MATERIAL CONTRIBUTION

The Williams v Bermuda Triangle

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Causation


- "... 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

- Apnoea (non-negligent)
- Hypercarbia (non-negligent)
- Oxygen Tension (negligent)
- Intraventricular haemorrhage (non-negligent)
- Patent ductus arteriosus (non-negligent)
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
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
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.
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
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
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.
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?