

MATERIAL CONTRIBUTION

The *Williams v Bermuda Triangle*

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Causation

- *Clinical Negligence*, (APIL & Jordan Publishing, 2014, 2nd edn.)
- “... *the law in this regard is complex and not always consistent*”

Today's talk

- What material contribution is *not*
- Competing causes (*Hotson / Wilsher*)
- Material contribution (*Bonnington / Bailey / Williams*)
- Practice points / Can you turn a competing cause into a material contribution?

'But for' causation...



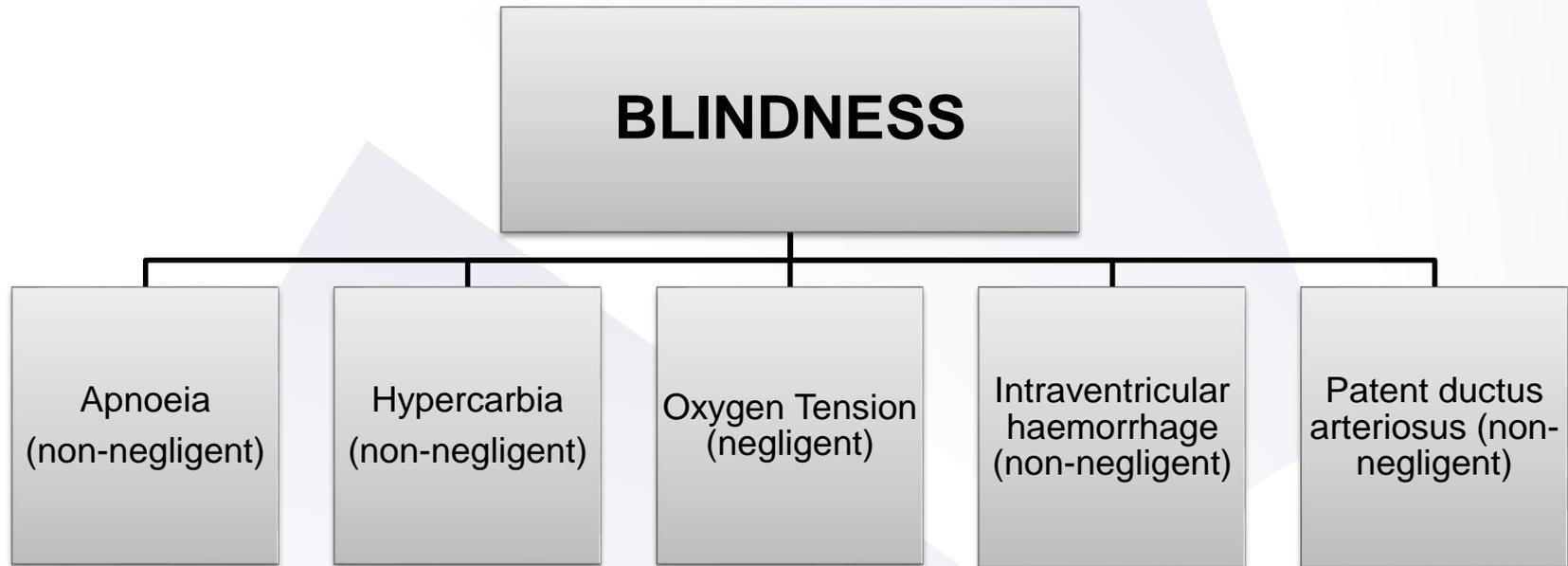
'But for' causation

- The one everybody understands (except clients)
- Often phrased 'in reverse': *if there had been no negligence, would the injury still have been sustained in any event?*

'Competing causes'

- ☹️
- 'Either or' cases
- *Hotson* [1987] AC 750
- *Wilsher* [1988] 1 AC 1074

Wilsher – the actual competing causes



Competing causes v Material contribution



Material contribution

- 😊
- *Bonnington*
- *Bailey*
- *Williams*

Bonnington Castings [1956] AC 613

- C contracted pneumoconiosis due to inhaling silica dust at work
- Most dust had a non-negligent cause
- Minority of dust had a negligent cause
- Fact: pneumoconiosis was caused by gradual accumulation of silica in lungs, with both sources contributing

Bonnington: the key points

The correct question is not ‘which source of dust’ probably caused the disease, because the disease could not be entirely attributed to one source or the other: negligent and non-negligent dust acted together

Bonnington: the key points

The cause of the disease was the dust from *both* sources: the real question was whether the ‘negligent’ dust made a material (*ie*, a more than minimal) contribution to the disease

Bailey v MoD [2008] EWCA Civ 883

- Surgery to remove gallstone
- **Negligent period of care / failure to resuscitate: leading to weakness**
- Transfer to different hospital
- **Non-negligent development of pancreatitis: leading to weakness**
- C throws up, and because of weakness cannot cope with own vomit
- The most likely cause of vomit was (non-negligent) pancreatitis
- C aspirates vomit → cardiac arrest → brain damage

Bailey: the key points

It was *enough* for C to establish that, on the balance of probabilities, a lack of care made a material contribution, namely something greater than negligible, to the weakness of her condition, although that was not an application of the "but for" test

Bailey: the key points

In a case where medical science could not establish the probability that "but for" an act of negligence the injury would not have happened, but *could* establish that the contribution of the negligent cause was more than negligible, **the "but for" test was modified**, and the claimant would succeed

Williams v Bermuda Hospitals [2016]

UKPC 4

- C arrived at A&E w. acute appendicitis
- There were delays in his treatment and his appendix ruptured → sepsis → damaged heart and lungs
- The rupture / development of sepsis were gradual
- Negligence added *about* 3 hrs to the delay in D operating on C

Williams – trial judge's decision

- Without the negligent part of the delay, C *might* have avoided the injury, but it could not be said that he *probably* would have
- Causation was therefore not made out and the claim failed

Williams – Privy Council judgment

- Injury in this case was caused by the single continual process of developing sepsis causing myocardial ischaemia
- The sepsis was not divided into separate components causing separate damage
- The negligent part of the delay in treatment probably contributed materially to the process, and therefore to the injury: C wins

Williams – Privy Council comments

- *Bailey* was correctly decided, *but* wrong to state that ‘material contribution’ cases involved a modification of the ‘but for’ test
- In *Bailey* C had proved a more than minimal contribution to her injury – something which has always been enough to establish causation

Material contrib'n: when will it apply?

When:

- A number of **factors act together** (in combination or in sequence) to cause C's injury
- One of those factors results from D's negligence
- That *negligent* factor makes a 'more than minimal' (*ie, a material*) **contribution to the injury**, and
- Science is unable to answer the question: 'would the injury still have occurred without the negligent contribution?'

Practice points I

- What is the injury?
- Do you have anything smaller?
- *'Let me ask you that question another way Doctor...'*

Practice points II

- What is the process leading to injury?
- Can you turn a ‘competing cause’ case into a ‘material contribution’ case?