John de Bono QC's analysis of Williams v Bailey [2016] UKPC 4

written by Imogen Hildred | 26 January 2016

On 25th January 2016 the Privy Council upheld the decision of the Appeal Court of Bermuda to award significant damages to a claimant on the basis that a short delay in operating on his appendix had materially contributed to his injury. The headline is that the doctrine of material contribution survives and that the Privy Council did not accept an argument that the decision in *Bailey v MoD* was wrong.

The facts

Mr Williams attended hospital at 1117 on 30th May 2011 with acute appendicitis. After an examination the doctor, at about 1215, ordered an 'immediate' CT scan. The scan was not performed until 1727 and not reported until about 1930, Mr Williams underwent surgery at around 2130. His appendix was found to be ruptured with widespread pus around the pelvic region. The ruptured appendix had led to sepsis which in turn had caused damage to his heart and lungs.

The litigation in Bermuda

At first instance the judge found that there had been a negligent delay in performing the CT scan which had led to an overall delay in surgery of between 2 and 4 hours. He found for the defendant on causation, concluding:

> *"I find that the plaintiff has failed to prove that the complications that Mr Williams developed during and after surgery were probably caused by the [hospital board's] failure to diagnose and treat him expeditiously. Had the CT scan been obtained and interpreted promptly these complications might have been avoided, but I am not satisfied that they probably would have been avoided."*

Unsurprisingly the plaintiff appealed. The Court of Appeal of Bermuda relied on *Bailey v MoD* and held that the test on causation was whether the breaches of duty had contributed materially to the injury. In the Court's view they plainly had.

The appeal to the Privy Council

The Hospital Board of Bermuda appealed to the Privy Council. It sought to rely on *Bonnington v Wardlaw* to argue that material contribution was only available in limited circumstances i.e. where: i) there had been a single causative agent; ii) the defendant had contributed to the pathological process in a way that was material; iii) the defendant's contribution was concurrent with any non-negligent cause; iv) and as a matter of probability the defendant's contribution had increased the magnitude (and not merely the risk) of harm.

The Privy Council roundly rejected this attempt to narrow the doctrine of material contribution, holding:

a. there is no basis for limiting material contribution to cases where the timing of origin of the

contributory causes is simultaneous;

b. Lord Simon was correct in *McGhee v NCB* to say 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 operated concurrently or successively.
c. The Appeal Court of Bermuda had been right to infer on the balance of probabilities that the plaintiff's heart and lungs had been injured by a single agent, sepsis from a ruptured appendix. The development of the sepsis and its effect on the heart and lungs was a single continuous process, during which the sufficiency of the supply of oxygen to the heart steadily reduced. The hospital board's negligence in delaying the CT scan and hence the time of surgery, materially contributed to the process. That was sufficient to establish causation.

The Privy Council restated the principle in *Wilsher* that where the most that can be said is that a claimant's injury is likely to have been caused by one or more of a number of disparate factors, one of which is attributable to a breach of duty then that will not be sufficient to establish causation. Proving that a breach might have made a material contribution is not enough.

The Privy Council did not specifically raise the issue of whether the same damage would probably have occurred in any event. It is clear from the judgment however that they did not believe that it would have done. If the same damage would probably have occurred in any event then they would not have found a material contribution from the delay.

The attack on Bailey

The Hospital Board attacked the reasoning of the Court of Appeal in *Bailey v MoD*. Here it is frustrating not to know from the judgment of Lord Toulson what the attack was. The Privy Council's view was that *Bailey* had been correctly decided albeit not for the right reasons. In *Bailey* the claimant suffered brain damage having aspirated her vomit and suffered a cardiac arrest. The concurrent causes were weakness from her pancreatitis (non-negligent) and dehydration (negligent). Lord Toulson said:

> *"In the view of the Board, on those findings of primary fact Foskett J was right to hold the hospital responsible in law for the consequences of the aspiration. As to the parallel weakness of the claimant due to her pancreatitis, the case may be seen as an example of the well-known principle that a tortfeasor takes his victim has he finds her. The Board does not share the view of the Court of Appeal that the case involved a departure from the 'but for' test. The judge concluded that that the totality of the claimant's weakened condition caused the harm. If so 'but for' causation was established. The fact that her vulnerability was heightened by her pancreatitis no more assisted the hospital's case than if she had an egg shell skull."*

Analysis

When *Bailey v MoD* was decided in July 2008 there was considerable surprise amongst clinical negligence practitioners. The decision made it much easier for claimants to establish causation. The decision in *Williams*, whilst not strictly binding, plainly leaves material contribution as a powerful weapon in the claimant's armoury for the foreseeable future.

Some will question Lord Toulson's reference to eggshell skulls but in practice nothing has really changed. Under Bailey a claim would still fail if the outcome would probably have been the same in

any event. That remains the case. *Williams* and *Bailey* explain causation in slightly different ways but the decisions are consistent with each other and lead to the same result. A claimant will win where she can prove:

a. *either* that but for the substandard treatment she would probably have avoided injury;
b. *or,* that her injury has been materially contributed to by the sub-standard treatment (but note, there is no material contribution if the outcome would probably have been the same in any event).

A defendant will win if the claimant cannot prove a material contribution. This includes:

a. cases where the outcome would probably have been the same in any event;
b. cases where the most that the claimant can prove is that the breach of duty is a possible cause of the injury.