MATERIAL CONTRIBUTION IN 'INDIVISIBLE INJURY' CASES – THINK AGAIN?

Introduction

It's well beyond the scope of a short article like this to examine the full history of an area of law as complicated as material contribution: my aim is just to make you aware of two recent cases that have shaken things up a bit, making this area of law trickier than ever.

Those of you who have a material contribution case in your back catalogue may want to revisit it in light of the decisions in *Davies* and *Thorley*, just to check whether anything has changed…

Background

Anyone who has practised in clinical negligence for long knows that causation is often a messier battleground than breach of duty.

There are of course two ways in which a claimant can establish causation: (i) by showing 'but for' causation, or (ii) by demonstrating that the defendant's breach of duty has made a 'material contribution' to their injury.

'But for' causation does what it says on the tin: if the expert evidence establishes that but for the defendant's error the harm would have been avoided, then the claimant will succeed. The converse is also true, and if the evidence shows that a given injury would probably have occurred irrespective of the alleged negligence, then the claim will fail.

Material contribution, however, is where things get a lot more complicated: it comes into play when science/medicine *can't say* whether the claimant would or would not have suffered the injury in question on the balance of probabilities (if not for the breach of duty), but *can say* that the error made a material contribution to the injury. Clinical negligence practitioners have been running cases on this basis since the late noughties (after the Court of Appeal decision in *Bailey v Ministry of Defence* [2008] EWCA Civ 883).

Divisi-what?

The significance of the more recent case law (discussed below) is that it throws a renewed focus on the question of whether the injury in question is 'divisible' or 'indivisible'.

For those of you wondering what this means: the law on material contribution initially developed through industrial disease, not clinical negligence, cases. Those authorities tended to involve claimants who had been exposed to a dangerous substance or agent while they were at work, and who developed some awful illness or condition as a result.

The distinction between divisible and indivisible injuries was based on the premise that in some conditions an increased dose of the harmful agent worsened the disease (this is a 'divisible' injury); whereas in others an increased amount of the agent that *caused* the disease did not make the disease itself worse (an 'indivisible' injury).

A common example of a 'divisible' injury would be pneumoconiosis: the more dust a worker inhaled, the worse their lungs got. The classic example often used for an 'indivisible' injury is cancer: this condition either does or does not develop, and the cancer isn't more severe because the person has been exposed to a greater amount of the agent that caused it.

The new cases

(1) Davies v Frimley [2021] EWHC 169 (QB)

Mrs Davies sadly died of bacterial meningitis. D admitted a negligent delay in commencing intravenous antibiotics (these should have been started at 10.40am but were not in fact started until 1.20pm), and C put the case on both a 'but for' and a 'material contribution' basis: arguing (i) that if antibiotics had been started at 10.40am then Mrs Davies would probably have survived, and alternatively (ii) that the failure to start antibiotics earlier made a material contribution to her death.

The judge found for C on a 'but for' basis, so his remarks on material contribution are not part of the core rationale of the judgment, but it's worth looking at the case both for its comprehensive review of the relevant authorities (see paras. 170-190), and because of the judge's subsequent comments on the law.

The judge held that Mrs Davies's injury (death from meningitis) was indivisible, and that *Bailey* was *not* in fact a case which departed from the normal rule that a claimant who had suffered an indivisible injury had to prove 'but for' causation. He also commented that:

One of the hazards when seeking to interpret the discussion in the later authorities, is that labels like 'material contribution'… are not always used in the same sense. (para.202)

This is undoubtedly correct, but it's not the only linguistic difficulty: there is also real scope for confusion over whether an injury is divisible or indivisible. In this case the judge mentioned that the injury (death) was indivisible, but arguably without looking at the *mechanism* by which that injury came about (progressing bacterial meningitis).

This raises the question: what has to be divisible to make a material contribution argument viable – the pleaded injury, or the process that led to it?

(2) Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB)

In this case C suffered a stroke and both parties admitted that this was an indivisible injury. There was an admitted breach of duty relating to a delay in recommencing warfarin (a blood thinning agent), which C had pleaded as the cause of the stroke on both a 'but for' and a 'material contribution' basis.

C's 'but for' case failed and the judge went on to consider the arguments in respect of material contribution.

C said that the existing case law demonstrated that the indivisibility of the injury was not a barrier to success. D on the other hand cited *Ministry of Defence v. AB* [2010] EWCA Civ 1317, and asserted that the doctrine of material contribution could only assist a claimant in a case '*where the disease or condition is "divisible", so that an increased dose of the harmful agent worsens the disease*' (set out in para.143 of *Thorley*).

The judge felt that he was bound by authority (principally *AB*) and held that:

the test of material contribution has no application to a case where (as here) there is indivisible injury and one tortfeasor (para.147)

albeit that at the same time he indicated that '*this is evidently a legal issue… ripe for authoritative review*' (para.151).

Where are we now?

The answer is a clear '*who knows?*', although I suspect that most county court judges hearing a material contribution case would feel bound to conclude, following *Thorley*, that a single-defendant 'indivisible injury' case based on material contribution would have to fail.

A number of commentators writing about these cases have suggested that they were wrongly decided, and the comment from the judge in *Thorley* that the issue should be looked at by the higher courts will probably end up being an invitation to someone.

In the meantime, if you have a material contribution case it may well be worth thinking very carefully about the expert evidence, and about how to describe the injury – or the way in which it came about – and about whether one or both of those should properly be characterised as divisible or indivisible.