Next Talk: 09:00 – 09:40

Material Contribution

Where we are, where we are going, and why

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What we will cover today

- **Davies v Frimley** [2021] EWHC 169
  - A paradigm of the issues (to be revisited)

- **(1) What is material contribution?**
  - Early origins of the doctrine
  - Bonnington Castings v Wardlaw [1956] AC613
  - McGhee v National Coal Board [1973] 1 WLR 1 HL
  - Fairchild v Glenhaven Funeral Services [2002] UKHL 22
  - Sido John v Manchester [2016] EWHC 407 (QB)

- **(2) The current state of the law**
  - Outside industrial disease
  - In the industrial disease context
  - Davies v Frimley

- **(3) The future**
  - Where do we go now?

Davies v Frimley – a paradigm of the issues

- On the morning of 24 February 2015 Mrs Davies complained to her husband of tinnitus in her right ear.
- Throughout the course of the day, she developed a painful headache.
- She visited her GP, who diagnosed a middle ear infection and prescribed oral antibiotics.
- Mrs Davies' condition deteriorated during the night.
- On the morning of 25 February 2015, the pain was so great that she was taken to hospital by ambulance.
- At 10.10 Mrs Davies was prescribed anti-sickness medicine and morphine sulphate.
- Mrs Davies was then sent for a CT scan.
- Intravenous administration of the antibiotic Augmentin began at 13.20.
- By the time that the matter came to trial it was admitted and agreed that the Defendant was negligent by failing to begin administering antibiotics by 10.40 that day.
- Sadly, on the evening of 27 February 2015, Mrs Davies was declared dead.

To be revisited...

(1) What is material contribution?

- Three orthodox routes to proof (*Davies v Frimley*):
    1. First, where the harm is **divisible**, a party will be liable if their culpable conduct made a contribution to the harm, to the **extent of that contribution**.
    2. Secondly, where the harm is **indivisible**, a party will be liable for **the whole** of it, if they caused it, applying "but for" principles.
    3. Thirdly, if two wrongdoers have both together caused an **indivisible** injury, in respect of which it is **impossible to apportion** liability between them, then each is **co-liable** for the whole of the injury suffered.
- Bonus fourth route: *Fairchild v Glenhaven* – material contribution to risk.
- But what about material contribution in circumstances where there is another agency and indivisibility? The meaning and extent of material contribution is rather more complex at a granular level and the position of a single tortfeasor and an apparently indivisible injury has very much been 'in the news'.

(1) What is material contribution?

Early origins of the doctrine

- Material contribution did not start with *Bonnington Castings v Wardlaw.*
- See *Mist* v. *Toleman & Sons* [1946] 1 A.E.R. 139, *Watts* v. *Enfield Rolling Mills (Aluminium) lul.* [I952] I A.E.R. 1013
- Lord Justice Scott in *Vyner* v. *Waldenberg Brothers, Ltd.* [1946] K.B. 50:

  "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

- Lord Goddard in *Lee* v. *Nursery Furnishings Ltd.* [1945] 1 A.E.R. 387:

  "In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident."

(1) What is material contribution?

Bonnington Castings v Wardlaw

- C developed pneumoconiosis during the course of his employment with D.
- Two factors contributed to the pneumoconiosis: silica dust particles from the operation of swing grinders (“guilty dust”) and silica dust from the operation of pneumatic hammers (”innocent dust”).
- Could the guilty dust be a cause of C’s pneumoconiosis which had developed over an extended period?
- Lord Keith’s view was that the swing grinder guilty dust ingestion must have been substantial even if small in proportion.
- Prima facie the particles accreted to cause the pneumoconiosis ie **cumulatively**. But beyond that nothing could be said about proportion or relative causative potency.
- On its face this was a case of a single tortfeasor, with an indivisible injury.

(1) What is material contribution?

Bonnington Castings v Wardlaw (A)

- Lord Keith: "*On the whole evidence I consider that the pursuer has discharged the onus that is upon him of showing that the defenders' fault was a material contributing cause of his illness.*"

- Lord Reid: "*In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota 'of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the appellants.*"

(1) What is material contribution?

Bonnington Castings v Wardlaw (B)

- *Bonnington* would now be decided differently on the science but is arguably a sub-category of material contribution where the injury is divisible in principle but where it is not possible to attribute constituent parts to particular factors.
- However, look again at how the factual matrix built in *Bonnington*:
  - (a) breach
  - (b) of a kind that might be expected to produce particular injury
  - (c) with nothing to displace the presumption
  - (d) equals proof on balance of probabilities.
- But that might not always be the case...

(1) What is material contribution?

A fork in the road: McGhee v National Coal Board

- C contracted dermatitis from the presence of brick dust on sweaty skin, which could happen without any negligence on the part of the employer.
- Was it that 'innocent' dust that caused the injury or the failure of D to provide washing facilities?
- The House of Lords held that it was sufficient to show that D's breach of duty made the risk of injury more probable, even though it was uncertain whether D's default was the actual cause.
- The difference from *Bonnington* is that in *Bonnington* both types of dust could be held to have contributed to the damage. In *McGhee*, for policy reasons, material contribution to risk was equated with material contribution to damage.

(1) What is material contribution?

Fairchild v Glenhaven Funeral Services

- The problem was this: a single strand of asbestos fibre could result in mesothelioma, and any one of a number of employers could have provided that strand.
- Each of the employers had, by their breach of duty, materially increased the risk of that happening – of that single strand of asbestos fibre being inhaled and lodging and developing into mesothelioma.
- So the 'but for' test was modified. *Fairchild* left open the door to other categories of industrial disease receiving the policy boost of the modified causation test.

(1) What is material contribution?

Picken J's special case

- See *Sido John v Manchester* (delay in carrying out CT scan). Picken J:

"[97] Dr John's case is ***not an industrial disease case****. As such, it is not a case about contribution to risk, but is a case which is concerned with* ***material contribution to injury or damage****. As such, and unlike a case which has as its focus risk rather than injury or damage where for causation to be made out there needs to be a single agent, the 'material contribution' approach* ***applies to both single agency and multiple factor cases****. This is the point which was made by Lord Bingham in the Fairchild case ((2002) 67 BMLR 90, [2003] 1 AC 32 (at [22])) when considering the Wilsher case. Lord Bingham explained that:* 'It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage.'...

(1) What is material contribution?

Industrial disease: a special case

...Accordingly, I am in no doubt that Mr Kennedy was ultimately right to accept that the 'material contribution' approach is appropriate in a case such as the present. There is no reason in principle why that should not be the case. Nor is there any authority which mandates such a conclusion. In short, ***the 'material contribution' approach applies, in my view, just as much to multiple factor cases as it does to 'single agency' cases***."

(2) The current state of the law

Outside industrial disease: **Bailey v MOD (A)**

- A cumulative cause case:
  - C was an in-patient on a renal ward in non-negligent hospital 2
  - She aspirated her vomit, leading to a cardiac arrest, leading to hypoxic brain damage.
  - Prior to transfer to hospital 2 she had been treated at hospital 1.
- C's case was:
  - (1) there was lack of care in resuscitation (not ultimately in issue);
  - (2) proper care would have led to early intervention and prevented her becoming as ill and weak as she became; and
  - (3) it was that weakness caused, or materially contributed to, by lack of care that led to her being unable to prevent herself aspirating.

(2) The current state of the law

Outside industrial disease: **Bailey v MOD (B)**

Waller LJ concluded at [46] – [47]:

- One cannot draw a distinction between medical negligence cases and others.
- The position in relation to cumulative cause cases can be summarised as follows.
  - If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation.
  - If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden.
  - In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed.
- *Bailey* involved cumulative causes acting so as to create a weakness and thus the material contribution test applied.

(2) The current state of the law

Outside industrial disease: **Dickens v O2 (A)**

- D liable for psychiatric injury negligently caused to C by excessive workplace stress.
- The county court held that the breach made a material contribution to C's illness and apportioned damages by 50% in light of *Hatton.*
- Smith LJ at [42]:
- *"My immediate reaction to the question of apportionment in the instant appeal was to wonder whether this case was any different from Bailey. Was this not a case of an indivisible injury (the Respondent's seriously damaged state following her breakdown) with more than one cause? It was not possible to say that, but for the tort, the Respondent would probably not have suffered the breakdown but it was possible to say that the tort had made a material contribution to it. If that is a correct analysis, should not the starting point have been that the Respondent was entitled to recover in full?"*

(2) The current state of the law

Outside industrial disease: **Dickens v O2 (B)**

- At [46], obiter (a problem that plagues material contribution):

"I respectfully wish (obiter) to express my doubts as to the correctness of Hale LJ's approach to apportionment. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is ***not scientifically possible*** *to say how much that contribution is (apart from the assessment that it was* ***more than de minimis****) and where the injury to which that has lead is* ***indivisible****, it will be* ***inappropriate simply to apportion the damages across the board****. It may well be appropriate to bear in mind that the Claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a* ***reduction in some heads of damage for future risks*** *of non-tortious loss. But my provisional view is that there* ***should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play****".*

(2) The current state of the law

Outside industrial disease: **Williams v Bermuda (A)**

- Mr Williams attended A & E with abdominal pain (from, it was later discovered, a ruptured appendix).
- A CT scan was (correctly) thought to be necessary.
- The factual finding was that there was a negligent delay in obtaining the CT scan, reporting it, and commencing surgery.
- By the time of the delayed operation there was widespread inflammation and pus from the ruptured appendix.
- The pus led to increased cardiac oxygen requirements, intra-operatively Mr Williams' blood pressure fell dangerously low, he suffered a myocardial ischaemic event with lung complications and required treatment in ITU.

(2) The current state of the law

Outside industrial disease: **Williams v Bermuda (B)**

- Lord Toulson gave the judgment of the Board:

"[38] The distinction drawn by Ms Harrison is also inconsistent with the opinion of Lord Simon of Glaisdale in McGhee v National Coal Board *... [which] said that where on the balance of probabilities an injury is caused by two (or more) factors operating cumulatively, one (or more) of which is a breach of duty, it is immaterial whether the cumulative factors operate concurrently or successively.*

[39] The sequence of events may be highly relevant in considering as a matter of fact whether a later event has made a material contribution to the outcome (as Hotson *illustrates), or conversely whether an earlier event has been so overtaken by later events as not to have made a material contribution to the outcome. But those are evidential considerations. As a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome."*

(2) The current state of the law

Outside industrial disease: **BAE Systems v Konczak**

- Psychiatric injury caused by sex discrimination, disability discrimination and unfair dismissal.
- Per Underhill LJ at [72]:
- *"On my understanding of* Rahman *and* Hatton*, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury."*

(2) The current state of the law

Thorley – a Narrowing? (A)

- *Thorley v Sandwell & West Birmingham Hospitals NHS Trust* [2021] EWHC 2604 (QB)
- A clinical negligence case, which might be seen to have had a quite surprising outcome in terms of the law.
- It is another case where the primary claim was "but for" (which failed in *Thorley*) with a secondary claim of material contribution (which would have failed as a matter of fact let alone law).
- The question was whether in cases of a single tortfeasor and an indivisible injury material contribution could apply.

(2) The current state of the law

Thorley – A Narrowing or Fusion or Neither? (B)

- Soole J was concise at [147] - [151]:
- *147. "On the face of it, the Court of Appeal decision in* AB *is binding authority that the test of material contribution* ***has no application to a case where (as here) there is indivisible injury and one tortfeasor****. However, given the basis on which the appeal in AB was argued and decided, I do not read the decision of the Supreme Court as an implicit endorsement of the proposition.*
- *148. On the basis of the cited passage,* Heneghan *is to the same effect; albeit a later passage might suggest that the distinction between divisible and indivisible injury was being viewed through the lens of the comparative difficulty of proof of material contribution. Thus the* Bonnington *test '… is to be applied where the court is satisfied on scientific evidence that the* ***exposure for which the defendant is responsible has in fact contributed to the injury****. This is readily demonstrated in the case of divisible injuries (such as silicosis and pneumoconiosis) whose* ***severity is proportionate to the amount of exposure*** *to the causative agent': [46].*

(2) The current state of the law

Thorley – A Narrowing or Fusion or Neither? (C)

- *149. By contrast, the observations of the Privy Council in Williams provide* ***support for the rival contention****; in particular through the endorsement of Professor Green's statement of 'trite negligence law'; the treatment of Bonnington as a case where material contribution by a single tortfeasor was established on the basis (at least, as presented to the court) that* ***the injury of pneumoconiosis was indivisible****; and the footnote citation of Lord Phillips of Worth Matravers in Sienkiewicz. However whilst evidently highly persuasive, they are not strictly binding even if part of the ratio.*
- *150. As to the very detailed discussion of the law of material contribution in John (Picken J), I do not read it as dealing directly with this particular issue.*
- *151. This is evidently* ***a legal issue which is ripe for authoritative review****, at least in a case where it may affect the result. On the basis of strict precedent, I conclude that the reasoning of the Court of Appeal in AB and Heneghan must be followed. Accordingly* ***the claim of material contribution must fail on the basis that this modified test of causation does not apply when there is a single tortfeasor and an indivisible injury.****"*

(2) The current state of the law

In the industrial disease context: **AB v MOD**

- Claims for exposure to radiation said to have been caused by nuclear testing carried out by the British Government in the Pacific region in the 1950s.
- Smith LJ at [134] observed that material contribution is available "*where the negligent and non-negligent causative components have both contributed to the disease (**as opposed to the risk** of the disease) and it is not possible to apportion the harm caused and therefore the damages*" in a setting where "t*he **severity of the disease** is related to the **amount of exposure***".
- At [150] Smith LJ then held that material contribution only applies where the disease or condition is divisible "*so that an **increased dose** of the harmful agent **worsens the disease***", cancer being indivisible as one either gets it or does not.

(2) The current state of the law

In the industrial disease context: **Heneghan v Manchester**

- A lung cancer case involving six defendants.
- Biological evidence could not establish which of the six tortfeasors triggered the lung cancer, epidemiological evidence could establish the increased risk provided by each of the six defendants.
- The 100% value of the executors' claims was £162,500.
- By reason of the division of responsibility between the available defendants the executors received £61,600 on the basis of their having contributed a total of 35.2% of the whole asbestos exposure.
- Jay J had applied the Fairchild exception. The executors wanted to go further and use Bonnington to obtain 100% of the £162,500.
- *Fairchild* had not addressed exposure between defendants: that was dealt with in *Barker v Corus UK Ltd [2006] UKHL 20* wherein a defendant was only liable in proportion to his contribution to his own contribution to asbestos and therefore to the risk that the deceased would contract mesothelioma. It was irrelevant whether the other exposure was tortious, non-tortious, by natural causes or caused by the employee himself.

(2) The current state of the law

Davies v Frimley (A)

- Facts set out previously.
- On a plain reading of the judgment it appears that HHJ Auberbach could be saying one of three things:
  - (1) Since the Court was able to determine the issue of 'but for' causation on the evidence before it, no other legal doctrine can be brought to bear in the case.
  - (2) No legal doctrine of material contribution to harm exists; only the 'material contribution to risk' exception in *Fairchild*.
  - (3) No legal doctrine of material contribution to harm exists in the context of *indivisible* harm. Since the Claimant suffered an indivisible harm (death), no legal doctrine other than 'but for' causation can be brought to bear in the case.

(2) The current state of the law

Davies v Frimley (B)

- (1) is the conclusion one comes to on a plain reading of the extract above but is perhaps an oversimplification of the judgment.
- (2) is a bold proposition and one which seemingly runs contrary to several judgments in cases of clinical negligence. For example, in *Sido John v Manchester*, Picken J gave his clear view that clinical negligence cases need to be considered separately to industrial disease cases.
- As for (3), see, for example, the cases of *Bailey* and *Williams v Bermuda* and other cases set out above where the Court accepted that the Defendant's negligence had materially contributed to an indivisible outcome.

(2) The current state of the law

Where are we now? Have the industrial disease cases narrowed the ambit?

- The key factual finding in *Heneghan* is [42]: "*The epidemiological evidence permitted the contribution to the risk of cancer attributable to an individual defendant to be quantified. But it went no further than that. That was the finding made by the judge at paras 30 and 63 of his judgment. We should not interfere with it*."
- It is suggested that both *AB* and *Heneghan* are red-herrings. They are concerned with **proof** of a causal factor to the cause of a disease.
- Thus read *AB* and *Heneghan* fall into line with *Sienkiewicz v Greif (UK) Limited* [2011] UKSC 10 wherein Lord Phillips expressed the view that a party who "*tortiously contributed <u>to the cause</u>*" of an indivisible disease will be liable in full."
- That accords with *Williams v Bermuda.*

(2) The current state of the law

Where are we now? What is indivisible?

- A further issue is what was understood by an indivisible injury.
- In *Davies* it was argued by the defendant that death is indivisible.
- However death is a state – if one thinks of a coroner's verdict provision is made for a cause or causes. Scroll back to a few moments before death and you may find a variety of cumulative causes of which only one is a breach of duty.
- Then look at a hypoxic brain injury – what difference would a capable midwife have made say a handful of minutes earlier: a lesser injury, but what difference would there have been in terms of disability? That mirrors *Sido John*.
- So even on a narrow reading of *AB* and *Heneghan* what might seem to have been indivisible, and seemingly accepted as such in *Thorley* (see paragraph 139) by the Claimant was not indivisible.

(3) The future

Where do we go now? (A)

- Well, not *Thorley*, which can probably be worked around, albeit it will make life harder for a while. Whilst it holds any sway a key approach in single tortfeasor cases will be to identify that the injury is not truly indivisible
- *AB* and *Heneghan* do highlight the issue of proof of causation. You have to go further than risk, further than citing epidemiological studies, the real message of *AB* and *Heneghan*.
- Rodeos
- The statistics are a starting point. The Court of Appeal judgment in *Mario Schembri v Ian Marshall* [2020] EWCA Civ 358 does however show how they can be used as a scaffold onto which a common sense and pragmatic view of all the evidence can be built to look at where the individual claimant is likely to have fitted.

(3) The future

Where do we go now? (B)

- Two historical examples that illustrate the conundrum
- All of that said it seems likely that as a minimum the Court of Appeal, and perhaps the Supreme Court are going to need to provide some clarity in respect of material contribution.
- The challenge in running material contribution is to avoid undermining the "but for" case where the "but for" case is available (as it will generally be).
- We suggest that the succinct analysis of Professor Sarah Green (Causation in Negligence, Hart Publishing, 2015, Chapter 5, p97) and approved in *Williams v Bermuda* remains compelling:

  "It is trite negligence law that, where possible, defendants should only be held liable for that part of the claimant's ultimate damage to which they can be causally linked … It is equally trite that, 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 …"