for the defendant's wrongful act]... and seeing whether it yields sensible results. The first step is to consider the case of a worker, whose hearing has been impaired by excessive noise wrongfully suffered whilst in the service of successive employers A and B. The basic principle suggests that A should be liable in full, but not more than in full, for the impairment existing when the worker leaves his employment..... A proper award of damages against employer A will recognise the existence of both current and potential symptoms.

What of employer B? Principle and common sense demand a recognition of the fact that he has "taken over" the plaintiff in a condition where his organs of hearing are already damaged, and where he is already subject to actual and potential symptoms. **It would be an injustice to employer B to make him liable for damage already done before he had any connection with the plaintiff. His liability, first principles suggest, should be limited to compensation for (a) the perpetuation and amplification of the handicaps already being suffered at the moment when the employment changed hands, and (b) the bringing to fruit in the shape of current hardship those symptoms which had previously been no more than potential.**

If this reasoning is followed, the result should be that the recoveries against A and B will amount in total to the award which would have been made if the damage had all been caused by the wrongs of a single employer; and, equally, that the assessment of such an award could form at least the starting point of any quantification of the individual liability of employers A and B.

Next, one must consider how this approach can be applied to a case where either (a) there are two successive employers, of whom only the second is at fault, or (b) there is a single employer, who has been guilty of an actionable fault only from a date after the employment began. Logic suggests that the analysis should be the same. Employer B has, once again, "inherited" a workman whose hearing is already damaged by events with which that employer has had no connection, or at least no connection which makes him liable in law. The fact that, so far as the worker is concerned, the prior events unfortunately give him no cause of action against anyone **should not affect the principles on which he recovers from employer B. Justice looks to the interests of both parties, not to those of the plaintiff alone.**

**The solution pre-supposes a division of responsibility between A and B, or (in the case of the second example) between non-blameworthy and blameworthy sources of noise.** How precise must this division be, before it can be found an apportionment in law? What happens if the apportionment is insufficiently precise? To the latter question, general principle supplies only a guarded answer. In strict logic, the plaintiff should fail for want of proof that the breach has caused the damage. Yet this seems *too* strict, for the plaintiff has proved some loss: perhaps it should all be attributed to the fault, simply as a matter of policy.

The answer to the first question seems less difficult. The degree of accuracy demanded should be commensurate with the degree of accuracy possible, in the light of existing knowledge, and with the degree of accuracy involved in the remainder of the exercise which leads to the computation of damages. ....

The appeal to “principle and common sense” led Mustill J. to say that it would be *unjust to the defendant* employer to make it liable for damage already done before it took over the employee in a damaged state. He earlier had commented that logical rigour could not be attained – but his reasoning in fact does give the appearance of such rigour.

The actual decision in *Thompson* would have been correct on ordinary vicissitude/contingency principles given the factual finding that the hearing loss was inevitable irrespective of the negligence, the effect of the negligence being to accelerate the onset of deafness – Mustill J, despite expressing the exercise as an apportionment or division, neither needed, nor tried, to *apportion* a notional total figure by way of general damages and ascribing a percentage to the tortious part. Instead, he awarded lump sums based on *acceleration of injury*, and made what he called “small awards”.

It is noteworthy that Mr. Gray, one of the *Thompson* plaintiffs, was awarded £295 special damages for the cost of a hearing-aid with a note which stated that “no separate argument was addressed on apportionment in relation to the latter item”. If this item had been apportioned, as would have been consistent with Mustill J.’s thinking, then presumably the award would have been appreciably less than £295. In those circumstances, Mr. Gray would have received a sum *insufficient in fact* to pay for his hearing aid, and consequently the view might be taken that the award was *unjust to him*. Would he have been restored to the position in which he would have been in but for the negligence of the defendants? Would it not have been more just to take the *Bernina* or *Wardlaw* approach and to find that because Mr. Gray’s deafness was contributed to materially by the negligence of the defendants, they were therefore liable for the whole loss, and could not be heard to say that there was some other (non-tortious) cause of part of his loss?

Mustill J. might be said to have used “apportionment” as the “tool” by which he made his assessment of the extent of the defendants’ “just responsibility” for the injury. But, if he had instead chosen the eggshell skull rule as his “tool”, would this also have provided a just solution? Applying the eggshell skull rule would have resulted in the defendants being responsible for the entire deafness because they had to take a plaintiff as they found him – they made worse a plaintiff whom they found in an already damaged state. Mustill J. on the other hand considered that the fact that he was in a damaged state before the employers were guilty of tortious acts was a reason for not making the defendants liable because it was *unjust to the defendant* to do so.

Would it not have been more just to attribute the whole of the plaintiff's loss to the defendant?

In *Rahman v. Arearose Ltd*<sup>27</sup> the approach of the Court of Appeal to the question of attributing responsibility between two tortfeasors merits consideration in more detail than space permits here. The claimant worked for D1 (who ran a Burger King café at Kings Cross), and its negligent failure to protect him from predictable assault resulted in his being badly assaulted by two black youths. D2, a hospital NHS trust, negligently treated his right eye and blinded it. *D2 accepted it was solely liable for the loss of the eye.* The court ruled that:

- D1, despite the hospital's admitted negligence for *loss and blindness* of the eye, was still nevertheless responsible for some of the *psychological* trauma consequent on *both* defendants' negligence. D2's later medical negligence did not extinguish the "causative potency" of D1's earlier tort in that regard. [*This aspect of the decision is useful on a topic commonly raised by defendants in injury claims - namely whether they should cease to have liability because the claimant's condition has been made worse by subsequent negligent medical treatment*<sup>28 29</sup>]
- One distinct part of the psychological damage was a phobia of Afro-Caribbean people – this was entirely attributable to D1 and not D2
- The court determined that a three-quarter/one quarter split between D2/D1 was the easiest way justly to apportion overall *general* damages, but
- this ratio was not to be applied to every head of damages – because, for example, the first 3 years loss of earnings was entirely due to D1, as was the reasonable cost of the claimant's removal expenses (to move away to an area where there were fewer Afro-Caribbeans).

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<sup>27</sup> [2001] QB 351

<sup>28</sup> at para. 28 where Laws L.J. approved observations from *Mahony v. J. Kruschich (Demolitions Pty. Ltd.* (1985) 156 C.L.R. 522 (High Ct. Australia): "Whether a tortfeasor can avoid liability for a subsequent injury tortiously inflicted by a second tortfeasor depends on whether or not the subsequent tort and its consequences are themselves foreseeable consequences of the first tortfeasor's negligence ... Where an injury is exacerbated by medical treatment, the exacerbation may easily be regarded as a foreseeable consequence for which the first tortfeasor is liable."

<sup>29</sup> See also *Webb v. Barclays Bank and Portsmouth Hospitals* [2001] EWCA Civ 1141 at para. 52 where the CA approved Clerk & Lindsell's statement that "only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation" It did not eclipse the original wrong-doing.

Despite its potential intricacies, there were very clear findings of fact to justify attributing the responsibility for the damage in this way – each defendant in *Rahman* had created distinct “consequences peculiar to the injury” inflicted by each.

In *Page v. Smith (no. 2)*<sup>30</sup> there was no *division* of responsibility for the psychiatric injury between the non-tortious pre-disposition of the claimant for the development of the condition, and the effects of the defendant’s tort: but the court did take the pre-disposition into account by discounting a full award to reflect the probability that the claimant would have suffered a recrudescence in due course regardless of the accident. Mr. Page had sustained no physical injury in a car accident for which the defendant was responsible, but the accident caused a recrudescence of chronic fatigue syndrome (“CFS”) from which the claimant had suffered in the past but which had been in remission for some years before the accident. The CFS became permanent and of chronic intensity. The Court of Appeal said that the trial judge had been correct in asking himself “did the road traffic accident cause *or materially contribute* to the condition that has prevailed since the accident?”. Neither the judge nor the CA suggested they should endeavour to apportion liability on the grounds that part of the condition was due to the claimant’s predisposition to CFS. Instead, the judge reflected the probability that the claimant might have suffered a recrudescence by reducing the overall total which otherwise would have been ordered.

Major J. in *Athey v Leonati*<sup>31</sup> had said:

“... Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule.”

before going on to reject the suggestion of division in that case because:

“In the present case, there is a **single indivisible injury**, the disc herniation, so division is **neither possible nor appropriate**. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.”

The psychiatric condition in *Page v. Smith* might similarly have been regarded as a “single indivisible injury” but specific consideration as to whether it was “neither possible nor appropriate” to attempt apportionment was not made. In a case where a court is considering whether it is possible to “divide” an injury, the *appropriateness*

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<sup>30</sup> [1996] 1 WLR 855

<sup>31</sup> [1996] 3 SCR 458 at para. 25

of division has not been articulated as a requisite consideration in the English case law but arguably it is implicit, involving, as it does, a value judgment which is part and parcel of the process of “justly” allocating responsibility.

### **Vicissitudes or contingencies contrasted with apportionment**

It is important conceptually to differentiate apportionment or divisibility from another perfectly common process in the assessment of loss, which is to take account of the vicissitudes of life or contingencies as applicable to the individual claimant. If, for example, a claimant suffered from a natural disease from which he was likely to die in 5 years, the court would take that fact into account in limiting damages to a period of 5 years. The court, in one sense, is “apportioning” damages by taking into account the possibility of another “cause” affecting the impact of the injury suffered in the tort and in the process it will usually reduce the sum it would otherwise have awarded: it is common for judges to discount by a certain “percentage” which also gives the impression of an apportionment

But in truth, it is not an apportionment at all – what the court is doing is taking a snapshot of the claimant, at a point immediately prior to the accident, which incorporates at that time all the particular negative or positive factors in the claimant’s own past or future, as well as the future factors which might afflict persons generally. The court when taking into account the contingencies and vicissitudes of life, makes its award in an attempt to reproduce the snapshot, the object being to restore the claimant, warts and all, to the position he was in before the tort was committed. [By this means the court already does “justice for the defendant” without the need to “apportion” competing contributions to the claimant’s loss]

What is referred to as an apportionment in *Thompson* and other subsequent cases is different – it is a percentage reduction to reflect *the defendant’s role in producing the harm*. Thus, using the illustration of a claimant who was going to die in 5 years time in any event, he would normally and, without apportionment, have received, say, £100,000 representing 5 years loss of earnings at £20,000 p.a. that being his whole loss after taking into account vicissitudes/contingencies. On the other hand, if the judge considered that the defendant was only 50% responsible for the harm (because the defendant had found the claimant already 50% damaged by non-tortious causes), the claimant would only receive £50,000 because he would still only be likely to live 5 years but the defendant was only responsible for 50% of the harm.

The conceptual difference therefore is capable of producing significantly different results as between a true apportionment on the one hand and reducing damages to reflect vicissitudes or contingencies on the other.

### **A trend towards apportionment and divisibility of injury?**

Mustill J.'s dicta in *Thompson* highlighted two associated considerations which have influenced the approach in a number of subsequent cases: one can be described as “justice for the defendant” – the other is “apportion however difficult”. The latter has meant that apportionment has been regarded as appropriate even where there is little more than arbitrary estimation available to enable a judge to undertake the task.

The Court of Appeal has suggested (see *Sutherland v. Hatton*)<sup>32</sup> that “if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then ... a sensible attempt should be made to apportion liability” except when the injury is “truly indivisible”<sup>33</sup>. *Sutherland* cited *Rahman* as an example of apportionment whereas in truth it was a case of attributing liability to each defendant for the distinct injury it had caused, the two psychiatric components (on the one hand, a phobia of black people and the other being PTSD) very exceptionally being susceptible of distinct attribution.

In *Sutherland*, the Court said that “many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should only pay for that proportion of the harm for which he by his wrongdoing is responsible.” In stress-at-work cases – such as those in *Sutherland* – is the restitutionary objective of restoring the claimant to the situation in which he was before the tort was committed achieved by this approach? Suppose that the employer’s negligence is proved to have made a claimant incapable of working whereas he had been capable of doing so in fact without interruption for years: if he earned £20,000 p.a., and the judge considers that 40% was due to a predisposition to breakdown, is the loss going to be awarded at only £12,000 p.a.? But the reality is that without the negligence, the employee would still have been continuing to earn £20,000 despite his pre-disposition. The just solution would surely be to award him £20,000 a year but reduce the total to reflect the contingency that the claimant would have suffered the breakdown for non-negligent reasons in the future?

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<sup>32</sup> [2002] EWCA Civ. 76 at para. 41

<sup>33</sup> *ibid* at para. 43(15)

In *Holtby v. Brigham & Cowan Ltd.*<sup>34</sup>, an asbestosis claim, the claimant's damages were reduced by 25% on the grounds that other employers apart from the defendants had also caused some of the injury. In the course of Stuart-Smith L.J.'s judgment, with which Mummery L.J. agreed, he said:

"20.... the onus of proving causation is on the claimant; it does not shift to the defendant. He will be entitled to succeed if he can prove that the defendant's tortious conduct made a material contribution to his disability. **But strictly speaking the defendant is liable only to the extent of that contribution. However, if the point is never raised or argued by the defendant, the claimant will succeed in full as in *Bonnington Castings v. Wardlaw...and McGhee v. National Coal Board...* I agree with Judge Altman that strictly speaking the defendant does not need to plead that others were responsible in part.** But at the same time I certainly think it is desirable and preferable that this should be done. Certainly the matter must be raised and dealt with in evidence, otherwise the defendant is at risk that he will be held liable for everything.

It is salutary to remember, at this point, the words of Lord Bramall in 1888 in the *Bernina* espousing a fundamentally different approach:

".. the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; ... he cannot be heard to say that there is some other wrongdoer who contributed to the damage"...

In *Holtby* there was reliance upon Lord Bridge's interpretation of *McGhee* as expressed in *Wilsher v. Essex Health Authority*<sup>35</sup> as laying down no new principle of law – a view which has now been rejected in *Fairchild v Glenhaven*<sup>36</sup>. This rejection does not in itself overrule *Holtby* but it does perhaps undermine confidence in its soundness.

Clarke L.J. agreed in the result of the appeal in *Holtby* but disagreed with the majority's approach to onus of proof:

"32. It is I think at least arguable on the basis of those decisions [*Wardlaw* and others] that in a case of this kind, where the claimant proves that two employers have made a material contribution to his condition, he is entitled to judgment in full against each, leaving them to contest issues of contribution between them. **That would certainly be the case where the injury was truly indivisible**, so that each made a material contribution to the same damage, as in a case of damage caused by, say, a collision....

35... It seems to me that once the claimant has shown that the defendants' breach of duty has made a material contribution to his disease, **justice requires that he should be entitled to recover in full from those defendants unless they show the extent to which some other factor**, whether it be "innocent" dust or tortious dust caused by others, also contributed..."..

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<sup>34</sup> [2000] 3 AER 421 where neither the *Bernina*, or *Grant v Sun Shipping* were cited although *Wardlaw*, and *McGhee* were

<sup>35</sup> 1988] AC 1074 at 1090C

<sup>36</sup> [2002] 3 WLR 89 at paras. 22, 70, 144, 150,

These observations echo the themes of the earlier case law and, it is suggested, correctly restates the common law approach to such questions, namely that:

- justice requires full recovery if it is truly to fulfil the objective of restoring the claimant to the condition he was in before the tort was committed: he has already proved he was injured by the defendant to a material extent, and has already proved therefore that he is not in the same state as before the accident: if he was required to prove more and fails, this defeats the objective - why *as a matter of justice* - does he need to show more?
- The defendant needs to show the “extent to which some other factor... also contributed” because it is *only* if the other factor was “divisible” (i.e. distinct and not *at all* caused by the defendant) that he can reasonably be exonerated.

The *Thompson* decision (along with *Holtby*) has also been followed in *Allen v British Rail Engineering*<sup>37</sup> (a lead Vibratory White Finger test case) where the Court of Appeal upheld Smith J.’s decision and methodology in awarding £4000 damages to Mr. Allen based on a total of £11000 but deducting £1500 for a pre-1976 loss (not negligent for this period), £1500 for post-1987 loss (when he moved to other employers) and 50% of £8000 for the period 1976-1987 (on the grounds that this represented the extent to which the defendants’ negligence contributed to the overall condition).

After reviewing *Bonnington*, *Thompson*, and *Holtby*, the Court of Appeal summarised the principles “in the case law as it now stands” in the following propositions<sup>38</sup>:

- (i) The employee will establish liability if he can prove that the employer's tortious conduct made a material contribution to the employee's disability.
- (ii) There can be cases where the state of the evidence is such that it is just to recognise each of two separate tortfeasors as having caused the whole of the damage of which the claimant complains; for instance where a passenger is killed as the result of a head on collision between two cars each of which was negligently driven and in one of which he was sitting.

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<sup>37</sup> [2001]EWCA Civ 242, [2001] ICR 942

<sup>38</sup> at para. 20. This passage was approved recently in *KR and others v Bryn Alyn Homes* [2003] EWCA Civ 85, at para. 117, where numerous claimants were awarded damages for sexual abuse in children’s homes and where, in principle the CA accepted that it was right to apportion general damages for psychiatric injury for the claimants because they were already damaged before being sent to the homes. The psychiatric injury was thus regarded as divisible. Interestingly, however, the Court overturned the trial judge’s proportionate reduction of the cost of therapy on the grounds that the cost was not divisible (para. 135).

(iii) However in principle the amount of the employer's liability will be limited to the extent of the contribution which his tortious conduct made to the employee's disability.

(iv) The court must do the best it can on the evidence to make the apportionment and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct.

(v) The amount of evidence which should be called to enable a judge to make a just apportionment must be proportionate to the amount at stake and the uncertainties which are inherent in making any award of damages for personal injury.

If these propositions are correct, the law has moved some distance from the (not so distant) days when a plaintiff could securely assume full recovery of his loss once he had proved the defendant had made a material contribution to it, and the defendant could not show that an element of the loss was distinctly attributable to someone else.

If taken as correct, these propositions suggest that a court should try to apportion whenever it can and a defendant should *only* ever be liable to the extent of his contribution to the disability. This poses a real danger to claimants – not least in cases where physical injury is combined with psychiatric damage arising in part from natural pre-disposition. The reasoning against this is best expressed in the passage already quoted above from Athey v. Leonati:

If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

### **Last words**

This review of the cases inevitably shows a variety of approaches to a problem which has troubled courts perennially. The mantra of the restitutionary principle – to restore the claimant to the position he was in before the tort was committed - is intoned in almost every case of this sort, but it could be argued that its primacy has not been maintained as the central focus of the process of quantification in the concern that there must be justice done for defendants. One can see this as an understandable judicial effort to contain the size of awards to reasonable proportions, especially in group litigation cases, but in the process there is a real danger that the very reason for the existence of tort law – which is to compensate victims - risks being undermined.

LAWRENCE CAUN  
Lamb Chambers