



Professor Jane Stapleton QC (Hon)
Christ's College, Cambridge

- *Three Essays on Torts* (OUP, 2021)
- Unnecessary Causes (2013) 129 LQR 39
- An 'Extended But-For' Test for the Causal Relation in the Law of Obligations (2015) 35 OJLS 697

Slide 2

[1] Did the insured peril play **any factual role** in how the insured's business interruption loss (BIL) happened? Solely an issue of fact.

[2] Was the connection between the insured peril and the BIL of a character covered by the **intended scope of the policy**? Involves construction.

[3] **Against what bench-mark** did the policy-holder and the insurer intend the business interruption loss should be judged? Involves construction.

Common law accepts that an *unnecessary* factor may be a cause of an oversubscribed indivisible outcome:

- A sufficient fire is a cause of destruction, despite presence of another: *FCA v. Arch Insur. & Oths.* [182]
- A sufficient reason is a cause of a decision to execute a deed, despite presence of another: *Barton v. Armstrong* [1976] AC 104 (PC)

Common law accepts that an *unnecessary* and *insufficient* factor may be **a cause** of an oversubscribed indivisible outcome:

- Pressure exerted by an individual is a cause of destruction of bus, despite pressure by 20 others: *FCA v Arch Insur. & Oths.* [184]
- A wheelbarrow is a cause of a nuisance, despite presence of 100 others: *Thorpe v. Brumfitt* (1872-73) L.R. 8 Ch. App. 650 (CA)
- One download is a cause of a suicide, despite presence of 10,000 others

Slide 5

Common law accepts that an *unnecessary* and *insufficient* factor may be **a cause** of an oversubscribed indivisible outcome:

Despite presence of many others, a reason is a cause of a decision

- to sack employee: *Assoc. Newspapers Ltd v. Dingle* [1961] 2 QB 162
- to market a product: *FCA v. Arch Insur. & Oths.* [185]

Despite presence of many others across the UK, an in-radius COVID case was a factual cause of the decision

- by Government to take action re COVID pandemic

[1] Factual Causation (solely an issue of fact)

Conclusion: in-radius COVID case (the insured peril) was a factual cause of the BIL even though it was not a but-for factor of the BIL [176] [191]

A factor is a cause of an outcome if, but-for it: the outcome would not have happened; or a contribution to the production of the outcome would not have happened. 129 LQR 39; 35 OJLS 697; *Three Essays on Torts* (OUP 2021)

[2] Intended Scope of the Policy/‘proximate causation’ (involves construction)

Conclusion: the intended scope extended to the BIL even though in-radius COVID case was not a but-for factor of the BIL [195]

[3] Intended Benchmark/Trends Clause (involves construction)

Conclusion: the intended benchmark is not ‘but for the in-radius COVID case’. It is, but for ‘circumstances...inextricable linked with the insured peril’ [287]