MATERIAL CAUSATION

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The Problem

- Arises where :-
  - Pre-tort disease/injury was present.
  - Post-tort disease/injury arose.
  - Multiple tortfeasors.

  Can occur with any kind of defendant (RTA, CN, employer)

  Psychiatric and physical disease.

Historical Overview

- Bailey v MOD was decided in 2007 (Foskett J) – see [2007] EWHC 2913 and approved by CA in 2008 – see [2008] EWHC Civ 883. Then CN cases such as Telles [2008] EWHC 292 and Boustead [2008] EWHC 2375. Popple [2013] Med LR 47, and John [2016] 4 WLR 54.

- Employer cases derive from much earlier case law.

Tort other than Clinical Negligence

- Industrial disease present difficult problems.
- Often claimants work for several employers and are exposed to a variety of hazards.
- And employers may (for instance) smoke or be exposed to noise, psychiatric stress anyway.
- Improvements in medical diagnosis have made apportionment easier.

PAGE v SMITH (No. 2)

- [1996] 1 WLR 855. CA (on this point).
- C had suffered with chronic fatigue syndrome (“CFS”) for many years.
- Minor accident caused psychiatric trouble.
- CFS returned and caused C to stop work.
- Material contribution established. C succeeded in full.

HOLTBY v BRIGHAM COWAN

- [2000] 3 AER 421. CA.
- Claimant exposed to asbestos and injured. Trial judge reduced damages by 25% because some injury would have occurred despite negligence.
- CA upheld judge. Claimant had to prove that D's tortious contribution and only liable *to the extent of that contribution.* Matter of fact fore the Judge.

HATTON v SUTHERLAND

- [2002] EWCA Civ 76. CA
- Claimant sued employer (school) for stress at work.
- Claim failed partly because CA concluded that the employee must show that psychiatric illness is not due merely to “stress” but
- Caused by identifiable breach(es) of duty which caused damage. This may be hard for C to do.

DICKINS v O2

- [2008] EWCA Civ 1144. CA
- CA doubted whether apportionment was appropriate in a case of psychiatric harm – specifically questioning the approach of Hale LJ in Hatton.
- Affirming that with industrial disease, “divisibility” (as a matter of evidence) remains the key test.

B v MINISTRY OF DEFENCE

- [2010] EWCA Civ 1317.
- Service personnel with cancer who had been involved in nuclear tests.
- CA assessed strength of case as poor (and hence struck out on limitation grounds) because cancer is not a “divisible” condition – namely one in which the *severity is related to exposure*.

BONNINGTON CASTINGS V WARDLAW

- [1956] AC 613. HL.
- The claimants were injured by exposure to dust.
- It was accepted that not all of their lung disease was caused by negligence.
- But they recovered in full (because doctors could not apportion the blame). Unlike the position in B v MOD, the condition was *proportionate to exposure*.

HOTSON v EAST BERKSHIRE AHA

- HL. [1987] AC 750. C injured by fall from tree. Developed avascular necrosis ("AN") in leg.
- Negligence made AN more likely, but probably would have developed anyway. C lost.
- But Lord Bridge said that if C had proved that negligence materially contributed to AN, he would have won. But C could not prove that, so he lost.

WILSHER v ESSEX AHA

- HL [1988] AC 1074. C given too much oxygen at birth and went blind.
- A number of factors MAY have caused the blindess, including the (negligent) excess oxygen.
- But C could not show that the negligence was probably the cause.
- And C could not show that the negligence had materially contributed to the blindess. So C lost.

BAILEY V MOD

- Claimant had stormy post-operative course.
- Negligent failure to give post-op resuscitation
- Other non-negligent factors contributed to poor outcome (cardiac arrest and brain damage).
- Impossible to establish how much of the damage was caused by negligence
- So Claimant succeeded in full.

TELLES V SW HEALTH AUTHORITY

- Claimant was a baby with a heart defect, treated at the Bristol Royal Infirmary.
- Three operations. First operation negligent. Others not negligent.
- Hypoxia (and consequent brain damage) caused both by negligence and by other factors.
- Parties agreed that if apportionment impossible, recovery in full.

BOUSTEAD v NW HEALTH AUTHORITY

- Claimant suffered brain injury caused by perinatal hypoxia which led to intra-ventricular haemmorhage (IVH).
- Judge found that D negligently failed to deliver four hours earlier than C was delivered.
- But other factors also involved in causing IVH.
- Apportionment impossible. C recovered in full.

HUSSAIN v BRADFORD NHS TRUST

- [2011] EWHC 2914
- Cauda equina. Culpable delay of 48 hours.
- Judge (Coulson J) held that C must show that delay caused actual damage – not merely a chance of improvement.
- On the facts, C would probably have been paralysed anyway (even without 48 hr delay).

LUDWIG v OXFORD RACLIFFE TRUST

- [2012] EWHC 96.

- Claimant had cerebral palsy acquired perinatally.
- Judge (Holroyde J) held that the cause of the CP could not be identified – therefore C failed.
- Further, on the facts, although the correct diagnosis had not been made, even if the diagnosis had been right, the treatment would have been the same.

POPPLE v BIRMINGHAM NHS TRUST

- [2012] EWCA Civ 1628 (CA)

- Asphyxial insult led to brain damage of new-born child.
- Judge held that no cause had been given other than negligently managed labour of C's mother.
- Further, CTG not available (because of negligent failure to monitor to properly). Material contribution found. J upheld on appeal to CA.

Williams v Bermuda Hospital Board

- [2016] UKPC4 [2016] AC 888.

- Claimant suffered septic injury following septicaemia. First instance judge held that there was a negligent delay but that it did not affect the final result. The claimant successfully appealed on the basis that the delay was a materially contributive cause of poor outcome.
- Privy Council dismissed hospital's appeal. Held that there was a material contribution on the facts.
- But PC cautioned against the 'doubling of risk' test. Of dubious value if the initial risk was small.

Conclusions

- The legal tests are the same irrespective of the nature of the case.
- If material contribution can be established, C will win against D.
- C will recover 100% if (but only if) it is evidentially impossible to apportion the extent of D's material contribution.
- The recent *Williams v Bermuda* decision lends powerful support to material contribution as a potential cause of action.
- If, but only, if there is good evidence that negligence has made a significant difference to the outcome.