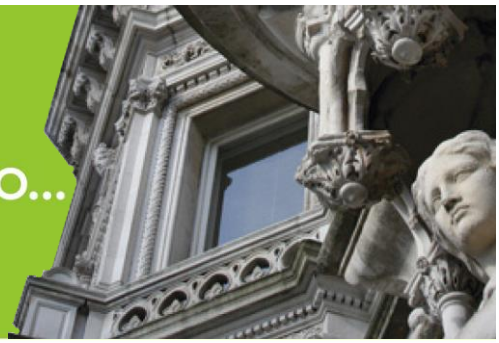

A Short Introduction to...

2 TEMPLE GARDENS

Causation: Sherlock Holmes, Submarines and the Hard Rock Café

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1. In a number of recent judgments, the Courts have looked again at causation, reviewed the well-known case of the Popi M,[1] and given some helpful guidance for Claimants seeking to establish causation.

The Popi M

2. In the Popi M, the ship Popi M sunk off the coast of Algeria in calm seas and fair weather. The Claimant's case was that the cause of the water entering the ship was contact by the ship with a submarine. The Defendant's case was that the cause of water entering the ship was prolonged wear and tear of the ship's hull over many years.
3. The trial Judge (Bingham J) held that, even though the Claimant's case (that the cause of the water entering the ship was contact by the ship with a submarine) was inherently improbable, on the balance of probabilities, that explanation would be accepted.
4. The House of Lords said this reasoning was flawed.
5. The House of Lords said that the trial Judge regarded himself as compelled to make a choice between the Claimant's "submarine theory" on the one hand (which he regarded as extremely improbable) and the Defendant's underwriter's "wear and tear" theory on the other (which he regarded as virtually impossible). However, he failed to keep in mind a third alternative, that the ship owners had failed to discharge the burden of proof which lay on them.
6. The House of Lords quoted from the dictum of Sherlock Holmes[2] when he told Dr Watson *"how often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth"*.
7. While Sherlock Holmes' dictum has a certain logic, the House of Lords in the Popi M said it does not reflect English law or the process of fact finding that a Judge has to perform.
8. The House of Lords said that the trial Judge should have held that the Claimant had failed to discharge the burden of proof.

[1] [1985] 1 WLR 948
[2] from The Sign of the Four by Sir Arthur Conan Doyle.

9. In other words, if the two options are:-

(i) a cause which is extremely improbable; and

(ii) a cause which is virtually impossible; a Judge is not entitled to choose the *"extremely improbable cause"* because it is more likely than the *"virtually impossible"* cause. This is because, taken by itself, if it is still *"extremely improbable"*.

Developments after the Popi M

10. However, a series of cases since the Popi M has indicated that there may be more force in Sherlock Holmes' reasoning than the House of Lords gave him credit for.

11. In Kiani v Land Rover Limited,[3] the Court had to choose between two alternatives as the cause of death:-

(a) accidental death; or

(b) suicide.

12. Waller LJ said at [30]:-

"As long as accident can be demonstrated to be possible, it is open to a Court which has discounted any other possibility to be of the view that accident has been proved on the balance of probabilities. That must be particularly true when a breach of duty, a duty to guard against the very type of injury with which the case is concerned has been established. Third, I do not myself think that it is false logic to reason that where only two possibilities are under consideration both of which seems unlikely, if one seems much less likely than the other, the less likely can be discounted thus making the first likely to have happened on the balance of probabilities."

13. Waller LJ said that the trial Judge was entitled to find that suicide was *"less than probable"* and that accident was possible, so it was open to him to find that accident was the cause of death.

14. These two themes:-

(i) where there has been a breach of duty (a duty to guard against the very type of injury with which the case is concerned), the fact that injury of the type that should have been guarded against occurred, is an important pointer to causation;[4]

(ii) if there are only two (or a limited number) possibilities, if one is much less likely than the others, that can be discounted, making the other possibility likely to have happened on the balance of probabilities;

have been developed or applied in later cases.

Damage of a type that might result from the negligence/breach of duty

15. In Drake v Harbour,[5] a fire occurred in the loft of a house after an electrician had been working in the loft and had gone home. The trial Judge found that the fire had been caused by the Defendant's negligence.

16. Longmore LJ said:-

"15 …in a case where negligence has been found and the damage which has occurred is the sort of damage which one might expect to occur from the nature of the work which the Defendant had been carrying out, a court should … be prepared to take a reasonably robust approach to causation".

17. The reasoning process was put clearly by Toulson LJ at [28]:

"In the absence of any positive evidence of breach of duty, merely to show that a claimant's loss was consistent with breach of duty by the defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."

[3] [2006] EWCA Civ 880

[4] This is similar reasoning to the doctrine of *res ipsa loquitur*.

[5] [2008] EWCA Civ 25

Two (or limited numbers of) competing causes

18. In Ide v ATB and Lexus Financial Services v Russell,[6] the Court of Appeal dealt with two appeals:

    1. In Ide, the Claimant fell off a mountain bike imported by the Defendant. There were two competing causes put forward by the parties: (a) defective handlebar; or (b) the Claimant had lost control of the bike, fallen off and the handlebar has been damaged in the fall.

    2. In Russell, there had been a fire at the garage of the Defendant which damaged the Claimant's car. There were three possible causes of the fire: (a) an arson attack; (b) a defect in the wiring in the garage; and (c) a defect in the electrics of the car. The Appellants in each case appealed on the basis that the trial Judge had adopted the impermissible reasoning of The Popi M.

19. In the Court of Appeal, Thomas LJ said:-

    "6. As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one it is logical to accept the other as being the cause on the balance of probabilities. It was accepted in the course of argument on behalf of the appellant that, as a matter of principle, if there were only three possible causes of an event, then it was permissible for a judge to approach the matter by analysing each of those causes. If he ranked those causes in terms of probability and concluded that one was more probable than the others, then, provided those were the only three possible causes, he was entitled to conclude that the one he considered most probable, was the probable cause of the event provided it was not improbable.

    7. The application of this approach by a court in considering a claim under the Consumer Protection Act 1987 in respect of a defective product can often be simpler. Under ss. 2 and 3 of the Act if a person is injured by a product, his claim succeeds if he establishes there is a defect in the product and that defect caused the loss unless the defendant can rely on one of the statutory defences. In determining whether the loss or injury has been caused by a defect or by some other cause, although the process of reasoning may involve an explanation of how the defect was caused, the task of the court is simply to determine whether the loss was caused by the defect and not by another cause. As is apparent from the first of the appeals, that distinction is important and can make the task of the court a simpler one, as no doubt Parliament intended."

20. In Amsprop Ltd v ITW Ltd,[7] His Honour Judge Toulmin CMG QC dealt with a fire at the Hard Rock Café, London. He considered Kiani, the Popi M, and Fosse Motor Engineers v Conde Nast (see below).

21. He said at [103]:-

    "If I conclude that out of only two possible causes of the fire, the flare up of food on the grill seems much less likely, I should discount that possibility and conclude that the fire was caused by a flame on the burner being drawn into the duct".

22. He found at [104] that he could not:-

    "on the evidence, conclude that it was less likely, let alone much less likely, that the fire was caused by a flare up of food on the grill rather than by a flame from one of the burners being drawn into the duct. On the evidence as presented to me, it would be speculation to say which seems the more possible cause."

23. HHJ Toulmin CMG QC's judgment in Amsprop therefore strikes a note of caution on the application of the "two or limited number of competing causes" principle to causation.

Note of caution

24. The limits of the "limited numbers of competing causes approach" were set out by Akenhead J in Fosse Motor Engineers Ltd v Conde Nast[8] at [67]:-

    "What is not acceptable, at the very least in a case like the current case, is to identify that there are, say, (as here) five possible causes, rank them each in percentage terms as possibilities and then select the possibility with the highest percentage as the probable cause. The only circumstances in which it would be legitimate would be if the highest

[6] [2008] EWCA Civ 424

[7] [2009] EWHC 2689 (TCC)

[8] [2008] EWHC 2037 (TCC)

ranked cause was the one which on all the evidence the judge was satisfied was the probable cause of the incident or loss in question. This proposition was, I believe, accepted ultimately by Counsel for both parties. I consider that it is dangerous and generally a fruitless occupation to seek to rank possibilities or probabilities in percentage terms in any event. If there are five possibilities of which four are remote or extremely improbable, that conclusion may go to support a judge's finding that the remaining "possibility" is in fact the probable case or explanation for the event in question."

Recent cases in the Court of Appeal

25. In 2013, the Court of Appeal considered the question of whether Claimants had discharged the burden of proof for civil liability. Nulty v Milton Keynes Borough Council,[9] involved a fire at a recycling plant. ACE European Group v Chartis Insurance UK[10] concerned fatigue cracking in certain components in a waste facility.

26. In Nulty, the trial judge[11] dealt with three potential theories as to how the fire started: (i) arcing from a live electric cable; (ii) a cigarette discarded by the Defendant; or (iii) arson by an intruder. He dismissed the latter. Accordingly, he was left with two theories. He concluded that arcing from a live cable was "*very unlikely*" and a *"remote possibility*", whereas he considered that the fire was caused by the Defendant carelessly discarding a cigarette was feasible. He concluded at [215] as follows:

"*Accordingly, of the three suggested causes of the fire, none of which, if taken on its own, is one that is inherently likely, I find that a cigarette end carelessly discarded by Mr Nulty is the most probable. In the light of this conclusion I must now turn to the authorities to decide whether or not that finding is sufficient for me to hold as a result that the Council has in law discharged the burden of proving that Mr Nulty caused the first fire*."

27. The Court of Appeal said at [34] and [35] that:

"*34. A case based on circumstantial evidence depends for its cogency on the combination of relevant circumstances and the likelihood or unlikelihood of coincidence. A party advancing it argues that the circumstances can only or most probably be accounted for by the explanation which it suggests. Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances. As Lord Mance observed in Datec Electronics Holdings v UPS Ltd […] there is an inherent risk that a systematic consideration of the possibilities could become a process of elimination "leading to no more than a conclusion regarding the least unlikely cause of loss", which was the fault identified in The Popi M. So at the end of any such systematic analysis, the court has to stand back and ask itself the ultimate question of whether it is satisfied that the suggested explanation is more likely than not to be true. The elimination of other possibilities as more implausible may well lead to that conclusion, but that will be a conclusion of fact: there is no rule of law that it must do so…* (emphasis added).

35. *The civil "balance of probability" test means no less and no more than that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing."*

28. The Court of Appeal held that the trial judge was entitled to conclude that Mr Nulty caused the fire because (as was implicit in his reasoning) he was satisfied that the case for believing Mr Nulty caused the fire was stronger than the case for not coming to that belief. He had considered the scenario of the discarded cigarette by Mr Nulty, and found it to be objectively plausible. However, he recognised that Mr Nulty's actions appeared to be out of character and for that reason the scenario did not seem likely "*if taken on its own*". He would not have concluded that Mr Nulty acted in this way if there had been any other plausible explanation, but he was satisfied there was none (see [40] – [41]).

29. However, the Court of Appeal also said at [42] there is no rule of law that if the only

[9] [2013] Lloyds Rep IR 243
[10] [2013] Lloyds Rep IR 485
[11] [2012] Lloyd's Rep IR 453

other possible causes of the fire were very much less likely, the discarded cigarette became in law the probable cause of the fire.

30. In ACE European (referring back to Ide v ATB Sales Ltd), the trial judge had rejected one of two competing theories of loss, each of which was improbable. He had then accepted the second theory as being the cause, on the balance of probabilities. On appeal, both parties accepted that the judge had correctly directed himself in relation to the Popi M. Longmore LJ said at [38], "*Of course, the judge has to be satisfied that the second theory is, on the balance of probabilities correct*" but found that the trial judge had reached a conclusion that was open to him on the evidence.

31. These two cases remind us that if a Court has considered two or more theories of causation, and discounted all but one, it must still stand back and consider whether that final theory is more likely than not to be true.

Recent cases at first instance

32. The Popi M has been applied in two other recent first instance decisions:

(i) In Wellesley Partners LLP v Withers LLP[12] Nugee J considered different reasons as to why an agreement had been drafted in a manner contrary to the instructions the Claimants said they had given. He was referred to the Popi M. He said that *"[a]t first blush neither [possibility] is particularly plausible*", and considered whether he should simply find that the Claimants had not discharged the burden of proof. However, he noted that a trial judge should be slow to resort to the burden of proof and should, wherever possible, make findings of fact, and went on to find that the Claimants had discharged their burden of proof (see [113]-[114]).

(ii) However, in Garner v (1) Salford City Council (2) P McGuiness and Company Limited,[13] Keith J found that the Claimant had not made out her case that she had been exposed to asbestos by the Defendants (who had demolished a building near her school playgrounds). He found on the facts that the chance of dust containing asbestos fibres being released into the atmosphere during this process was minimal (see [38]). He also found that the Claimant did not have any occupational exposure (or any other exposure) to asbestos. He considered whether that undermined his finding as to the building works but found it did not. He said if he had found otherwise he would have fallen into the Popi M trap. He also noted that "*apart from principle, the reason it would be inappropriate to do that in this case is that there are other possibilities which cannot be eliminated*."

Burden of proof

33. In Love v Halfords Ltd[14] at paragraph 27, Sir Colin Mackay said:-

"…it is a rare case which turns upon the incidence of the burden of prof. I have in mind the wise words of Lord Reid in McWilliams v Sir William Arrol & Co [1962] SC (HL) 70 at 83 when he said:

'In the end when all the evidence has been brought out it rarely matters where the onus originally lay: the question is which way the balance of probability has come to rest.'"

Conclusion

34. Therefore, in considering causation where there are competing causes, Claimants (on whom the burden rests) should look for:

(i) damage which is consistent with, or is expected may occur from, a breach of duty. Then, it is easier to infer that the breach of duty caused the damage;

(ii) a limited number of possible causes and then seek to discount the cause advanced by the Defendant as much less likely than the cause proposed by the Claimant;

(iii) ways of showing, in all the circumstances, that the cause that they propose is probable.

35. Defendants who are facing such claims need to:

(i) argue (if there are a limited number of competing causes) that in fact the Claimant's cause is much less likely than the cause they advocate;

(ii) postulate a number of possible causes, none of which is really more or less probable than the others (and so cannot be discounted) and argue

[12] [2014] EWHC 556 (Ch)
[13] [2013] EWHC 1573 (QB)
[14] [2014] EWHC 1057 (QB)

that the Claimant has simply failed to prove his case on the authority of the Popi M.

36. Although it not believed that Sherlock Holmes travelled on a submarine, rode a mountain bike or ate at the Hard Rock Café, his dictum has a continuing influence on English law.

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