## QUEEN'S BENCH DIVISION

9, 10, 11, 14 December 2020; 29 January 2021

DAVIES (EXECUTOR OF ESTATE OF MRS DAVIES, DECEASED)
v
FRIMLEY HEALTH NHS FOUNDATION TRUST

[2021] EWHC 169 (QB)

Before His Honour Judge AUERBACH
(Sitting as a Judge of the High Court)

## COMMENTARY

The decision in the instant case of *Davies v Frimley Health NHS Foundation Trust* was made by the application of the "but for" causation test to the admitted negligence. Of interest is the court's consideration of whether the claimant also could have established causation by way of material contribution. Having reviewed the authorities the judge concluded as part of his obiter judgment that material contribution did not apply to cases of indivisible injury. Whilst it is right to observe that the case law does not speak with one voice on this issue, this conclusion is open to question.

In issue is the scope of the House of Lords decision in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 which applied a material contribution causation test in cases where science was unable to say whether or not but for the negligence the injury would have happened, but the evidence did show that the negligence was more than a de minimis contributing cause to that injury. The House of Lords in *Bonnington Castings* approached the case as though the injury (an industrial disease) was an indivisible injury, for which there had been both non-negligent and negligent causes. The negligent cause had been material (in the sense of being more than de minimis), and consequently the claimant was entitled to recover damages for the whole injury. In the subsequent Court of Appeal case of *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2008] LS Law Med 481; [2009] 1 WLR 1052 a similar approach was taken where clinical negligence through lack of care had contributed to the claimant's weakened state, along with another non-negligent cause of pancreatitis, which in turn had led to the claimant aspirating vomit, suffering a cardiac arrest and hypoxic brain damage. The judge had been unable to say what relative contribution the clinical negligence had made to the overall weakened state. The Court of Appeal regarded this case to be one of cumulative causes in which the "but for" test was to be modified in keeping with *Bonnington Castings* (see paras 43 and 46).

In the two subsequent decisions of *AB v Ministry of Defence* [2010] EWCA Civ 1317 and *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 WLR 2036; [2016] ICR 671, the Court of Appeal suggested that the causation test of material contribution evinced in *Bonnington Castings* and followed in *Bailey* applied only where the injury was "divisible" and made worse by the negligence (see para 150 in *AB*, and para 23 in *Heneghan*). In such cases the tortfeasor was liable only for the increased harm so caused.

It is difficult if not impossible to reconcile *AB* and *Heneghan* with the earlier decisions of *Bonnington Castings* and *Bailey*. Even though subsequent judicial analysis is to the effect that the disease in *Bonnington Castings* would now be considered a divisible injury, this was not the analysis of the House of Lords in *Bonnington Castings.* It approached the case as though it was one of indivisible injury. Furthermore, the resultant injury in *Bailey* of cardiac arrest and hypoxic brain damage was not considered by that court to be a divisible injury.

The broader scope of *Bonnington Castings* has been affirmed by the Privy Council in *Williams v The Bermuda Hospitals Board* [2016] UKPC 4; [2016] Med LR 65; [2016] AC 888; [2016] 2 WLR 774. The Privy Council noted there had been no suggestion that the pneumoconiosis disease was "divisible" in the sense of the severity of the disease being dependent on the quantity of silica dust inhaled. It did not regard the material contribution test to be confined to cases of divisible injury.

Indeed, the Privy Council approved the following analysis of causation by Professor Sarah Green in *Causation in Negligence* (2015), chapter 5, p 97): "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 …" In *Williams* the Privy Council held that since the judge had found that injury to the plaintiff's heart and lungs had been caused by a single known agent, sepsis, and that its development and effect on the heart and lungs had been a single continuous process which had continued for a minimum period of 140 minutes longer than it should have done, it was right to infer on the balance of probabilities that the defendant's negligence had materially contributed

to the process, and therefore materially contributed to the injury to the heart and lungs.

In the instant case of *Davies*, the deceased was suffering from a single disease process (pneumococcal meningitis), just as in *Williams* the plaintiff was suffering from a single process of sepsis due to a burst appendix. In *Davies* there was a negligent delay of 2 hours 40 minutes in providing effective antibiotic treatment for the disease process thereby allowing that process to continue, just as in *Williams* there was a negligent delay of at least 2 hours 20 minutes in providing effective surgical treatment for the burst appendix that was causing ongoing sepsis. In *Williams* the negligently prolonged sepsis contributed to the indivisible injury (damage to the heart and lungs). In *Davies* the negligent delay in administering antibiotics allowed the bacterial infection to worsen during that period of delay. The worsening infection due to the delay was, as a matter of logic, a contributing cause of the deceased's deterioration and ultimate death, an indivisible injury. If the judge had been unable to find causation proven on the "but for" test it is hard to see why causation should not have been made out on the modified material contribution test, pursuant to *Bonnington Castings, Bailey* and *Williams.*

Reported by Adrian Hopkins QC