

Compass Chambers



Material Contribution ...what does that even mean?

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&

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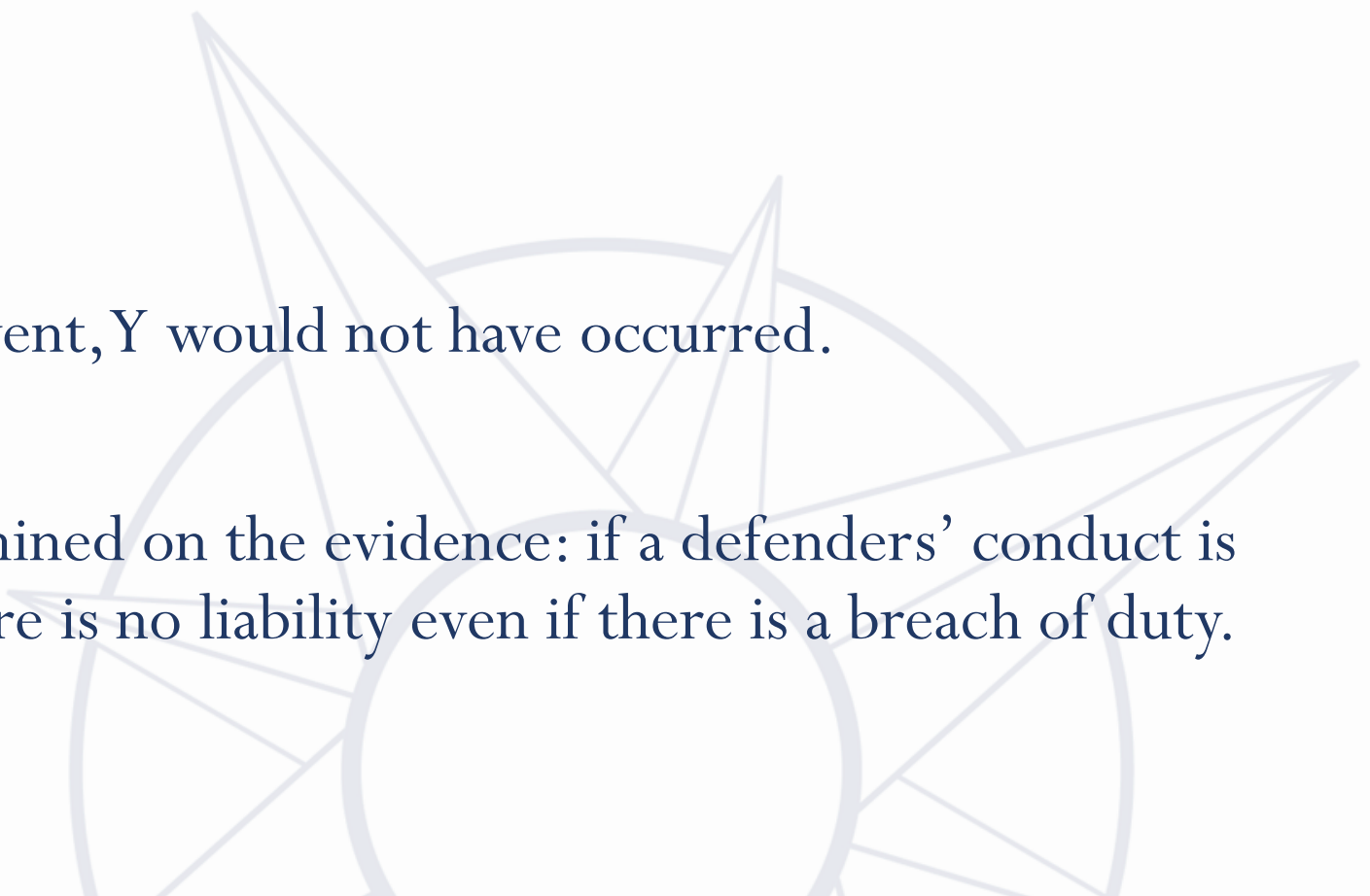
An origin story.....

In the beginning there was:

‘But for Causation’

A simple concept: But for X event, Y would not have occurred.

A question of fact to be determined on the evidence: if a defenders’ conduct is not a factual cause of harm there is no liability even if there is a breach of duty.

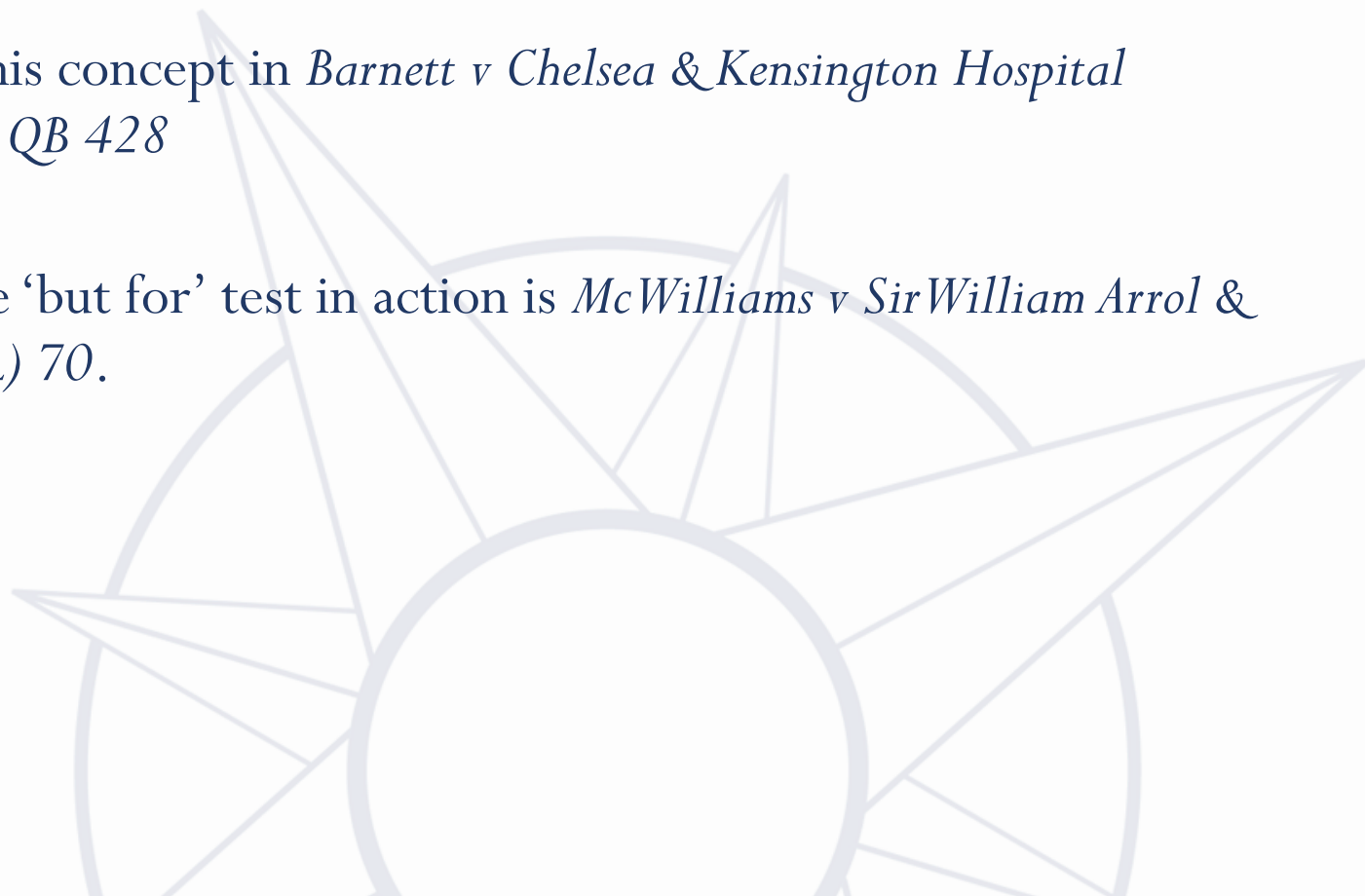




If the harm would have occurred anyway there is no liability.

See an interesting example of this concept in *Barnett v Chelsea & Kensington Hospital Management Committee*, [1969] 1 QB 428

Another striking example of the ‘but for’ test in action is *McWilliams v Sir William Arrol & Co and Lithgows Ltd*, 1962 SC (HL) 70.

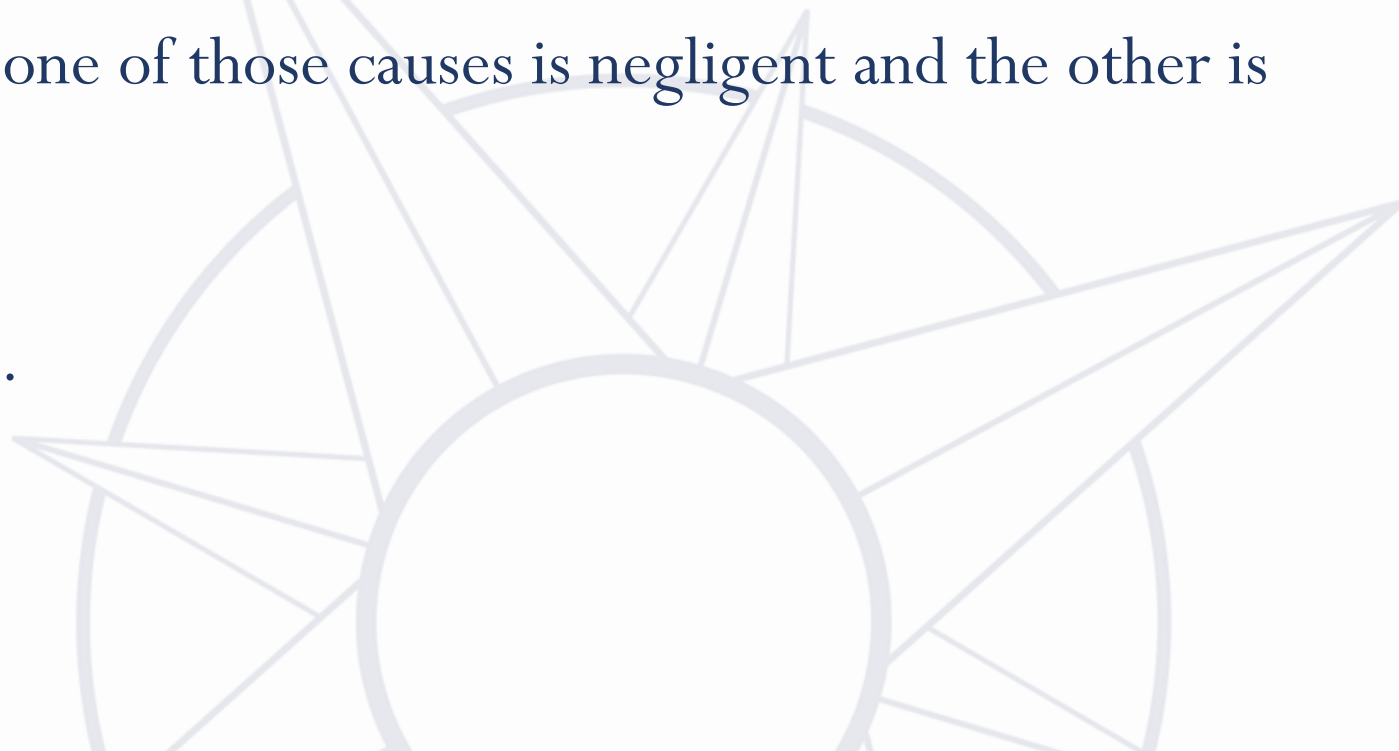




What about where there is more than one cause of the pursuer's injury?

Worse still, what about where one of those causes is negligent and the other is not?

The 'but for' test doesn't work.





Enter:

Wardlaw v Bonnington Castings Ltd 1956 SC (HL) 26

- Industrial disease case.
- Workman contracted pneumoconiosis after breathing in dust at his workplace.
- Some dust came from a hammer for which there was no precaution against dust = no negligence.
- But, other dust came from machines for which extraction plant was available.
- Employers in breach for not maintaining the extraction plant.



How did the court get round the 'but for' problem?

It gave us the concept of:

MATERIAL CONTRIBUTION





Lord Reid:

‘It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material’.



Wardlaw concerned causes of harm operating concurrently.

But what about where there are sources of danger operating consecutively.

Back to the 'but for' test?



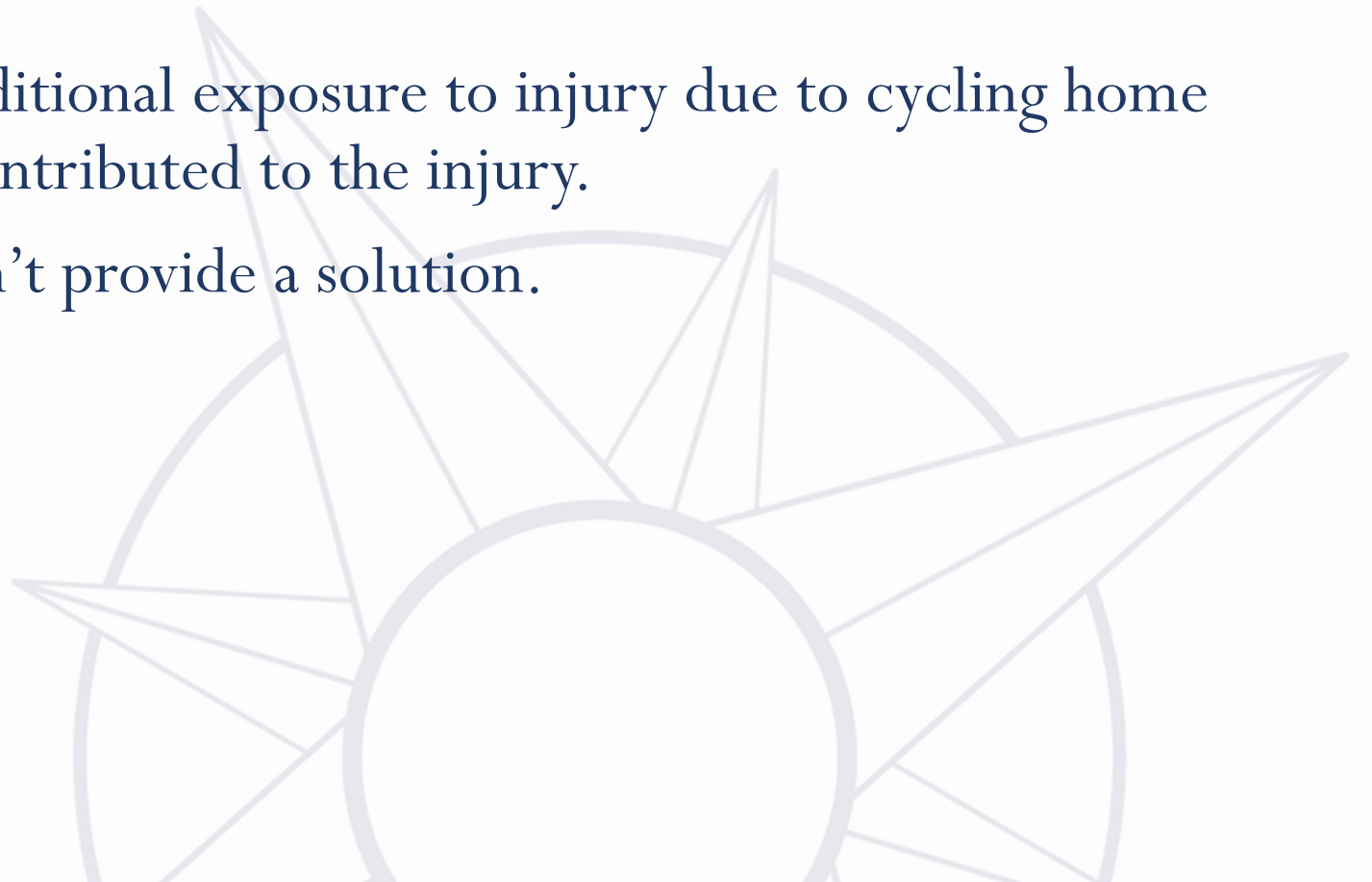


The house of Lords didn't think so - *McGhee v National Coal Board, 1973 SC (HL)*
37

- The pursuer worked all day in a dry dusty brick kiln.
- He cycled home every day caked in dust.
- He developed dermatitis
- Admitted the dermatitis was attributable to the work in the kiln.
- Not a breach of duty to have him work in the kiln
- NCB provided no washing facilities, which was a breach of duty.



- Expert evidence did not answer the question as to how the pursuer developed dermatitis.
- Could not be proven that additional exposure to injury due to cycling home covered in dust materially contributed to the injury.
- Thus *Bonnington Castings* didn't provide a solution.

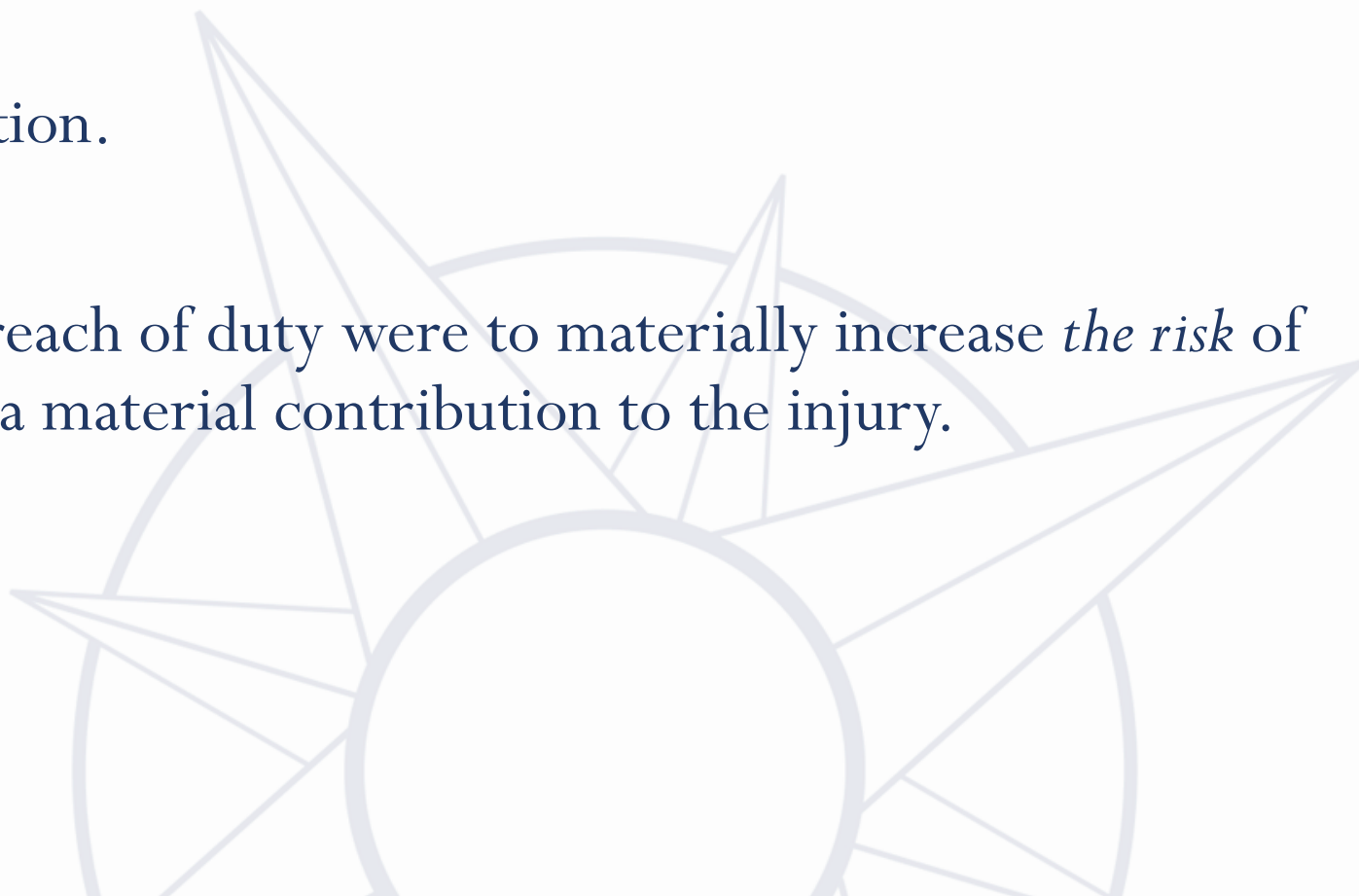




How was the problem solved?

HL took a broad view of causation.

It considered that where the breach of duty were to materially increase *the risk* of injury it was to be regarded as a material contribution to the injury.





Lord Reid:

‘But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man’s mind works in the everyday affairs of life. From a broad and practical view point I can see no substantial difference between saying what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury’.



Lord Salmon:

‘In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the common law’.



Two strands forming:

1. Material contribution to the injury
2. Material contribution to the risk of injury.

A distinction without a difference?





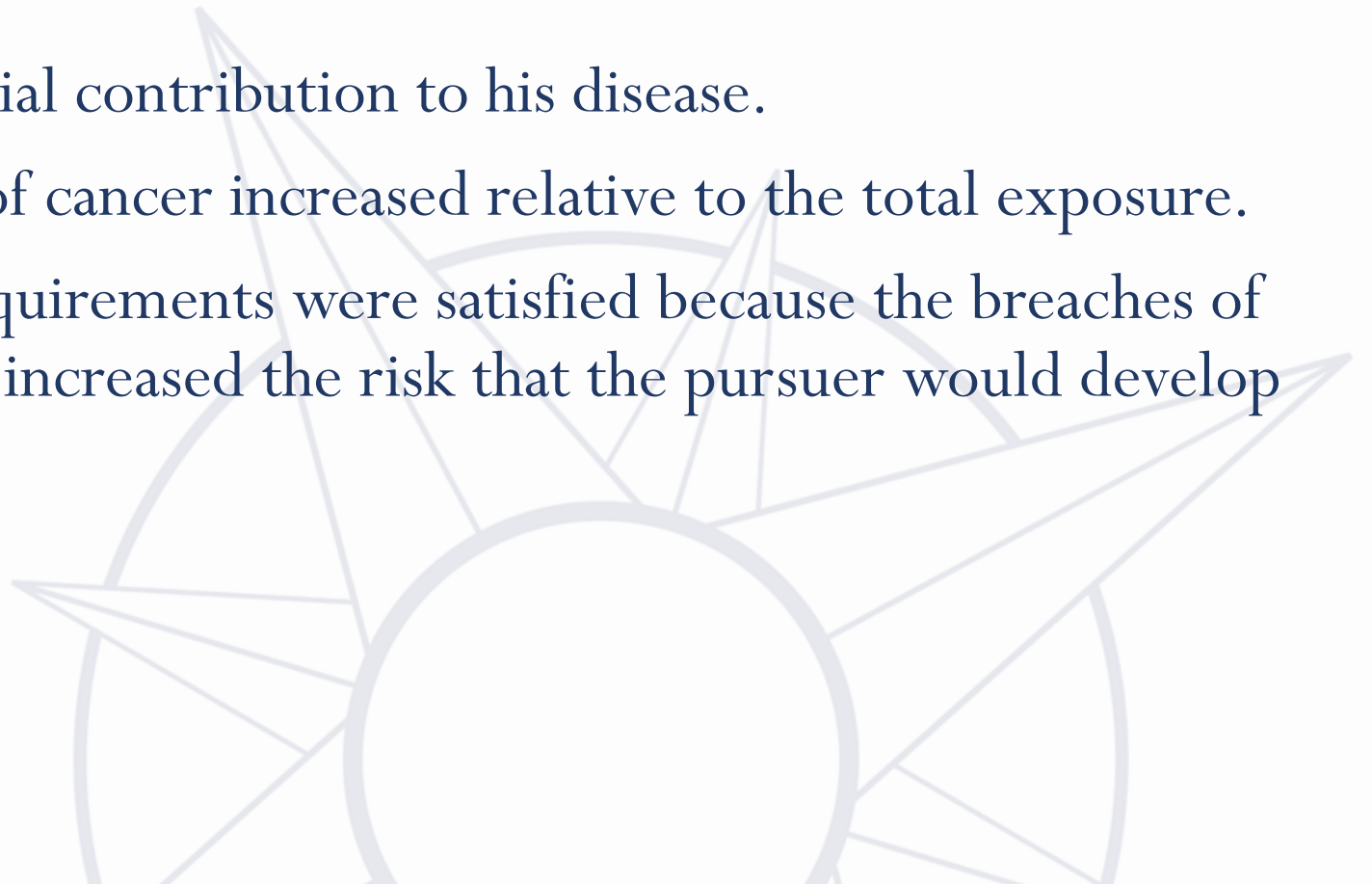
Fairchild v Glenhaven Funeral Services Ltd, [2003] 1 AC 32

Took McGhee that bit further.

- Pursuer was employed by 2 defenders at different times and for different periods.
- Both in breach of duty by exposing him to asbestos which later caused cancer.
- Medical evidence agreed that the cancer was caused by asbestos but could not answer whether it was the exposure with D1 or D2 or both that caused it.



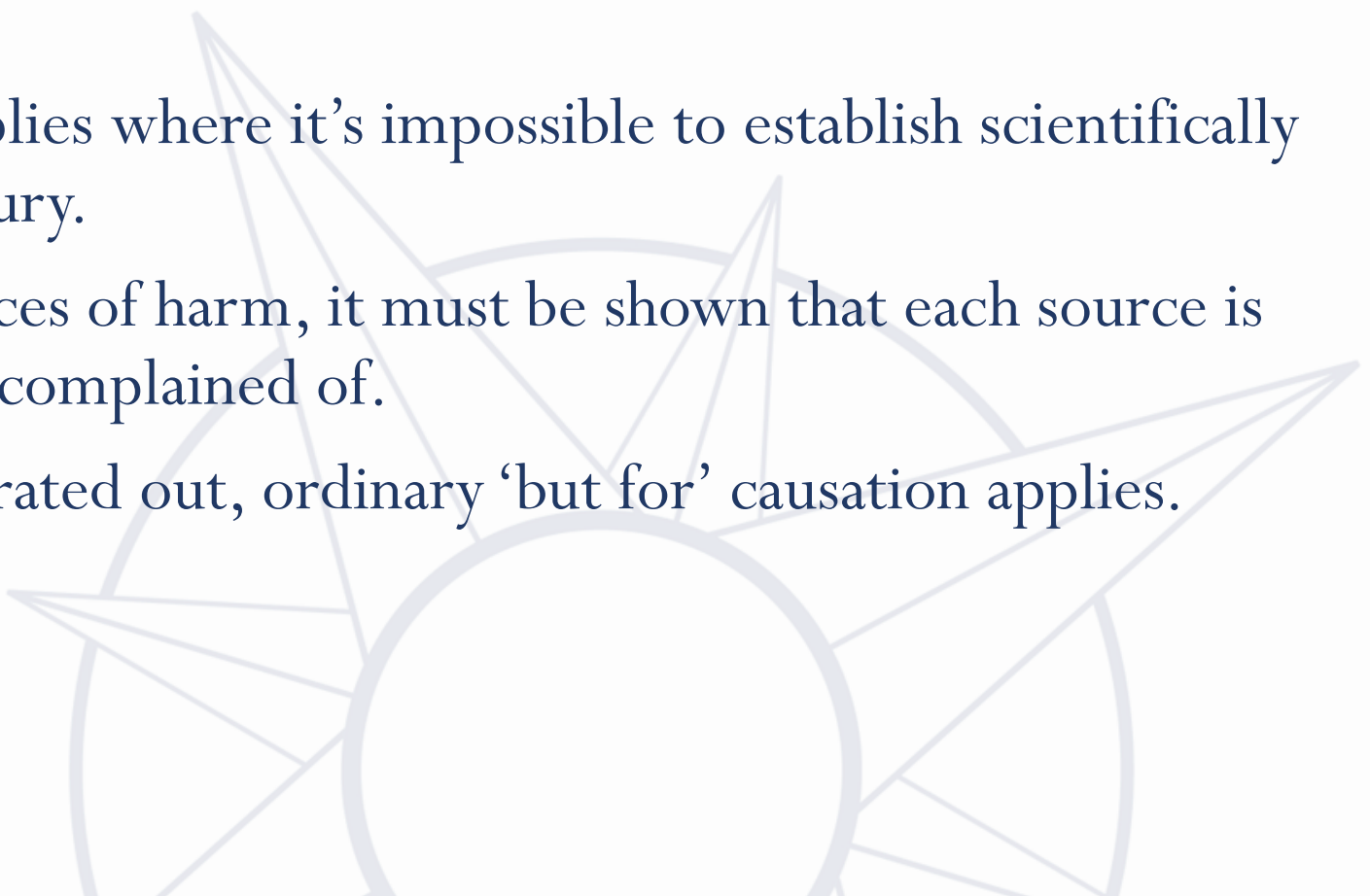
- Was also proven that once established P's condition would not get worse due to further exposure.
- P could not establish a material contribution to his disease.
- It was accepted that the *risk* of cancer increased relative to the total exposure.
- It was held that the causal requirements were satisfied because the breaches of the defenders had materially increased the risk that the pursuer would develop cancer.





Divisible v Non-Divisible

Some important limitations to the application of Material Contribution

- McGhee & Fairchild only applies where it's impossible to establish scientifically the cause of the pursuer's injury.
 - Where there are different sources of harm, it must be shown that each source is capable of causing the injury complained of.
 - Where the cause can be separated out, ordinary 'but for' causation applies.
- 



Material contribution - problems and solutions?





What is 'material'?

- Lord Reid in *Bonnington Castings*:

I do not see how there can be something too large to come within the *de minimis* principle but yet too small to be **material**

[1956] AC 613 at 621



How much is material?

- *Carder v University of Exeter* [2017] ICR 392
- 2.3%?





How much is material?

- Lord Reid in *Bonnington Castings*:

It may be that, of the noxious dust in the general atmosphere of the shop, more came from the pneumatic hammers than from the swing grinders, but I think it is sufficiently proved that the dust from the grinders made a **substantial** contribution

[1956] AC 613 at 622



Material contribution?

- *Bailey v Ministry of Defence* [2009] 1 WLR 1052:

It was sufficient for the claimant to establish on a balance of probabilities that the defendants' lack of care had made a material contribution to the weakness of her condition which led to her cardiac arrest and hypoxic brain damage



Material contribution — Illustrations

- *Clough v First Choice Holidays* [2006] PIQR P22
- *Williams v Bermuda Hospitals Board* [2016] AC 888





‘Unnecessary and insufficient causes’

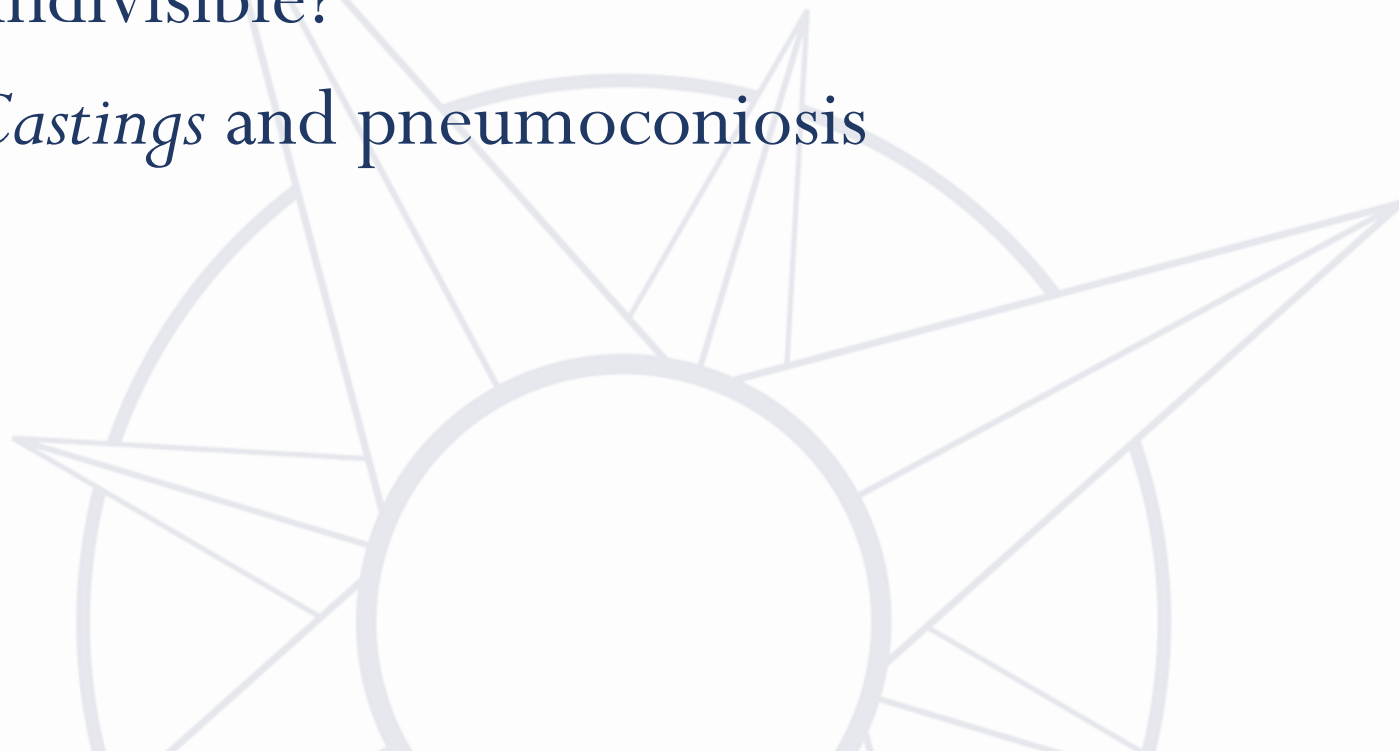
*Financial Conduct Authority v
Arch Insurance (UK) Ltd*
[2021] AC 649





Holmes v Poeton Holdings Ltd [2024] KB 521

- TCE and Parkinson's disease
- Divisible or indivisible?
- *Bonnington Castings* and pneumoconiosis





Material contribution — other examples?

- *Psychological injury*
- *Other diseases?*





Material contribution — other examples?

Sanderson v Hull
[2009] PIQR
P7





Sanderson - Five Fairchild conditions

- The duty in question was specifically intended to protect employees against the risk of a particular disease.
- The duty was intended to create a private law right to compensation.
- The greater the exposure to the harmful agent, the greater the risk of contracting the disease.
- Medical science cannot establish which particular exposure to the harmful agent is more likely than not to have triggered the condition.
- The employee has contracted the disease against which he should have been protected.



Material contribution — conclusions?

‘... an area that has been bedevilled by apparent inconsistency and imprecision at the highest level on multiple occasions’





Questions



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