

Williams v Bermuda Hospitals Board
[2016] AC 888, [2016] UKPC 4

Summary

The claimant went to hospital, suffering from acute appendicitis. There was a delay in diagnosing that the claimant was suffering from appendicitis, during the course of which delay the claimant's appendix ruptured and pus started leaking around his pelvic region. Sepsis – which occurs when antibodies released to deal with an infection start harming the infected person's body – set in, and resulted in the claimant suffering injury to his heart and lungs. The claimant – who was operated on 10 hours after being admitted to hospital, and who eventually made a full recovery after being seriously unwell in hospital for a few weeks due to the complications arising out of his condition – sued the defendant board, claiming that the delay in diagnosing his appendicitis had been (i) negligent, and (ii) caused the complications that had resulted in his heart and lungs being temporarily damaged. The case eventually wound up being heard by the Privy Council on issue (ii).

Lord Toulson gave the judgment of the Board. He found (see, in particular, [31]) the claimant on issue (ii), on the basis that the injuries suffered by the claimant in this case were indivisible, and that the rule of law which applies in cases of indivisible injury is that if a defendant's tort and an innocent factor have both materially contributed to a state of affairs that triggers an indivisible injury, then the defendant's tort will be held to have caused that injury and the defendant will be held liable for that injury (assuming the injury is not too remote a consequence of the defendant's tort and the defendant has no defence to being sued for damages in respect of that injury). This rule applied here. The injury to the claimant's heart and lungs was indivisible: it was not an injury that was capable of being greater or smaller depending on how much pus had leaked into the claimant's pelvic region before the claimant was operated on. The injury had been triggered by the leakage of pus into the claimant's pelvic region. Some of that leakage was leakage that the hospital treating the claimant could have done nothing about: even if there had been no negligent delay in diagnosing the claimant's condition and treating him, the claimant's appendix would still have ruptured before the claimant could be operated on, and pus would have begun leaking into the claimant's pelvic region. However, some of the leakage could have been prevented had the claimant been treated with due care, and *that* leakage made a 'material contribution' to the total quantity of pus that triggered the condition that resulted in the claimant's heart and lungs being damaged. The result was that the claimant's negligent treatment was held to have *caused* the damage to the claimant's heart and lungs, and the defendant hospital board was held liable in full for that damage.

Comments

(1) *But for*. Lord Toulson seemed to think (at [47]) that the rule (let's call it 'The Rule') that he applied to the claimant's case in *Williams* was an example of the 'but for' test in causation, where we ask – would the claimant have suffered the harm he did but for the defendant's negligence? *It is not*. At no point in applying The Rule do we ask the counterfactual question – what would have happened had the defendant not been negligent? Instead, in applying The Rule, we ask the factual question – did the defendant's negligence make a material contribution to a state of affairs that resulted in the claimant suffering an indivisible injury? The result is that, under The Rule, the claimant can end up being held liable in full for an injury that – so far as we know – was likely to occur anyway, even if the defendant had not

been negligent. This seems very unsatisfactory. The unsatisfactory nature of the Privy Council's conclusion is compounded by the fact that the main authority they quote in favour of their view that The Rule is part of English law is *Bonnington Castings v Wardlaw* [1956] AC 613 – a case, which as the Privy Council conceded in a note that seems to have been added to the judgment as an afterthought, is actually a case that should have been decided on the basis that the claimant was suffering a *divisible* injury; in which case, the right approach is to ask which bit of the injury suffered by the claimant was caused by the defendant's negligence and the issue of causation is resolved by asking which bit of the defendant's injury would *not* have been suffered had the defendant not been negligent. It cannot be ruled out that the House of Lords in *Bonnington Castings*, seeing that *some* of the claimant's injury in that case (pneumoconiosis) was caused (on a 'but for' basis) by the defendant employer's negligence thought that the defendant should be held liable for that injury as the defendant had *contributed* to that injury, and simply went wrong in holding the defendant liable for the whole of the claimant's injury, rather than the bit that the defendant's negligence actually caused. On this reading, *Bonnington Castings* is not authority in favour of The Rule. As the history of the litigation arising out of the House of Lords' decision in *Fairchild* shows, the courts depart from the 'but for' test for causation at their peril (which is *not* to say that there are no cases where we should depart from the 'but for' test; there are) and it is slightly surprising that the Privy Council should have been so happy to depart from the 'but for' test in such a casual manner. But – and this is not the first time in a case involving Lord Toulson that this observation has been made in these casenotes – maybe they just didn't realise the full implications of what they were doing.

(2) *Stapleton and Steel*. In an important casenote ('Causes and contributions' (2016) 132 LQR 363), Jane Stapleton and Sandy Steel – our two most preeminent thinkers on causation in the law of tort – are critical of the result reached by the Privy Council in this case, but endorse The Rule.

The endorsement: 'to the extent that [The Rule] is asserted as a general principle for cases of indivisible injury it is correct and must be understood as employing a causal concept which is broader than but-for causation' (365). They go on to substantiate their endorsement by giving an example where D1, D2 and D2 each separately and independently put one drop of poison in C's tea. Two drops are sufficient to kill; one drop is not. C drinks the tea and dies. Stapleton and Steel ask the rhetorical question: 'Is the law to say that since no one was a necessary, but-for, cause of the death no one is responsible?'

The criticism (at 366-67): '[A] flaw in the discussion of indivisible injuries in *Williams* is the Privy Council's unqualified acceptance of the statement that: "where a defendant has been found to have...contributed to an indivisible injury, she will be held fully liable for it, even though there may have been other contributing causes."' For Stapleton and Steel, finding that a D caused a C's indivisible injury under The Rule does *not* settle the issue of whether D should be held liable for that injury: 'If the mechanism for an indivisible injury would have been complete absent the contribution due to wrongful conduct, no compensatory liability should be imposed even though the contribution should be recognised as a cause' (367). Let's call this The Liability Rule. The Liability Rule would not absolve D1, D2, and D3 in the poison in the tea case as no mechanism for poisoning C would have existed in the absence of D1, D2 and D3's wrongful conduct. But The Liability Rule might have worked to absolve the defendant hospital board in *Williams*, if they had been able to show that had they treated the claimant reasonably promptly, enough pus would still have leaked into the claimant's pelvic region to trigger the damage to the claimant's heart and lungs that he suffered in that case. If this was the case, then on Stapleton and Steel's preferred approach, the defendant hospital board in *Williams* should have argued, 'Sure, our negligence caused

the injury the claimant is complaining of in this case as our negligence was one of the factors that contributed to the build-up of pus in the claimant's pelvic region, which build-up triggered the claimant's injury; *but* we still aren't liable for the claimant's injury because even if everyone had treated the claimant right, he still would have suffered the same injury.'

One puzzle about The Liability Rule is why the baseline for determining whether a defendant should be held liable for an injury that the defendant's negligence contributed to causing is set by asking: What would have happened had *no one* done anything legally wrong to the claimant? The baseline is *not* set by asking: What would have happened had *the defendant* not done anything legally wrong to the claimant? One can see why that second baseline might be regarded as unsatisfactory. It would enable each of D1, D2, and D3 in the poison in the tea case to take advantage of The Liability Rule to avoid being held liable for C's death. Each of them could say: 'I admit I caused C's death under The Rule, but I shouldn't be held liable for C's death because had I not put poison in C's cup of tea, C would still have died.' But if we are adjusting the baseline for applying The Liability Rule on an *ad hoc* basis to avoid unsatisfactory results in cases like this, why can't we just dispense with The Liability Rule altogether, and adjust the rules on when we are willing to find that a defendant's tort caused a claimant's injury to avoid unsatisfactory results in cases like the poison in the tea case. This might not satisfy a scientist – in whose realm, you can't just *say* that A caused B to happen – but as lawyers, what is so *wrong* about saying in a case like *Williams* (assuming 'but for' causation was not made out in that case), 'The defendant's negligence did not cause the plaintiff's injury as the plaintiff would still have suffered injury due to an unavoidable build-up of pus in his pelvic region even if he had not been negligently treated' while saying in cases like the poison in the tea case, 'While we wouldn't normally be able to say that any *one* of D1, D2, and D3 caused C's death in this case, each of them made enough of a contribution to her death that it would be wrong to allow them (given the fact that they each acted wrongfully in acting as they did) to deny that they caused her death'?

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