MATERIAL CONTRIBUTION IN BIRTH INJURY CLAIMS

Key authorities on the principles of material contribution:

1. *Bonnington Castings Ltd. –v- Wardlaw [1956] AC 613 – HL.*

2. *Wilsher –v- Essex AHA [1988] AC 1074 – HL.*

3. *Holtby –v- Brigham Cowan (Hull) Ltd.[2000] 3 All ER 421 – CA.*

4. *Fairchild –v- Glenhaven Funeral Services Ltd. [2003] 1 AC 32 – HL.*

5. *Bailey –v- MOD [2009] 1 WLR 1052 - CA.*

6. *Williams –v- The Bermuda Hospitals Board [2016] UKPC 4 – PC.*

The following central propositions can be drawn from the said cases:

- In a case in which injury is caused by cumulative causes and medical science cannot establish the relative potency of each cause, i.e. can't answer the "but for" question or identify the extent of contribution, a Claimant merely has to establish that the negligent cause made a "material contribution: *Bonnington* and *Bailey*.

- It is immaterial whether the cumulative factors operate concurrently or successively: *Williams*.

- In a case where it is possible to identify the extent of the contribution of a "negligent" cause then the Defendant is liable to the extent of that cause: *Holtby*.

- Where the Defendant's breach of duty increases an <u>existing</u> risk factor the Court <u>may</u> infer material contribution to damage: *Fairchild.*

- Where the Defendant's breach of duty only adds a new/discrete risk factor to the existing risk factor(s) it is not legitimate to infer that it was causative of the damage: *Wilsher*.

Birth injury claims involving material contribution arguments:

1. *Canning-Kishver –v- Sandwell & West Birmingham NHS Trust [2008] EWHC 2384.*

Neonatal breaches of duty led to cardiac collapse in a premature baby. C developed cerebral atrophy. A number of potential contributory factors were identified by the experts (including immaturity at birth) but found on balance of probabilities the cardiac collapse constituted a more than negligible contribution to C's cerebral atrophy. C succeeded in full

2. *Ingram –v- Williams [2010] Med. LR 255.*

C delivered prematurely by father at home. Developed cerebral palsy. Alleged but for failures by GP C would have been delivered in hospital. Causative factors included prematurity, neo-natal infection and not being born in hospital. Expert evidence to the effect that all causal factors made an unquantifiable but material contribution to C's injury. GP found not to have been in breach of duty but J would have allowed awarded full damages had he found negligence.

3. *Popple –v- Birmingham Women's NHS Foundation Trust [2011] EWHC 2320.*

C suffered an acute profound hypoxic insult over 15-20 minutes leading up to birth causing cerebral palsy. Allowing for 10 mins of "fetal reserve" the damage was agreed to have been caused over the following 5-10 mins. The lack of CTG monitoring led the causation experts to conclude that it was impossible to identify when the damage occurred within the 5-10 min window. J. found that just as likely that C's injuries would have been avoidable if delivered 5 mins earlier as they would if 10 mins earlier. J held but for breach of duty by midwives C would have been delivered over 10 mins earlier (and avoided all damage) but that even if delivery was delayed by just 5 mins then there would have been a material contribution to C's injuries (and full recovery).

4. *Rich –v- Hull & East Yorkshire Hospitals NHS Trust [2016] Med. LR 33.*

Failure to prescribe maternal corticosteroids prior to an emergency CS at 32 weeks. C suffered respiratory distress syndrome resulting in PVL and cerebral palsy. J found there was no breach of duty but considered the issue of causation in some detail. Neo-natal experts agreed that steroids would have materially alleviated C's RDS and that the RDS caused the PVL. The extent of the diminution in severity of the RDS and PVL could not be quantified on any existing medical/scientific evidence. C would have recovered in full had breach of duty been established.

5. *DS –v- Northern Lincolnshire and Goole NHS Foundation Trust [2016] EWHC 1246.*

CP as a result of an acute profound hypoxic insult immediately prior to delivery. C case that midwifery failings caused a delay in delivery by 6-9 mins and but for that delay he would have sustained a less damaging injury. J. found that the negligent delay was only 3 mins and C did not contend that this would have materially affected the degree of injury. J did go on to find that a 6 min delay would have made no material difference but that a 9 min delay would have made a material difference to C's cognitive abilities, ability to manage himself and make daily decisions. Notable that the neonatologists and paediatric neurologists did attempt to identify exactly how C's injuries might have differed by reference to motor deficits, cognitive impairment, IQ, care/supervision patterns, continence, employability and capacity.

Application of the material contribution principle to "chronic partial" and "profound acute" hypoxia cases

Causation experts in CP claims generally take different approaches to chronic partial and profound acute cases:

(a) It is common to see neo-natal evidence to the effect that the progression of chronic partial hypoxic ischaemic injury is not linear over time. Once the fetal capacity to compensate is exhausted there will be irreversible damage but the rate of progression depends unpredictable factors. In those circumstances it is impossible to determine the point at which neurological injury commenced but it can be said that the longer the duration of the damaging hypoxia then the greater the neurological injury. In cases such as this a significant period of negligent delay in delivery might well be deemed to have materially contributed to the injury and result in full recovery.

(b) Neonatologists and paediatric neurologists are more willing to enter into an "apportionment of damage" exercise in cases of profound acute injury claims - see *DS –v- Northern Lincolnshire and Goole NHS Foundation Trust*. The period of damaging hypoxia (after the initial non-damaging 10 mins) is generally deemed to be more predictable. The *Popple* case might be seen as something of an "outlier" in this respect.

It follows from the above that a Court is more likely to carry out an apportionment exercise in acute profound hypoxia cases leading to less than 100% recovery for C. It should be borne in mind that Courts are expected to perform this exercise even if quantification is difficult – "broad brush" approaches are acceptable: *Allen –v- British Rail Engineering [2001] EWCA 242*.

What amounts to a "material" contribution?

There is little judicial guidance as to what constitutes "material" or "de minimis". Decisions in the field of asbestos related disease suggest that the threshold is low: *Mayne –v- Atlas Stone Co. Ltd. [2016] EWHC 1030* and *Carder –v- Secretary of State for Health [2015] EWHC 2399*.

With respect to CP cases involving delayed delivery, it is suggested that causation experts generally consider that it is difficult to attribute an appreciable difference in injury to a culpable delay of less than 5 minutes.