Revisiting the Test of Material Contribution in Clinical Negligence Claims following Davies v Frimley Health NHS Foundation Trust

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In *Davies v Frimley Health NHS Foundation Trust* [2021] EWHC 169 (QB), the High Court considered the question of causation in circumstances where the deceased had suffered from acute pneumococcal meningitis.

Ultimately, HHJ Auerbach, sitting as a Judge of the High Court, concluded that if antibiotics had been commenced by 10.40 on 25 February 2015, there would still have been enough time for antibiotics to reach the brain, ahead of the tipping point being reached, and to have altered the course of the infection and saved Mrs Davies' life.

Accordingly, "but for" causation was made out, on the balance of probabilities, without the need for the Court to determine whether the failure to administer timely antibiotics made a material contribution to Mrs Davies' death. Nonetheless, HHJ Auerbach analysed the authorities on "material contribution" in a clinical negligence context.

Background

On the morning of 24 February 2015, Mrs Davies complained to her husband of tinnitus in her right ear. By 16.06, she was complaining of being in "*agony*," and her GP diagnosed "*otitis media*" shortly after 17.00. Oral antibiotics were prescribed. Overnight, Mrs Davies vomited several times and became drenched in sweat. She arrived at hospital by ambulance at 08.39 on 25 February 2015.

At trial, it was agreed that it was negligent of the Defendant to have failed to administer IV antibiotics by 10.40 that day. In fact, IV antibiotics were not commenced until 13.20. By 14.30, Mrs Davies' GCS had fallen to 9 and her right pupil was dilated. She had been intubated and ventilated within three hours of that time. By the evening of 27 February 2015, Mrs Davies had died.

Causation

In short, there was disagreement as to whether Mrs Davies had already passed the point of no return by 1040 and would have died in any event, when it was agreed that IV antibiotics should have been administered.

The Experts' Views

Professor Lever, Consultant Microbiologist, was of the view that if antibiotics had been given within an hour of admission and in any event by 10.40, Mrs Davies would have survived on the balance of probabilities. IV antibiotics will "*kill the bacteria … very quickly and reverse pathology and it is not uncommon to see improvement, or at the very least, arrest of decline, within 30-60 minutes of administration*".

Professor Masterton considered that this case was very unusual with Mrs Davies showing a very rapid decline. He concluded, on the balance of probabilities, "*earlier administration of antibiotics … would not have altered the outcome in this case.*"

It was the evidence of the Neurosurgeons, particularly the evidence of Mr Norris, which gave rise to the question of whether causation could be established on the basis that the delay in administration of IV antibiotics made a "material contribution" to Mrs Davies' decline and death. Mr Norris stated:

Between those times (10.10 and 12.00), I consider that the outcome is uncertain and I am not therefore able to express a view on the balance of probabilities. However, I can say with confidence that during the time Mrs Davies deteriorated I consider that any delay between about 10.10 and 12.00 made a material contribution to her decline and death.

Mr Crocker, Neurosurgeon, agreed with Mr Norris' construct but not his timings. His view was that by 10.40 it was already too late to save Mrs Davies' life.

However, it was on this basis that the Claimant argued that it was sufficient to found liability on the distinct legal basis that the negligence made a material contribution to the disease process that led to Mrs Davies' death.

It was argued, on behalf of the Claimant, that there was a distinct doctrine of material contribution which can apply to a case of indivisible injury, arising from a disease process. *Williams v The Bermuda Hospitals Board* [2016] AC 888 was an example of such a case.

The Defendant argued, surprisingly, that there was a line of authority which allowed for the modification of the "but for" test but only where: (a) but for causation could not be determined on the balance of probabilities; and (b) the injury was divisible. As meningitis was indivisible, the material contribution test could not have any application.

Analysis of Legal Principles

HHJ Auerbach, at [200], considered that the following principles of causation were clear:

First, where the harm is divisible, a party will be liable if their culpable conduct made a contribution to the harm, to the extent of that contribution. Secondly, where the harm is indivisible, a party will be liable for the whole of it, if they caused it, applying "but for" principles. Thirdly, if two wrongdoers have both together caused an indivisible injury, in respect of which it is impossible to apportion liability between them, then each is co-liable for the whole of the injury suffered.

The Judge accepted that *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 provided a further distinct route to liability in limited types of cases to which it applies, based on contribution of risk to actual harm.

He considered that since *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, the authorities had wrestled with whether that decision established the existence of an additional route to liability that may be available where none of the three routes identified above applied, and which was conceptually distinct from all of them.

In earlier authorities, it was considered that this was, in fact, the case. For example, in *Bailey v Ministry of Defence* [2009] 1 WLR 1052, the Court of Appeal upheld the decision of Foskett J at first instance. Foskett J was not able to say that, absent the Claimant's negligent care, the injury would not have occurred; but he did consider that both the negligent care and the pancreatitis made a material contribution to the overall weakened state, which in turn caused the aspiration. Accordingly, causation was established. Waller LJ described this as a modification of the "but for" test following the principle laid down in *Bonnington*.

However, in *AB v Ministry of Defence* [2010] EWCA Civ 1317 at [134], the Court said of *Bonnington*:

At no stage in that case was it suggested that the damages should be apportioned as between the effect of the tortious and non-tortious components. If that had been suggested, and if expert evidence had been called showing the effect of the different components (as we think it would be nowadays), the damages would probably have been apportioned.

Lord Toulson, in *Williams*, endorsed this approach and determined that it was accepted in later cases that pneumoconiosis was a divisible disease. Therefore, HHJ Auerbach considered that *Bonnington* would now fall within the first type of case that he described above.

In *Williams*, it was effectively concluded that sepsis was a single agent process causing indivisible harm. The development of sepsis and its effect on the heart and lungs was a single continuous process that continued for a minimum period of two hours 20 minutes longer than it should have done. The Defendant's negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs. Causation was thus established.

Indeed, at [47] Lord Toulson said of *Bailey*:

The Board does not share the view of the Court of Appeal that the case involved a departure from the "but-for" test. The judge concluded that the totality of the claimant's weakened condition caused the harm. If so, "but-for" causation was established. The fact that her vulnerability was heightened by her pancreatitis no more assisted the hospital's case than if she had an egg-shell skull.

Accordingly, HHJ Auerbach considered there was no "*novel legal principle, distinct from the general jurisprudence on co-contribution to divisible and indivisible harm*" established by *Bonnington*, and that *Bailey* was nothing other than the application of the "but for" principle.

Comment

Notwithstanding HHJ Auerbach's analysis of the "material contribution" approach, this case was actually determined on the basis that "but for" causation was made out on the balance of probabilities. On the evidence that was before the Court, the Judge held that Mrs Davies died from a disease which, whilst it involved a process that took its course over a period of time, led to the indivisible outcome of death. The Court's analysis of the expert medical evidence permitted a finding that the traditional "but for" test of causation was satisfied.

The implications, if any, of HHJ Auerbach's analysis were accordingly – and entirely understandably – left unexplored. However, there can be no doubt that the concept of "material contribution" still has an important role to play in cases of indivisible injury, such as pneumococcal meningitis, where the evidence leads to the conclusion that the omission or negligent act of the treating physicians have materially contributed to the continuous process of infection and ultimately, death. Considering the various House of Lords, Supreme Court and Privy Council authorities, the legal position seems to be as follows:

1. The "material contribution" analysis is neither a special route to liability nor a principle of law.

2. Rather, it is a question of evidence and inference that can apply in cases where there is a cumulative or continuous process leading to injury – whether divisible (as in, on contemporary analysis, *Bonnington* itself) or indivisible (as in *Williams*: see [41]). Following *Williams* it can also apply to consecutive, as well as concurrent or simultaneous, breaches of duty.

3. Where the evidence in such a case permits a finding of material contribution, then causation will be established in the orthodox sense. Indeed, in *Causation in Negligence* (Hart Publishing, 2015) at pp. 94-5, Professor Sarah Green suggests that a material contribution analysis is appropriate "*where it is more likely than not that at least one defendant's breach has made a difference to the claimant's outcome, but it is not possible to isolate the physical effects of individual breaches from one another.*"

4. The material contribution analysis does not apply where there are multiple, discrete potential causes (one of which is negligent) but it is not known which was the operative cause: see *Wilsher v Essex Area Health Authority* [1988] AC 1074, 1090-91 per Lord Bridge of Harwich.