Material Contribution in the Spotlight (Again) following Thorley v Sandwell & West Birmingham Hospitals NHS Trust

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This blog deals with the causation aspects of *Thorley v Sandwell & West Birmingham Hospitals NHS Trust* [2021] EWHC 2604 (QB). Philip Godfrey dealt with the factual background and breach of duty aspects of this case in his recent blog.

In short, Soole J preferred the evidence of the Defendant's expert and dismissed the claim on that basis. In so doing, however, he concluded that as a matter of law the material contribution approach to causation does not apply when there is a single tortfeasor and an indivisible injury.

Soole J is surely right to acknowledge that this is an issue "*ripe for authoritative review*" (see [151]), but it is suggested that his reasons for reaching the above conclusion are somewhat questionable.

The Arguments on Causation

The Claimant put his case on a "but for" basis as well as under the material contribution approach. Considering the judge's finding on breach of duty, the question of but for causation did not arise but the material contribution question remained live to the extent of certain admitted breaches: see [82].

The "But For" Approach

Having heard evidence from experts for each party, Soole J preferred the evidence of the Defendant's expert Professor Pasi: see [123]-[136]. He therefore concluded that the Claimant's stroke would have occurred in any event: see [137].

The Material Contribution Approach

Soole J identified the legal issue as "*whether this modified test of causation can be applied to a case where (as admittedly here) the injury is indivisible*": see [138]. He then referred to a number of authorities including *Williams v The Bermuda Hospitals Board* [2016] AC 888 at [31]-[32] per Lord Toulson, *John v Central Manchester NHS Foundation Trust* [2016] EWHC 407 (QB) at [82]-[97] per Picken J, *AB v Ministry of Defence* [2010] EWCA Civ 1317 at [134] & [150] per Smith

LJ, *Heneghan v Manchester Dry Docks Ltd* [2016] 1 WLR 2036 at [23] per Lord Dyson MR and *Davies v Frimley Health NHS Foundation Trust* [2021] EWHC 169 (QB) at [168]-[211] per HHJ Auerbach.

The judge's conclusions on the law at [147]-[151] are concise and worth citing in full:

On the face of it, the Court of Appeal decision in AB *is binding authority that the test of material contribution has no application to a case where (as here) there is indivisible injury and one tortfeasor. However, given the basis on which the appeal in* AB *was argued and decided, I do not read the decision of the Supreme Court as an implicit endorsement of the proposition.*

On the basis of the cited passage, Heneghan *is to the same effect; albeit a later passage might suggest that the distinction between divisible and indivisible injury was being viewed through the lens of the comparative difficulty of proof of material contribution. Thus the* Bonnington *test '… is to be applied where the court is satisfied on scientific evidence that the exposure for which the defendant is responsible has in fact contributed to the injury. This is readily demonstrated in the case of divisible injuries (such as silicosis and pneumoconiosis) whose severity is proportionate to the amount of exposure to the causative agent': [46].*

By contrast, the observations of the Privy Council in Williams *provide support for the rival contention; in particular through the endorsement of Professor Green's statement of 'trite negligence law'; the treatment of* Bonnington *as a case where material contribution by a single tortfeasor was established on the basis (at least, as presented to the court) that the injury of pneumoconiosis was indivisible; and the footnote citation of Lord Phillips of Worth Matravers in* Sienkiewicz. *However whilst evidently highly persuasive, they are not strictly binding even if part of the ratio.*

As to the very detailed discussion of the law of material contribution in John *(Picken J), I do not read it as dealing directly with this particular issue.*

This is evidently a legal issue which is ripe for authoritative review, at least in a case where it may affect the result. On the basis of strict precedent, I conclude that the reasoning of the Court of Appeal in AB *and* Heneghan *must be followed. Accordingly the claim of material contribution must fail on the basis that this modified test of causation does not apply when there is a single tortfeasor and an indivisible injury.*

Soole J then went on, for completeness, to deal with the question whether the omission of warfarin made a material contribution to the occurrence of the Claimant's stroke on the facts. He concluded that it did not on the basis of the Defendant's expert evidence, which he preferred as above.

Comment

The conclusion that the material contribution approach does not apply where there is a single tortfeasor and an indivisible injury could be seen as a rather surprising one.

On the face of it, it is inconsistent with *Bonnington* itself, where Lord Reid considered at p. 621 that "*the disease is caused by the whole of the noxious material*" and that the question was "*whether the ['guilty dust'] materially contributed to the disease*." Thus, there was a single tortfeasor and a single process with two potentially contributory causes ('innocent dust' and 'guilty dust'). The harm in *Bonnington* was viewed, at the time it was decided, as indivisible – see *Bonnington* at p. 621, *Williams* at [32] and *Davies* at [206] – but that was no bar to the operation of the material contribution approach. This situation, with a single process but multiple causal agents, it is to be contrasted with a situation where there are multiple, discrete causal processes e.g. *Wilsher v Essex Area Health Authority* [1988] AC 1074.

Moreover, whilst *Davies* may appear to support the proposition that the material contribution approach only applies where "*two wrongdoers have both together caused an indivisible injury, in respect of which it is impossible to apportion liability between them*" (see [200]), HHJ Auerbach noted that this category encompasses *Bonnington* as understood at the time it was decided: see [206], n. 13 ("*with one party being the source of both causes*").

Turning to the more fundamental alleged conflict between the approaches in *Williams* (citing Professor Green and *Sienkiewicz*) and in *Heneghan* and *AB*, it could be argued that the word "indivisible" is used by these authorities in different ways.

- In *Sienkiewicz* at [90], Lord Phillips of Worth Matravers opined that a party who has "*tortiously contributed to the cause*" of an indivisible disease will be liable in full (emphasis added). This is carried through to Lord Toulson's advice in the *Williams* case and is consistent with Professor Green's approach that the material contribution analysis applies "*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*" (*Causation in Negligence* (Hart Publishing, 2015) at pp. 94-5). For the reasons above, it can be argued that it will also apply where it is not possible to isolate the effect of any breach of duty from any other non-tortious effects.

- The word indivisible is thus used in this context to describe conditions where it can be said that various cumulative factors have contributed to the overall condition, but the effect of those factors cannot be separated in the result.

- In *AB* at [134], Smith LJ noted that the material contribution approach is available "*where the negligent and non-negligent causative components have both contributed to the disease (as opposed to the risk of the disease) and it is not possible to apportion the harm caused and therefore the damages*" but may only operate "*where the severity of the disease is related to the amount of exposure*". Ignoring for a moment the inconsistent nomenclature, this summary seems consistent with the approach in *Sienkiewicz*, *Williams* and of Professor Green as to when the material contribution approach can apply.

- Later in *AB*, at [150], Smith LJ opined that the material contribution approach "*only [applies] where the disease or condition is 'divisible' so that an increased dose of the harmful agent worsens the disease*" (emphasis added). *Bonnington* was then given as an example of such a case. Smith LJ went on to hold that cancer is indivisible in that "*one either gets it or one does not.*"[1]

- As *Bonnington* itself and the subsequent analyses of it demonstrate, an increased dose of a harmful agent may well worsen a disease in circumstances where it is not possible to isolate the physical effects of individual breaches from one another. In this sense, the damage is indivisible even if the process leading to it is cumulative. In other words, a contribution "*to the cause*", to use Lord Phillips' phrase, can be proved even if a precise contribution to overall result cannot (see also Professor Green's formulation quoted at the first bullet point above). Such cases will usually involve multiple tortfeasors but may involve a single tortfeasor alongside non-tortious factors. It is suggested that this is the sense in which the word "indivisible" is used in *Sienkiewicz* and *Williams*.

- *AB* and *Heneghan* both use "indivisible" in a different sense, where it is not possible to show that a particular causal factor has made any contribution "*to the cause*" of a disease.

- Once this difference in meaning is understood, it is arguably possible to reconcile *Sienkiewicz* and *Williams* with *AB* and *Heneghan*.

All of these points – to which it is acknowledged there are counterarguments – suggest that there are circumstances in which the material contribution approach may apply in a case involving a single tortfeasor and an "indivisible" injury (in the sense of cumulative causes combining to form a single injury where the precise effects of individual contributions cannot be isolated).

It is accordingly suggested that the operation of the material contribution approach may not be quite as 'black and white' as Soole J's analysis suggests. That said, precisely where the line is to be drawn, and the correctnesss of the many authorities cited, remains a matter for argument. It therefore seems likely that these issues will find their way to the appellate courts again before too long. Whether this is in the context of clinical negligence or industrial disease (as to which, see my blog here) remains to be seen.

[1] It is right to acknowledge that Lord Phillips in *Sienkiewicz* gave lung cancer as an example of an indivisible condition where a contribution to the cause may be proved. This appears to follow from his Lordship's analysis at [75] of Mackay J's decision in *Shortell v BICAL Construction Ltd* (QBD, 16 May 2008). Whether lung cancer – or cancer more generally – is properly to be treated as such a condition now seems unlikely, to say the least (see e.g. *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) at [8.53]-[8.61] per Swift J) but, ultimately, it can be argued that it is a matter of expert evidence whether a condition is (i) divisible, (ii) indivisible in Lord Phillips' sense or (iii) indivisible in Smith LJ's sense: see e.g. *BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1 at [93] per Irwin LJ and my blog here.