



# Brain injury cases and material contribution

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# Causation ≠ cause and effect

- *“The problem at the heart of this case rests in the law's attempts to contain the kaleidoscopic nature of the concept of causation within a decent and rational system for the compensation of innocent persons who suffer injury by reason of other people's wrongdoings. The common law has on the whole achieved just results, but the approach has been heavily pragmatic.”*
- ***Rahman v Arearose Ltd v University College London NHS Trust*** [2001] QB 315

# Brain injury cases and material contribution

- ❑ Brain injury cases (not birth injury) in the clin neg context can involve:
  - Infection (meningitis) type cases
    - Davies v Frimley Health NHS Foundation Trust [2021] EWHC 169 (QB)
  - Trauma
    - John v Manchester University Hospitals NHS Foundation Trust [2016] EWHC 407 (QB)
  - Slow growing tumours (meningiomas)
    - E.g. delayed referral by primary health care

# Brain injury cases and material contribution

- ❑ Skull a closed container
- ❑ Trauma, infection, slow growing tumours
  - Rising intracranial pressure
  - Raised ICP leads to permanent brain injury
- ❑ Where delay neuropsychological deficits may be larger
- ❑ But how do you disentangle neuropsychological deficits attributable medical condition vs those of delay?
- ❑ Is it difficult or impossible (beyond the realms of scientific knowledge) to disentangle?

# Material Contribution: CA authority in the clin neg context

- Material contribution just a conceit of disease injury lawyers?
- ***Bailey v MOD* [2008] EWCA Civ 883**

*In my view one cannot draw a distinction between medical negligence cases and others.*  
(Waller LJ [46])

- ❑ Remains good law - binding

# Bailey: Material contribution

## □ The Bailey criteria:

- Multiple causes for the injury
- Tortious and non-tortious causes
- Medical science unable to determine the relative contribution of the causes – so impossible for C to fulfil but for test
- But medical science must be able to conclude that the contribution of the negligent cause was more than minimal

# Material contribution application

- *Williams v The Bermuda Hospitals Board* [2016] UKPC 4
- ❑ Another clin neg case
- ❑ Application of the material contribution exception:
  - Simultaneous causes only; not sequential causes?
  - i.e. Not cases relating to delay?
  
  - “...it is immaterial whether the cumulative factors operate concurrently or successively.” [38]
- ❑ BUT
  - Sequential cause cases may give rise to evidential issues
  - Has the contribution by the negligence been “overtaken” by later events [39]

# Material contribution application

- ❑ Privy Council in *Williams* endorsed *material contribution* exception
  - *Bonnington Castings Ltd v Wardlaw* [1956] AC 613:
  - re-affirmed
  
- ❑ Professor Sarah Green's analysis accepted
  - where a defendant has been found to have caused or contributed to an indivisible injury, she will be held fully liable for it, even though there may well have been other contributing causes ...”



## Material contribution in a brain injury case

- ❑ ***Dr Sido John v Central Manchester and Manchester Children's University Hospitals NHS Foundation Trust [2016] EWHC 407 (QB)***
  
- ❑ GP fell at his home after a night out.
- ❑ Alleged, and proved, negligent delay in his treatment (the arrangement of a CT scan and the provision of a 'blue-light' ambulance to take him to a specialist centre).
- ❑ He suffered brain injury as a result of:
  - ❑ raised intra-cranial pressure (negligent),
  - ❑ the initial head injury (non-negligent) and;
  - ❑ post-operative infection (non-negligent).

# Material contribution in a brain injury case

- ❑ ***Dr Sido John v Central Manchester and Manchester Children's University Hospitals NHS Foundation Trust [2016] EWHC 407 (QB)***
  
- ❑ For the material contribution exception to apply
  - ❑ *not merely difficult but is impossible to allot particular loss to a particular cause [99]*
  
- ❑ If damage can disentangle as between causes
  - ❑ A divisible injury
  - ❑ Apportionment of damages

# Davies v Frimley Health NHS Foundation Trust [2021] EWHC 169 (QB)

- ❑ *Obiter comments* on material contribution
- ❑ *I conclude that, while Bonnington Castings was viewed in Bailey as establishing a novel principle, later authorities of the Court of Appeal, House of Lords and Privy Council view it as having resulted in an anomalous outcome, for peculiar reasons, and not as standing for any novel legal principle, distinct from the general jurisprudence on co-contribution to divisible or indivisible harms. [209] HHJ Auerbach*
- Demonstrably wrong:
  - *Bonnington Castings* – repeatedly endorsed by Supreme Court
  - *Bailey* – Analysis of facts criticised in *Williams* but statement of principle not
  - *Williams* – Reiterated *Bonnington* principle in clin neg context

# But that does not mean material contribution is not controversial...

- ❑ ***Melissa Rich (a protected party by her mother & litigation friend Helen Rich) v Hull & East Yorkshire Hospitals NHS Trust [2015] EWHC 3395***
- ❑ Professor Jane Stapleton
  - it is unnecessary to require any modification of the “but for” test at all; it is sufficient in this type of case for the Claimant to prove that the Defendant’s negligence contributed to the mechanism which led to her indivisible injury.
- ❑ But Prof Stapleton’s conception does not reflect the authorities - therefore not the law
- ❑ E.g. Jay J – concluded if found for C on breach would have applied *Bailey etc.* as bound by it [211]