



CAUSATION: MATERIAL CONTRIBUTION TO INJURY

Williams v The Bermuda Hospitals Board [2016] UKPC 4

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Facts: The Claimant attended at the emergency department of a hospital run by the Defendant and was complaining of abdominal pain. He was suffering from acute appendicitis. A CT scan was ordered at approximately 13.10, but was actually performed at 17.27. The report was not received until 19.30, and the Claimant was taken into theatre for an appendectomy at 21.30. During the procedure his appendix was found to have ruptured and there was a widespread collection of pus which led to myocardial ischaemia. The evidence suggested that there would likely have been some pus accumulating due to sepsis for approximately six hours. The Claimant brought proceedings against the Defendant for the complications which he alleged were the result of a negligent delay in his treatment.

The trial judge found that due to a failure to order the CT scan on an urgent basis, there had been an avoidable delay of between four hours 15 minutes and two hours 20 minutes in the start of the operation. However, he held that although there had been negligence, the Claimant had not proved that the culpable delay caused the complications. He awarded \$2,000 in damages for the extra suffering during the period prior to the appendectomy being carried out.

The Court of Appeal subsequently reversed this decision on the basis that the correct test here was whether the breaches of duty by the hospital contributed materially to the injury, and, finding that they did, remitted the case for a fresh assessment of damages.

Held: The Defendant appealed, submitting that this was not a case where *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 applied since the sepsis attributable to the hospital's negligence developed *after* sepsis had already begun to develop. The Privy Council rejected this argument.

Bonnington was not confined to cases in which the timing of the origin of multiple contributory causes to the Claimant's damage is simultaneous. As a matter of principle, successive events are capable of each making a material contribution to the subsequently adverse outcome.

In the present case, injury to the Claimant's heart and lungs was caused by a single known agent (the sepsis from the ruptured appendix). It was not divided into separate components, and its effects, including the progressive myocardial ischaemia, were part of a single continuous process. On the balance of probabilities the hospital's negligence materially contributed to this process and therefore materially contributed to the injury to the heart and lungs. The appeal was dismissed.

Material Contribution

The Privy Council provided helpful confirmation that the causation principles set out in *Bonnington*, *Hotson v East Berkshire Health Authority* [1987] AC 750, and *Wilsher v Essex Area Health Authority* [1988] AC 1074 remained good law. They specifically confirmed the reasoning in *Bonnington*, namely that where an injury is not divisible, the relevant question is whether the negligence is a partial cause of the entire injury, as opposed to a complete cause of part of the injury. It does not then matter whether this negligent cause acts concurrently to any non-negligent causes, or consecutively.



In either event, as long as the claimant proves that on a balance of probabilities that the negligent actions materially contributed to the overall injury, he or she will succeed in establishing liability for the whole injury. The sequence of events may be relevant in considering whether a later event has in fact made a material contribution to the outcome or instead wholly overtaken an earlier event, but the judgment emphasises that these are all evidential considerations for individual cases which do not detract from the overall principle.

What is particularly interesting in the judgment however is the Privy Council's approach to the decision in *Bailey v Ministry of Defence* [2009] 1WLR 1052. They considered, albeit in obiter comments, that the Court of Appeal in *Bailey* had been wrong to treat that case as a departure from 'but for' causation, based on the findings of fact made by the trial judge that the totality of the claimant's weakened condition caused the harm. Instead, the Privy Council considered that in *Bailey* 'but-for' causation was established, as it was an example of the principle that a tortfeasor takes his victim as he finds her: "*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.*" One might consider that this leaves the status of the Court of Appeal's decision in *Bailey* somewhat questionable if relying upon it in cases of material contribution to injury, although the general principles in respect of material contribution remain unchanged. The safest course of action for claimants in material contribution cases may then be to focus on *Bonnington* until an appellate court has the opportunity to clarify this point.

Doubling of risk

The Privy Council also took the opportunity to provide some obiter guidance on the 'doubling of risk' test in deciding questions of causation. This view was expressed by Baroness Hale in *Sienkiewicz v Greif* [2011] UKSC 10, who said that whether the risk of a particular disease has been doubled is not an appropriate test of causation in cases where the *Fairchild* exception does not apply. Causation is a concept that looks backwards to find the probable cause of the disease the claimant now has. Just because a disease has in fact materialised, the existence of a statistically significant association between a risk factor and the claimant's disease does not prove in that individual case that the disease was in fact caused by the same risk factor. The Privy Council in *Williams* advised caution in the use of the 'doubling of risk' argument as a tool for attempting to invite inferences of causation simply on the basis of a heightened risk, which may still be very small even when doubled.