

## **Bar Vocational Course**

### **Legal Research Task**

Below is an example of a 2,500 word legal research piece which is typical of the task required as part of the Bar Vocational Course. This particular piece is on Clinical Negligence and focuses on the law of causation therein.

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#### RESEARCH NOTE

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1. I am asked to advise on the following issues;
  - (i) Causation in relation to the negligent treatment Errol Winston received at St. John's Hospital;
  - (ii) Causation in relation to the way in which Craft & Co. dealt with Errol Winston's case;
  - (iii) Differences in the law's approach to causation in clinical negligence as opposed to cases of solicitor's negligence and personal injuries cases generally;
  - (iv) Further questions to be put to Mr Khan, the expert in the case, to clarify or amplify his statement;
  - (v) An overall estimation on the likely prospect of success/percentage discount likely in this case against Craft & Co.

2. The facts of the case are that Mr Winston was referred to Mr Reginald Howard, an Orthopaedic surgeon at St John's hospital, Tooting because of pain to his shoulder. Mr Howard recommended a rotator cuff operation, which was carried out in the hospital. In breach of hospital procedure, Mr Winston was not provided with TED stockings before or during his operation. Mr Winston subsequently developed DVT shortly after the operation, and he suffered a pulmonary embolism.

### Negligence by St John's Hospital

#### **'But for' causation: The general rule**

3. The primary test for causation is the 'but for' test (see, e.g. *Barnett v. Chelsea & Kensington Hospital Committee* [1969] 1 QB 428). In the context of medical negligence claims this means that a claim will fail if on the balance of probabilities the ultimate injury would have failed anyway, despite competent treatment.
4. The 'but for' test can be difficult to apply in a medical negligence context, because there are often several concurrent or successive causal factors contributing to the claimant's injury, and because the actual cause of the injury is often indeterminate. This issue was addressed by the House of Lords in *Wilsher v. Essex Area Health Authority* [1988] AC 1074, where it was held that it was not sufficient to establish factual causation to show that the defendant's actions merely increased the risk of the claimant suffering the injury in question, or that it was one of several possible causes. In order to establish 'but for' causation in medical negligence cases, it must be shown that the defendant's negligence actually caused or contributed to the injury suffered by the claimant.
5. In the case of Errol Winston, it seems unlikely that Mr Winston would be able to establish causation in accordance with the simple "but for" test

in relation to the failure of the hospital to provide him with TED stockings. Mr Khan's evidence is that while the use of TED stockings does have some effect in reducing the risk of a patient suffering DVT (and consequently a pulmonary embolism), the failure to use TED stockings was not a cause of the pulmonary embolism in the sense that it did not act to do more than merely increase the risk of DVT. On the evidence of Mr Khan as it stands, it seems that it cannot be said that but for the failure to issue EW with TED stockings, EW would not have had a pulmonary embolism and as such *prima facie* he cannot maintain an action against the defendant hospital trust.

6. Noting that in paragraph 5 of his witness statement, Mr Winston claims that he was never warned of the risk of DVT, one way in which Mr Winston may be able to prove 'but for' causation is to show that had he been warned of the risk, he would not have undergone the surgery on his shoulder. Mr Khan should be asked what the risk of DVT to patients such as Mr Winston, undergoing surgery, actually is. If the risk of DVT is very low, it may be difficult to show that this would not have been a risk that Mr Winston would have been willing to take. Clearly if it can be shown that he would have opted for surgery even if he had been warned of the risk of DVT it will not be possible to establish that but for the hospital's failure to warn him of the risks he would not have suffered a DVT. It may also be difficult to demonstrate that the hospital was under a duty to warn him of the risk of DVT if it was a very remote risk.
7. I note that Mr Khan makes no mention in his report of the effect of the failure by the hospital to provide blood thinning drugs to Mr Winston before the operation. Mr Khan should be asked whether this was standard procedure in the hospital, and whether the failure to provide such drugs could have contributed to or caused Mr Winston's injury.

### **Exceptions to the strict 'but for' causation rule**

*On the balance of probabilities the defendant caused the claimant's injury*

8. In *Hotson v. East Berkshire Health Authority* [1987] AC 750 it was held that in cases where, on the facts it is impossible to conclusively determine whether the 'but for' test has been satisfied, the court may determine causation by asking whether on the balance of probabilities the defendant's negligence caused the claimant's injury. In that case, it was impossible to tell whether the claimant's injury (a fall from a tree), had he received competent medical intervention, would have caused permanent paralysis in any case. The court therefore asked whether it was more likely than not paralysis had been an inevitable outcome of the original injury.
9. In the case of Mr Winston, it may be that the court would take a similar approach, if it is impossible to say whether Mr Winston would have developed DVT even if he had been provided with TED stockings and blood thinning drugs. Although Mr Khan has thus far provided an opinion as to what degree the absence of TED stockings can increase the likelihood of developing DVT, he has not given a detailed opinion as to the effect that wearing TED stockings may have had on Mr Winston in particular. Mr Khan should therefore be asked to provide an opinion on whether he believes the occurrence of DVT in Mr Winston was an inevitability of, for example, pre-existing medical circumstances or the circumstances of the operation on his shoulder. Clearly, if the development of DVT was inevitable, with or without the TED stockings, Mr Winston will be unable to demonstrate factual causation. If Mr Khan is of the opinion that Mr Winston's pulmonary embolism was not an inevitability then he should be asked to provide an opinion as to whether it is more likely than not that Errol Winston's DVT was caused by the failure of the hospital to provide him with TED stockings.
10. A potential problem with adopting the approach taken in *Hotson* however, is that it may not be possible for Mr Khan to provide an opinion on how likely it would have been that Mr Winston would have

suffered a DVT and subsequent pulmonary embolism even if he had been provided with TED stockings. If it is not possible to draw a conclusion as to whether the injury suffered by Mr Winston was an inevitability, or what the chances of him having suffered similar injuries even while wearing TED stockings were, then clearly the approach taken in *Hotson* will be inappropriate.

*The defendant's negligence 'materially contributed' to the claimant's injury*

11. In *Bonnington Castings v. Wardlow* [1956] AC 613, the court held that where the defendant's negligence 'materially contributed' to the claimant's injury, this would be sufficient to satisfy the causation requirements, even if it could not be definitively said that the strict test of causation had been met.

12. It is unlikely that this exception to the strict 'but for' causation test will be of use in establishing causation in the case of Mr Winston, as the evidence currently available from Mr Khan indicates that provision of TED stockings may reduce the risk of developing DVT, but does not suggest that the medical causation of DVT is a failure to wear the TED stockings. Mr Khan should however be asked to address this issue for the avoidance of doubt.

*It is impossible for the claimant to show the defendant caused his injury but causation is satisfied*

13. A further deviation from strict 'but for' causation is found in *McGhee v. National Coal Board* [1973] 1 WLR (affirmed in *Fairchild v. Glenhaven Funeral Home*), where although it was impossible for the claimant to show that the defendant's negligence was the cause of his injury, the House of Lords nevertheless accepted that causation had been satisfied. According to the judgments of Lords Simon (at p.1014), Reid (at p.1011) and Salmon (at p.1017), the House of Lords in *McGhee* allowed a material increase in the risk of the claimant suffering injury

due to the defendant's actions to be equated to a material contribution to the injury suffered, such as to establish causation. In *McGhee* the claimant suffered severe dermatitis in consequence of being covered in brick dust at work. The claimant's case was that had the defendant employer provided on-site washing facilities, in order that he could have washed the dust off before travelling home, he would not have developed dermatitis, though this could not be proved one way or another. None the less their Lordships were prepared to equate the material increase in risk of catching dermatitis from the lack of wash facilities with the lack of wash facilities being a material contribution causing the claimant to suffer dermatitis.

14. Since Mr Khan is of the opinion that a failure to use TED stockings does materially increase the risk of DVT and therefore a pulmonary embolism then this exception to the strict rules of causation may apply in the case of Errol Winston. If the court were to adopt this approach, a material increase in risk of DVT caused by not providing TED stockings could be sufficient to establish a material contribution to the injury suffered by Mr Winston, and thus causation would be proved.

15. The principle laid down in *McGhee* was expressed in terms helpful to Errol Winston by the first instance judgement of Pain J in *Clark v. MacLennan* [1983] 1 ALL ER 416, in which it was held that where a general duty of care arose and there was a failure to take a recognized precaution and that failure was followed by the very damage which that precaution was designed to prevent, the burden of proof lay with the defendant to disprove causation. In Errol Winston's case there has been breach of a general duty of care by the hospital, and a failure to take a the recognized precaution of providing TED stockings. Given then that Mr Khan implicitly confirms that the purpose of the TED stockings is to reduce DVT and therefore pulmonary embolisms and given that that harm was exactly the harm that arose, according to *Clark v MacLennan*, the burden of disproving causation should shift to the defendant hospital. Unfortunately, this authority was disapproved,

though not overruled, by the Court of Appeal in *Wilsher v. Essex Area Health Authority* [1987] QB 730, and has not received any subsequent judicial support or application since. I would not therefore advise that it be relied on in Mr Winston's case.

16. If relying on the principle in *McGhee*, it will be important to demonstrate that Mr Winston's case falls within the same category of cases as *McGhee*, and importantly, that it does not fall within the same category of cases as *Wilsher v. Essex Area Health Authority*. In *Wilsher*, the claimant was born prematurely and shortly thereafter developed retrolental fibroplasia (RLF). RLF could have been caused by the defendant's negligence in exposing the claimant to excess oxygen, but it may also have been caused by any one of four other medical conditions which were afflicting the claimant. The claimant was therefore unable to show that it was more likely than not that he had developed RLF as a result of excess oxygen.

17. In both *Wilsher* and *Fairchild* the House of Lords has attempted to clarify the distinction between the approach adopted in *McGhee*, and that favoured in *Wilsher*, however the basis of the distinction remains unclear. In *Fairchild* a majority of their Lordships identified the number of factors which operated on the claimants as being the root of the difference between the two cases. In *McGhee* the claimant was certain his dermatitis stemmed from only one factor, exposure to brick dust, whereas in *Wilsher* the claimant was exposed to five different factors all of which could have caused his RLF (cf. Lord Bingham [22], Lord Hutton [118], Lord Rodger [149]).

18. Adopting this line of authority, on the evidence as it stands it would seem that Mr Winston's case is more appropriately analogized to *Wilsher*, and not *McGhee*. Mr Khan indicates at paragraph 6 of his report that Errol Winston's pulmonary embolism was partly the result of Mr Winston's immobility during and after surgery. It seems then that there are at least two factors which led or may have led to the

embolism. In fact, there may be more than two factors which operated to cause, or may have operated to cause Errol Winston's pulmonary embolism, of which Mr Khan should be asked to provide a detailed list. If the most Mr Khan is able to say is that the hospital's negligence was one of a number of factors which could have caused Errol Winston's pulmonary embolism, then Mr Winston will be unable to establish causation.

### Professional negligence by Croft & Co.

19. The general rule of 'but for' causation, as outlined above, applies in the case of professional negligence by solicitors. In addition, the claimant must satisfy the test of remoteness, by showing that there is sufficient proximity between the solicitors' negligence, and the loss suffered by the claimant (see e.g. *Nash v. Phillips* (1974) 232 E.G. 1219). The chain of causation can be broken by an intervening act of either the claimant or a third party but not the defendant (*Normans Bay Ltd v. Coudert Brothers (a firm)*, *The Times*, March 24, 2004).

20. The rules on causation governing negligence by solicitors are less complicated than those which apply in the case of medical negligence, largely because there tend to be less parties and events in the chain of events leading to the final loss or injury suffered by the claimant. Causation in cases of professional negligence by solicitors also does not have to take into account complex medical concepts and theories. As such the basic rule as to causation operates without need for exception or amendment.

21. In this case I am therefore of the opinion that there will not be a problem in establishing causation in terms of demonstrating that the failure on the part of Craft & Co. caused Errol Winston to suffer loss.

### Conclusion

22. On the evidence as it stands I am of the opinion that it is unlikely that Mr Winston will be able to demonstrate causation between the failure of the hospital to provide TED stockings, and his subsequent pulmonary embolism. However, it is not possible to come to a definitive conclusion before hearing the answers to the questions I have outlined to be put to Mr Khan.