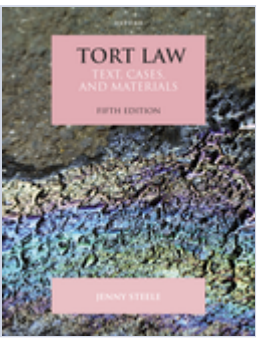

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6. Causation, Remoteness, and Scope of Duty: Connection to the Damage

Jenny Steele, Professor of Law, University of York

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter examines the essential connection between the defendant's breach and the damage suffered by the claimant. It explores the elements of factual and legal causation in relation to the tort of negligence. Drawing on recent decisions including *Manchester Building Society v Grant Thornton* and *Khan v Meadows*, it identifies the existence of other aspects of attribution including the necessity for the damage to fall within the scope of the defendant's duty. The chapter continues by examining some of the most challenging problems of causation, all of which concern multiple potential causes. It considers issues relating to 'material contribution to damage', and whether a given breach has materially contributed to the risk of injury. It then discusses the idea of loss of chance as well as the controversy surrounding uncertainty, single agents, and apportionment and non-tortious sources with respect to causation. A number of relevant cases are considered, including *Fairchild v Glenhaven Funeral Services Ltd* [2002], *Barker v Corus* [2006], *Durham v BAI* (the 'Trigger' Litigation) [2012], *IEG v Zurich* (2015), and *Gregg v Scott* [2005].

Keywords: damage, causation, remoteness causation, potential causes, material contribution to damage, risk of injury, loss of chance, uncertainty, single agents, apportionment, non-tortious sources, Fairchild v Glenhaven Funeral Services Ltd

Central Issues

i) Negligence is a damage-based tort. The claimant must show that relevant damage was caused by the defendant's breach of duty, and that this damage is appropriately recoverable from the defendant. There must be, in other words, a sufficient connection between the defendant's breach, and the damage suffered. Whilst the need to show 'causation' is crucial, and the questions raised are often far from straightforward, it is increasingly evident that other questions about the connection must also be answered.

ii) As we will see in **Section 1** of this Chapter, there have traditionally been two distinct questions of causation. The first is often known as the question of **'cause in fact'**. On the face of it, resolving this question requires application of a simple factual test. Most typically, this is stated in terms of the 'but for' test: would the damage have occurred 'but for' the negligence? But as we will begin to discover in **Section 2**, the impression of simplicity can be misleading. Here we deal with the general principles of 'cause in fact', returning to still more challenging questions derived from the existence of multiple potential causes, in Sections 5–7.

iii) There is also traditionally a second 'causal' question about the connection between the breach of duty, and the damage, which is addressed in Section 3. Controversy persists over whether this question (traditionally called **'cause in law'** or **'remoteness'**) is really a question of causation at all. In *The Wagon Mound* (1961), the Privy Council attempted to establish that there was only one causal question ('cause in fact', above), and that a second question—of remoteness—was best expressed in terms of foreseeability. Although *The Wagon Mound* continues to be the leading case on 'remoteness', that attempt was never wholly successful, and elements of causal language have persisted. Typically, these have been regarded as elements of remoteness. But comments of the Supreme Court have hinted that 'remoteness', and 'cause in law', are actually two separate criteria.

iv) That there are also further questions about the extent of recoverable damage, beyond both 'causation' and 'remoteness', has been made clearer by recent decisions of the Supreme Court. The Supreme Court has set out a series of questions, which includes not only cause in fact, remoteness, and a separate idea of 'effective cause', but also a further idea about the 'nexus' between the damage and the duty owed. Even if the defendant's breach of duty was a cause of damage that was not too remote, is that damage sufficiently connected to the duty? In other words, is it within the 'scope' of the duty? The question takes us back to a long-established idea, of the 'risk principle'. This principle was originally applied in relation to remoteness, and is therefore introduced in Section 3. Recent decisions ask whether the risk is within the **'scope of the duty'** that is owed, but do so as an additional stage, and this is the subject of **Section 4**. 'Scope of duty' now appears to be independent not only from causation, despite causal language in the leading case, but also from remoteness. 'Scope of duty'

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analysis brings together issues of duty and of damage. Plainly, there are losses which pass the test of cause in fact, and are not considered to be 'remote from' the breach of duty, which will nevertheless be judged to fall outside the scope of the duty owed.

v) After our introduction to 'cause in fact' (Section 2), 'remoteness' (Section 3), and 'scope of duty analysis' (Section 4), subsequent sections of this Chapter consider some particularly vexed issues in relation to factual causation or 'cause in fact'. These issues are all related to the existence of **multiple potential causes**. They show that the working through of causal questions in negligence has been anything but straightforward. **Section 5** of the Chapter is an introduction to the difficulties surrounding multiple potential causes.

vi) **Section 6** turns to the important notion of a **'material contribution to damage'**. Courts have clearly considered a material contribution to be a sufficient causal link under some circumstances. But the nature of the test remains in doubt. Some have argued that adoption of 'material contribution' as a test is merely a response to difficulties of proof; others that it is a way of satisfying the 'but for' test; and others still that it captures a distinct form of causal connection.

vii) Courts have also considered what *evidence* of the relevant causal link will suffice. In *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32, the House of Lords accepted that in certain circumstances, where even a material contribution cannot be established on balance of probabilities, it will be sufficient for the claimant to show that a given breach has materially contributed to the *risk of injury*. This has unleashed a series of issues requiring attention in the highest court. Senior judges have spoken in terms of special principles applying within the '*Fairchild* enclave'; but the boundaries of that enclave remain in some doubt. The Supreme Court has so far decided that, as the reasons for the *Fairchild* innovation are readily understandable, it is appropriate to 'keep digging', and to continue to innovate within the enclave. **Section 6** addresses these issues in the law before and after *Fairchild*.

viii) **Section 7** turns to a related problem, captured in the idea of **loss of chance**. In *Gregg v Scott* [2005] UKHL 2, the House of Lords refused to recognize increase in risk (or loss of opportunity) as damage in its own right. Traditional causal principles were applied, despite the then recent decision in *Barker v Corus*, which appeared to accept that risk could be identified with damage in some circumstances. It is *Barker*, however, that has since been reinterpreted. The traditional 'all or nothing' approach was further reinforced by the House of Lords in *Rothwell Chemical and Insulating Company* [2007] UKHL 39, where increase in risk was held not to be actionable harm. Nevertheless, the idea of liability based on contribution to risk or chance continues to recur, and in some circumstances—particularly in relation to financial losses—such liability has been upheld.

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1 Introduction: How Many ‘Causation’ Questions Are There?

We have already seen that liability in negligence depends on showing that a duty of care has been breached. Negligence, however, is a tort requiring damage, and the claimant must therefore also establish that the defendant’s breach caused the damage in respect of which a remedy is claimed. Further, there must be a relevant link between the breach, and the damage, so that the damage can properly and fairly be attributed to the breach. Recent decisions underline that although this link has traditionally been approached in terms of ‘remoteness’, this is only one of the further questions of attribution to be answered.

The traditional analysis holds that there are two distinct questions of causation involved in the tort of negligence and in those other torts that require damage. Here we set out the two generally recognized questions, known as ‘cause in fact’, and ‘cause in law’ or ‘remoteness’. We will then explain the general problems of categorization and terminology which plague this aspect of the law of tort. Some say that only the first is a causation question, though their description of the second question varies; others that there are more than two questions of causation. At the end of the section, we address the Supreme Court’s new proposed model for analysing the various ingredients needed to determine ‘attribution’ of the damage to the breach of duty.

The Traditional Division: Two Questions

On a traditional approach, there are two basic questions of causation:

1. Was the defendant’s breach of duty or other tortious intervention a **factual cause** of the damage? This question is addressed in an introductory fashion by Section 2. More difficult aspects of this question continue to arise and are debated in later Sections of the Chapter.
2. Is the damage **attributable to** the defendant’s breach of duty (or other tortious conduct)? This is the more elusive question addressed in Section 3 in relation to ‘remoteness’. But we will also see in Section 4 that there is more than one question of attribution.

The first question is apparently rather simple. It seems to ask about facts. As we will see, it is often not simple at all. However, there is at least a recognized starting point for such questions, which is whether the breach of duty was a ‘but for’ cause of the harm. In other words, would the harm have come about ‘but for’ the tort? This is often referred to as a ‘counterfactual’ question: what if the facts had been different? This test is sometimes not sufficient because too many factors pass this initial test. On other occasions it is inappropriate because factors which clearly are causes are unable to pass the test. So it is set aside. On other occasions still, there are difficulties of *proving* that it is satisfied, and what amounts to proof will be subject to consideration. Even so, ‘but for’ expresses a recognized test with a recognized purpose—to show whether the harm is historically linked (regarded as a test of cause and effect) with the damage.

The second question cannot be so easily identified.

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‘Remoteness’ or ‘Cause in Law’: Causal or Not?

Remoteness Not a Causal Idea

There are those who argue that the only question of causation in the law of tort is the first, relating to factual causation. Other questions of attribution or remoteness are not about cause. Of these approaches, we can pick out two variations:

1. Some have argued that the second question of attribution is a purely legal question about ‘the foreseeability of the harm’, or ‘the scope of the risk against which the defendant had a duty to guard’. These approaches try to align the question of attribution with the question of duty.
2. Others have argued that the second question is best expressed quite honestly and openly in terms of ‘the scope of liability for consequences’.

The second of these two approaches is championed by Jane Stapleton, ‘Cause in Fact and the Scope of Liability for Consequences’ (2003) 119 LQR 388. It has the merit of being simple to state. There are two tests: one concerns factual causation, the other asks whether the harm is within the scope of the consequences for which there should be liability. But it has the disadvantage that the second stage is a very open enquiry and many factors could, in principle, be relevant.

Variations of the first of the two approaches above, aligning attribution with duty, will be encountered in the case law extracted in Section 3. In particular, the foreseeability approach was adopted in *The Wagon Mound (No 1)* [1961] AC 388. A ‘scope of duty’ approach was identifiable in important cases such as *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360, and *South Australia Asset Management Corporation v York Montagu* [1997] AC 191. This approach is now recognized as an essential element in negligence analysis, but has also been described as separate from remoteness, and is therefore discussed in Section 4. Whether it is genuinely separate from remoteness is a lingering question.

Multiple Causal Questions

Not everyone agrees that the only question of causation encountered in the law is the question of factual causation. Hart and Honoré, in a highly influential work, argued that the test of ‘but for’ causation does not establish, as a matter of ordinary language, whether the factor in question is to be called a ‘cause’.[1] Too many factors will satisfy the test. Even if the ‘but for’ test identifies those factors which pass a threshold of ‘historical involvement’, not all such factors deserve to be identified as ‘causes’. Equally, Hart and Honoré argued that the remoteness test in law involves genuinely ‘causal’ elements, and that there are other causal questions in play apart from those we capture in terms of ‘but for’ cause and ‘remoteness’.

Jane Stapleton has been critical of the Hart and Honoré approach, though that approach has clearly influenced some of our most senior judges.[2]

p. 358 **J. Stapleton, 'Occam's Razor Reveals an Orthodox Basis for Chester v Afshar' (2006) 122 LQR 426, at 426**[3]

> Lawyers across the common law world often find 'causation' problematic. This is because we do not actually agree on what we mean by that and other causal terms. Sometimes by 'causation' lawyers mean just the objective question of historical 'fact': whether the defendant's breach of obligation had anything at all to do with the production of the claimant's injury. Other times lawyers use causal terminology not merely for this idea of historical involvement but for a separate notion of 'causal connection' which, together with a third notion of 'remoteness', concerns the normative evaluation of whether this particular consequence of the defendant's breach is one for which he should be held legally responsible. The most well-known version of this three-step approach was that championed by Hart and Honoré.
>
> For them, even where a factor is historically involved in the production of an outcome, or to use their terms, even when it is 'a causally relevant factor' in relation to that outcome, it will not be a 'cause' of it where there is no 'causal connection' between the factor and outcome. Yet it is not at all clear what they mean by a 'causal connection', what therefore beyond historical involvement they mean by a 'cause', and where the line between 'causal connection' and 'remoteness' lies.
>
> The three-step Hart and Honoré approach is both inconvenient and obfuscatory. Clarity in legal reasoning will not be improved in this area until it is abandoned in favour of a two-step analysis consisting of the factual issue of historical involvement and the normative question of whether a particular consequence of breach should be judged to be within the scope of liability for the breach.

It is true that the Hart and Honoré approach is inconvenient and subtle. Then again, they were seeking to describe a multi-faceted phenomenon. Given the influence of their work, we should spend a little space identifying some of its key features. We should then be better placed to consider, particularly in Section 3 of this chapter, to what extent ideas of 'cause' still make themselves felt in the second question of attribution ('remoteness', 'scope of liability for consequences', or whatever else it may be called) identified earlier.

Causation and Ordinary Language

Lord Hoffmann, *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC at 29

> The courts have repeatedly said that the notion of causing is one of 'common sense'. So in *Alphacell v Woodward* [1972] AC 824, 847 Lord Salmon said:
>
> > 'what or who has caused an event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.'

p. 359 **H. L. A. Hart and T. Honoré, *Causation in the Law* (2nd edn, Oxford University Press, 1985), 1**

> … the assertion often made by the courts, especially in England, that it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned, seems to us to be true.

The quotations above reinforce a common theme of English law in respect of causal enquiries. Law does not depend upon either science or philosophy for its notions of causation. Rather, it employs 'common sense' notions which are inherent in the way that ordinary people talk about cause.

At first sight, this position appears naive. It would seem to deny the many problems associated with causation, taking refuge in a fictional 'shared understanding'. Common sense is, notoriously, not something on which people can commonly agree, so what hope is there for using this concept to arrive at solutions to difficult questions of causation?

According to Hart and Honoré, law's 'common sense' approach does not involve a denial of the complexities of causal statements, but is actually based on an appreciation of such complexities. Equally, and to the extent that it rejects scientific approaches, the law's approach does not do so through lack of understanding. Rather, according to Hart and Honoré, law relies on 'common sense' primarily because the concerns of the law in discussing cause are often similar to the concerns of everyday language, and different from the concerns of science or philosophy. As John Gardner has put it:

> 'Common sense [in Hart's work] does not have its popular Forrest Gump overtones. It has a technical oppositional meaning specific to philosophers …' (Book review of N. Lacey, *A Life of HLA Hart* in [2005] 121 LQR 329, 331).

A distinction between the concerns of science and the concerns of law is made in the following extract. Here, Hart and Honoré are concerned to distinguish some common scientific questions about cause from some 'everyday' attempts to *explain* particular events in terms of what caused them.

Hart and Honoré, *Causation in the Law*, 33–5

> ## Abnormal and normal conditions
>
> In the sciences causes are often sought to explain not *particular* occurrences but *types* of occurrence which usually or normally happen: the processes of continuous growth, the tides, planetary motions, senile decay. In ordinary life, by contrast, the particular causal question is most often inspired by the wish for an explanation of a *particular* contingency the occurrence of which is puzzling because it is a departure from the normal, ordinary, or reasonably expected cause of events: some accident, catastrophe, disaster, or other deviation from the normal cause of events. ...
>
> p. 360 ↵ ... What is normal and what is abnormal is, however, relative to the context of any given inquiry ... If a fire breaks out in a laboratory or in a factory, where special precautions are taken to exclude oxygen during the manufacturing process, since the success of this depends on safety from fire, there would be no absurdity at all in *such* a case in saying that the presence of the oxygen was the cause of the fire. The exclusion of oxygen in such a case and not its presence is part of the normal functioning of the laboratory or the factory, and hence a mere condition ...
>
> ... the distinction between cause and conditions may be drawn in different ways. The cause of a great famine in India may be identified by the Indian peasant as the drought, but the World Food authority may identify the Indian government's failure to build up reserves as the cause and the drought as a mere condition ...

We can particularly highlight two implications of the above extract:

1. That any question of causation in respect of the law will depend upon the reason for asking the question.
2. In isolating the factor or factors which we consider to deserve the title of 'cause', there is generally more attention paid, in everyday language as in law, to 'abnormal' events.

The influence of Hart and Honoré's work is clearly to be seen in the following extract. The case from which this passage is drawn concerned *criminal* liability under a particular statutory provision, but Lord Hoffmann's judgment has since been referred to in a number of crucial cases on causation in the tort of negligence:

Lord Hoffmann, *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, at 29

> The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed. Take, for example, the case of the man who forgets to take the radio out of his car and during the night someone breaks the quarterlight, enters the car and steals it. What caused the damage? If the thief is on trial, so that the question is whether he is criminally responsible, then obviously the answer is that he caused the damage. It is no answer for him to say that it was caused by the owner carelessly leaving the radio inside. On the other hand, the owner's wife, irritated at the third such occurrence in a year, might well say that it was his fault. In the context of an inquiry into the owner's blameworthiness under a non-legal, common sense duty to take reasonable care of one's own possessions, one would say that his carelessness caused the loss of the radio.

In everyday *explanations* as to what 'caused' a particular event, some events and states of affairs are reduced to the level of 'mere conditions' of the occurrences in question. Out of the many conditions which form the
p. 361 necessary history of an adverse event, we tend to select one ↵ (sometimes more than one) as 'causes'. As Hart and Honoré point out, this will generally be an 'abnormal' condition, although what is counted as abnormal will vary with the context. Human intervention will often be selected as a cause, particularly so if it is in some way 'faulty'. But as Lord Hoffmann explains, this depends on the reason for asking. If we want to know whether a car owner should have taken more precautions, even a deliberate criminal act on the part of another may become part of the general 'context' of the event, amounting perhaps even to a 'normal condition'. So one can, by an omission, 'cause' loss of a car radio, even though it is taken by someone else—at least if there is a positive duty to act.

This last point shows that for the purposes of 'cause in fact', we do not need to ask whether the defendant's breach of duty was *the* cause of accidental damage. Rather, the breach needs to be *a* cause of that damage. Lord Hoffmann also pointed out, in the *Empress Car* case, that an event may have *more than one cause*. However, 'mere conditions'—factors which we would most naturally treat as being essential to the history of the event, but which we would not select as a relevant 'cause' of the event—will *also* pass the 'but for' test. For Hart and Honoré, 'mere conditions' are *not* to be called 'causes'.

In summary, the idea of 'but for causation' is treated by Hart and Honoré as no more than a useful way of asking whether the defendant's breach of duty was effective in the history of events which led to the claimant's loss, while avoiding 'abstract metaphysics'. 'But for' causation is an important element in our common understanding of the nature of 'cause', particularly when causal questions are asked for the purposes of attribution of responsibility. 'But for' causation will, however, not always provide the tools that we need.

Hart and Honoré treat causation as a multilayered concept best understood through close analysis of the way in which we use language in everyday life and in law. The purpose of the enquiry into causation will help to determine the meaning of causation in a given case. There are many important 'causation' questions in law.

Multiple questions of attribution?

In its two decisions in *Manchester Building Society v Grant Thornton* [2021] UKSC 20 and *Khan v Meadows* [2021] UKSC 21, which were designed to be read together, the Supreme Court has set out a new structure for analysis of the tort of negligence and in particular of what is needed to attribute damage to the breach of duty.[4] Unfortunately perhaps, the Supreme Court has not attempted to streamline any of the tests involved, nor to rationalize the elusive concept of remoteness, nor to clarify the breadth of the notion of causation. Rather, it has presented all possible tests as alternatives. Thus remoteness is presented as additional to a notion of 'alternative effective cause'. Scope of duty, which was the subject of the decisions, is an additional enquiry and not an alternative interpretation of remoteness.

The strength of the six-step model set out in the extract below is perhaps that it provides a clear checklist. Its weakness is that it does nothing to advance understanding of any of the steps other than (perhaps) scope of duty, and even seems to imply there is no route to rationalization. Most particularly, it leaves 'remoteness'—which it bundles into 'legal responsibility' together with, but in addition to questions of effective cause—in need of an explanation. It is best to remember that the role of this statement—despite its appearance ↵ of generality—was to clarify the role of scope of duty analysis: it would be leaning too hard on the approach to assume that it closes the possibility that other listed aspects of legal responsibility might, in fact, be means of approaching the remoteness question in some circumstances. Here we extract from *Khan v Meadows*; the same six steps were also set out in *Grant Thornton* [2021] UKSC 20, at [6]. The substance of these decisions is considered in Section 4, on scope of the duty.

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***Khan v Meadows* [2021] UKSC 21**

Lords Hodge and Sales JJSC, with the agreement of Lord Reed, Lady Black, and Lord Kitchin

> 28. In our view, and as explained in more detail below, a helpful model for analysing the place of the scope of duty principle in the tort of negligence, and the role of the other ingredients upon which Mr Havers has relied in this context, consists of asking six questions in sequence. It is not an exclusive or comprehensive analysis, but it may bring some clarity to the role of the scope of duty principle which SAAMCO highlighted. Those questions are:
>
> (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
>
> (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
>
> (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
>
> (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
>
> (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)
>
> (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)
>
> Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to place the claimant in the position he or she would have been in absent the defendant's negligence.

We can glean from this that there is more than one causal question at work, from the reference to alternative effective causes as an aspect of the legal responsibility question (step 6), in addition to the 'factual causation' question in step 4. We can also glean that there are multiple questions of legal attribution at work. What we cannot glean is the nature of the 'remoteness' question. Indeed, it seems this cannot be explained in terms of 'scope of duty' or 'alternative cause', since these are stated as separate elements. This makes the nature of remoteness if anything more difficult to comprehend.

A different structure was set out by Lord Burrows in the same case, which he described as more conventional.

p. 363 ***Khan v Meadows*, Lord Burrows**

> 79. Scholars have long debated whether the conventional conceptual structure of the tort of negligence could be improved and, in particular, whether the duty of care is an unnecessary element: see, eg, Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559. But for the purposes of this judgment, I have had in mind, and would prefer to adhere to, a relatively conventional approach which sees the tort of negligence as involving seven main questions. They are as follows:
>
> (1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question)
>
> (2) Was there a breach of the duty of care? (the breach, or standard of care, question)
>
> (3) Was the damage or loss factually caused by the breach? (the factual causation question)
>
> (4) Was the damage or loss too remote from the breach of duty? (the remoteness question)
>
> (5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question)
>
> (6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)
>
> (7) Are there any defences? (the defences question)
>
> 80. As this approach is relatively conventional, I do not think it is necessary to extend this judgment by explaining each of the seven questions. Suffice it to say that the duty of care concept controls the boundaries of the tort of negligence and problematic areas include pure economic loss, psychiatric illness and omissions; legal causation, as distinct from remoteness, is focusing on whether intervening acts of the claimant, or third parties, or natural events, break the chain of causation (so that the breach is no longer an effective cause); the *SAAMCO* principle as to whether the loss was within the scope of the duty of care falls to be considered as the sixth question; and defences include contributory negligence (which is a partial defence), voluntary acceptance of risk, illegality and limitation of actions. Questions (4)–(6) are closely related because they are all concerned with limitations on the recovery of factually caused loss: although generally regarded as different from each other, the same result may be reached by applying more than one of those three limitations (and, depending on the facts, the order in which one considers them may be largely a matter of convenience). I would add that what Lord Hodge and Lord Sales appear to treat as their first question—often labelled the question of 'minimum actionable damage' (see Jane Stapleton, 'The Gist of Negligence' (1988) 104 LQR 213)—can, in my view, be conveniently treated as a sub-issue under the duty of care enquiry (my first question).

Though it is certainly fair to describe this approach as more conventional, it still leaves 'remoteness' as a problematic concept. In particular, it treats 'legal causation' in terms of intervening cause, in a different category from 'remoteness'. It furthers our problem that questions of both legal cause and of scope of duty are now treated as *additional to* questions of remoteness, so that remoteness cannot be explained in terms of

either of them. Remoteness is 'explained' only through reference to the decision in *The Wagon Mound*. As that decision—as we will see in Section 3—sought to do away with 'legal cause' (plainly now still in existence as a
p. 364 separate idea), and to align remoteness with the test for a duty of care ↵ (a job done much better via scope of duty analysis), there is little indication in these recent decisions of how to make sense of remoteness. As Lord Burrows recognized, it all depends how remoteness is understood. On some views, he said, 'remoteness might be thought wide enough to embrace the *SAAMCO* principle' (*MBS v Grant Thornton*, at [179]).

2 'But For' Causation

2.1 Defining 'But For' Causation

It should be especially underlined that for the purposes of causation in the tort of negligence, it is not enough to show that the defendant's *conduct* has been the cause of the damage suffered by the claimant. Rather, it is the *breach of the duty of care* that must have caused the relevant damage.

In determining questions of factual causation, the starting point is 'but for' causation: would the claimant's injury have occurred 'but for' the defendant's negligence? If the same injury would have occurred even without the defendant's negligence, then that negligence is not a 'necessary cause' of the damage or loss to the claimant. The idea of necessary cause is also referred to in the Latin version as *causa sine qua non*.

Since tort is a civil action, the claimant must establish that the breach of duty is a 'but for' cause of his or her injury or loss *on the balance of probabilities*. That is to say, the claimant must convince the court that it is more likely than not that the injury would *not* have occurred *without* the negligence (or other tortious intervention) of the defendant. The following case provides a classic illustration of the 'but for' test.

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428

Three nightwatchmen presented themselves at a casualty department provided and run by the defendants, complaining to the nurse that they had been vomiting for three hours after drinking tea. The nurse reported their complaints by telephone to the duty medical officer, who instructed her to tell the men to go home to bed and call in their own doctors. This, reportedly, is what the duty medical officer said:

> Well, I am vomiting myself and I have not been drinking. Tell them to go home and go to bed and call in their own doctors, except Whittal, who should stay because he is due for an X-ray later this morning [at 431].

All of the men left. About five hours later, one of them died from poisoning by arsenic, which had been introduced into the tea. Nield J concluded that he would have died from the poisoning even if he had been admitted to the hospital and treated with all due care five hours earlier.

> **Nield J, at 433–4**
>
> My conclusions are: that the plaintiff, Mrs Bessie Irene Barnett, has failed to establish, on the balance of probabilities, that the death of the deceased, William Patrick Barnett, resulted from the negligence
> p. 365 of the defendants, the Chelsea and Kensington Hospital Management ↵ Committee, my view being that had all care been taken, still the deceased must have died. But my further conclusions are that the defendant's casualty officer was negligent in failing to see and examine the deceased, and that, had he done so, his duty would have been to admit the deceased to the ward and to have treated him or caused him to be treated.

This case illustrates just how important the causation requirement is. It will no doubt have appeared to the plaintiff that the 'but for' test was an obstruction to justice in this case. There had been a proven breach of a duty of care in that there was a failure to diagnose and treat, and a man had died as a consequence of the condition for which he should have been treated. But causation is not a merely technical requirement. It is itself linked to questions of fairness and justice, primarily through the idea of responsibility. In this instance, where the arsenic was introduced to the tea with criminal intent, the defendants should not be held liable for consequences that they *could not have prevented*.

2.2 Further Illustrations of the 'But For' Test

Hypothetical Acts of the Claimant: McWilliams v Sir William Arroll Co Ltd *[1962] 1 WLR 295 (HL, Scotland)*

The appellant was the widow of a steel erector, who had been working at a height of 70 feet when he fell and was fatally injured. No safety belt had been provided. The appellant claimed damages both for breach of common law duties of care, and for breach of the duty contained in the following statutory provision:

Section 26(2), Factories Act 1937

> Where any person is to work at a place from which he is liable to fall a distance of more than ten feet, then … means shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety.

The respondents argued successfully that because the deceased would not have worn a belt, even if it had been provided, their breaches of duty had not caused his death.

Viscount Simonds, at 301–2

The deceased was a steel erector of many years' experience and was employed by the first respondents in erecting a steel tower for a crane for the use of the second respondents in their shipbuilding yard at Port Glasgow. Whilst so employed he fell from a height of about 70 feet and was fatally injured. I need not describe in detail the nature of his work. It was dangerous work, as all such work must appear to a layman, but it was not specially dangerous work. It was the work he had been accustomed to do for many years. On the day of the accident he was not wearing a safety belt. It was proved that a safety belt was not on that day available for his use if he had wanted to use it. A belt had been available until two or three days before the accident but then had been removed, together with the but in which it had been stored, to another site. It is a matter of conjecture whether the deceased knew that it had been removed.

p. 366 ↵ In these circumstances, the simple case was made that the respondents were in breach of their duty to provide a safety belt for the use of the deceased; he was not wearing one when he fell to his death; if he had been wearing one, he would not, or at least might not, have so fallen: therefore the respondents are liable.

To this simple case the respondents make answer. Let it be assumed that they were in breach of their duty in not providing a safety belt on the day of his accident and, further, that if he had then been wearing one, the accident would not have occurred. Yet there is a missing link: for it was not proved that the deceased was not wearing a belt because it was not provided; and alternatively, if any question of onus of proof arises, it was proved that if one had been provided, the deceased would not have worn it.

… The evidence showed conclusively that the deceased himself on this and similar jobs had except on two special occasions (about which the evidence was doubted by the Lord Ordinary) persistently abstained from wearing a safety belt and that other steel erectors had adopted a similar attitude. Nor was their attitude irrational or foolhardy. They regarded belts as cumbersome and even dangerous and gave good reason for thinking so. It was, however, urged that on this single occasion the deceased might have changed his mind and that the respondents did not and could not prove that he had not done so.

My Lords, I would agree that, just as a claim against a dead man's estate must always be jealously scrutinised, so also an inference unfavourable to him should not be drawn except upon a strong balance of probability. But there is justice to the living as well as to the dead, and it would be a denial of justice if the court thought itself bound to decide in favour of the deceased because he might, if living, have told a tale so improbable that it could convince nobody. That, my Lords, is this case and in my opinion the courts below were amply justified in receiving the evidence given (not only by the respondents' witnesses) as to the attitude adopted by the deceased and other steelworkers to the wearing of belts and acting upon it.

This case offers another illustration of the potency of 'but for' causation. Viscount Simonds' judgment is dominated by the perceived 'injustice' to the defendants if they should be held to be liable in negligence for damage that their actions, if careful, would probably not have prevented. Causation is, again, related to

responsibility. The only 'responsibility' in question is responsibility for *consequences*. If no consequences flow from the breach of duty, then I am not responsible in tort for that breach. If there is an injury, but I could not have prevented that injury through proper conduct, then again I am not responsible, even if my behaviour is culpable. Even a clear breach of a statutory duty will give rise to no liability in tort if it is not shown to have caused the eventual damage.

We should pause here to point out that 'but for' has not always been found a satisfactory test for the first, 'factual' aspect of causation. Recently, Jane Stapleton has suggested that this is because not all factual scenarios are like the ones we have addressed so far. Some cases involve cumulative states of affairs, all of which play a role in bringing about an outcome: they do not resemble the binary 'either/or' world of these cases, and as a consequence, some interventions which should be called 'causes' are not in fact necessary to the result. An example is the case where two fires combine to destroy a building: either would be sufficient on its own, so that neither passes the 'but for' test, with absurd results. The suggested solution is that the law contains an alternative to the 'but for' test for factual causation, which applies in those non-binary cases: Jane Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39. We discuss these more difficult cases, and the existence of
p. 367 alternatives to 'but for', in section 5. ↵ In any case, the 'but for' test has its own difficulties. Unavoidably, it deals in hypotheticals (also known as counter-factuals): what *would* have happened *if* the defendant had not breached their duty? Hypothetical questions can be difficult to answer 'on the balance of probabilities'. Here we consider some variations of this hypothetical dimension.

Hypothetical Acts of the Defendant

Matters become more complex if the defendant's negligence has removed an opportunity for the *defendant* which might prevent the loss to the claimant. In assessing whether this negligence has 'caused' the claimant's injury, the court must try to determine what the defendant *would* have done, 'but for' his or her *own* original negligence. It seems obvious that the defendant will argue that he or she would not have acted so as to save the claimant from harm, even if the opportunity had arisen to do so, so that the original negligence made no difference, and is not causative of any harm. In accordance with the general approach to causation, the court must then assess this evidence for persuasiveness. On balance, what does the court think that the defendant would have done?

When we extracted *Bolitho* in Chapter 3, we noted the House of Lords' conclusion that if the defendant's hypothetical failure to save the claimant from harm *would in itself be negligent*, it cannot be relied upon by the defendant. In this instance, whether the hypothetical act or omission would be *negligent* must be answered by application of the *Bolam* test. This raises particular issues because the defendant's evidence as to his or her own likely actions will be crucial. That evidence will be scrutinized for persuasiveness, and it will also be measured against the relevant standard of care. The defendant has the opportunity to present a hypothetical course of action and claim it to be the most likely. The claimant's problems are compounded because the *Bolam* test will apply to the hypothetical events. If the claimant cannot show that the defendant in particular would have acted so as to avoid the harm (and here the defendant controls much of the evidence), then she or he will in effect have to show that *no competent doctor* would have acted so as to prevent the damage.

Hypothetical Acts of Third Parties

How does the situation differ where the hypothetical acts (which the defendant argues are likely to have led to harm even if the defendant themselves had been careful) are those of a third party? Generally (though an alternative scenario will be seen immediately below), this arises where that third party cannot be sued, because it has not in fact been negligent. *Gouldsmith v Mid-Staffordshire General Hospitals Trust* [2007] EWCA Civ 397 illustrates. Here, the claimant ought to have been referred to a specialist unit, and failure to do so was a breach of duty. The question was whether a referral would have led to surgery which would have prevented the later need to amputate some of the claimant's fingers. In other words, would the referral have had the effect of saving the fingers, or not? Expert evidence persuaded the judge that a majority of specialist units *would* have carried out the surgery; but a minority would not have done. The trial judge applied *Bolitho* (discussed in Chapter 3), concluding that since not operating would have been acceptable practice in a *Bolam* sense, causation was not established. A hypothetical failure to carry out the surgery would not have been negligent. The Court of Appeal pointed out an error in the approach. Because this case concerned hypothetical acts of third parties, not of the defendant, the judge did not need to ask about the negligence of not operating: it was enough to establish that on the balance of probabilities, in light of expert evidence about the practice of
p. 368 specialist centres generally, the surgery would ↵ have taken place. The *Bolam* test, therefore, did nothing to hinder the claim. A hypothetical failure by a third party is dealt with differently, and the question is simply one of probability.

Oddly enough, it has proved to be more difficult to resolve a situation where the defendant's negligence results in a further delay in medical treatment, which in fact *is* negligent. The 'hypothetical' issue here is whether the treatment received *would* also have been negligent even if referral had been more speedy; or would the absence of the initial negligence have led to proper treatment? This was the situation in *Wright v Cambridge Medical Group Ltd* [2011] EWCA Civ 669, but it is unlikely to arise in just this form in too many other instances. That is because either the claimant, or the defendant, ought to have 'joined' the hospital (the intervening negligent party) to the litigation, so that there could be a proper analysis of all the evidence—the judges of the Court of Appeal expressed surprise and concern that his had not been done. In the absence of this obvious move, Lord Neuberger argued that the point in *Bolitho* discussed earlier, namely that a defendant cannot—as a matter of law—rely on his or her own hypothetical negligence to resist a claim, also applied to a *third party's* negligence: there was a presumption that a third party would act with due care, and this *could not* be rebutted by evidence. The other judges—one of whom dissented—did not reason in this way. Lord Neuberger explained the issue as embodying a principle which was not articulated in *Bolitho* in relation to the defendant's own hypothetical negligence, and which has not so far been accepted elsewhere in English law. That is, that the initial negligence removed an opportunity to sue the party who would have been negligent, for the consequences of their *hypothetical* fault.

The essence of Lord Neuberger's solution was that a claim may be based on the removal of the opportunity for the third party to cause harm through their negligence, and with it, the opportunity of the injured party to claim against them. But it is capable of treating *all* claims as claims for economic loss, in the form of an opportunity to sue. This argument was unnecessary in the case of *Wright* and, applied more broadly, it could be very problematic.[5] It is *unnecessary* in *Wright* because members of the Court of Appeal found no basis on which to conclude that the hospital would have been negligent in the event of an earlier referral. This was sufficient on its own to deal with the question of 'factual causation' in this case. It could be *problematic*

because, as Lord Neuberger noted, it translates a claim for physical injury into a claim for economic loss. As we will see in relation to remoteness, courts are wary of extending liability to forms of damage which were not within the scope of the duty owed. More than that, as we will see in relation to 'loss of a chance' (in Section 7), it would lay the ground for lost chance claims in medical negligence and perhaps much more generally. That route has already been rejected.

The decision in *Wright* raises the question of 'lost chances', explored in Section 7. But *Wright* also, evidently, raises the question of what happens when more than one negligent act or omission contributes to harm. That relates directly to our next issue for discussion.

Multiple Causes

Particular problems arise where multiple events contribute to the injury suffered by the claimant, most particularly where there are multiple torts. In this section, we introduce only one aspect of such cases. Other aspects of 'multiple cause' are considered in respect of 'intervening acts' (Section 3), in respect of proof of
p. 369 causation and contributing causes ↵ (Sections 5 and 6), and in respect of contribution between tortfeasors (Chapter 8). We will indicate, where appropriate, how these other issues link with the causal question considered here. But the fact that we must return to different aspects of the problems raised by multiple causes indicates how difficult it is to categorize 'causal' questions.

Concurrent and Consecutive Torts

A first (and frequently difficult) question is whether the claimant's damage should be treated as 'divisible' or 'indivisible'. If it is indivisible, the general principle is that each tortfeasor who can be said to have contributed to the damage is held fully responsible for that damage, subject to any deduction for contributory negligence on the part of the claimant (Chapter 7, Defences): *Dingle v Associated Newspapers* [1961] 2 QB 162. A defendant who is held liable for causing injury may pursue contribution proceedings in order to recover a proportion of damages from a concurrent tortfeasor (on Contribution, see Chapter 8.2). **Torts contributing to the same damage are *concurrent* torts.**

Where damage is considered to be *divisible*, the claimant in an action against any specific defendant will be awarded damages only for that part of the injury that is caused by the specific defendant's breach. **Torts contributing distinct injuries are *consecutive* torts.**

In the following two cases, damage caused by the original tort seemed to have been swallowed up by the effects of the later event. What, if anything, is the continuing responsibility of the original tortfeasor? The cases give different answers.

Baker v Willoughby [1970] AC 467

The plaintiff suffered injury to his leg in a road traffic accident caused by the tort of the defendant. Shortly before his tort action was heard, he was shot in the same leg during an armed robbery and the leg had to be amputated. This was a case of consecutive torts, although there was no prospect of proceeding against the

second tortfeasor. Equally, there was no question of holding the first tortfeasor liable for the loss of the leg—there was no meaningful causal link between the first and the second torts. The first tortfeasor had not put the plaintiff in danger, for example.

The House of Lords held that the first tortfeasor should pay for the damage he had 'caused' notwithstanding the intervention of the second incident. This makes perfect sense because, if the second tortfeasor had been available to be sued, he would have had to pay only for the *additional* pain, suffering, loss of amenity and loss of earnings that he had caused.

> **Lord Pearson, *Baker v Willoughby*, at 496**
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> I think a solution of the theoretical problem can be found in cases such as this by taking a comprehensive and unitary view of the damage caused by the original accident. … The original accident caused what may be called a 'devaluation' of the plaintiff, in the sense that it produced a general reduction of his capacity to do things, to earn money and to enjoy life. For that devaluation the original tortfeasor should be and remain responsible to the full extent, unless before the assessment of the damages something has happened which either diminishes the devaluation (e.g. if there is an unexpected recovery from some of the adverse effects of the accident) or by shortening the expectation of life diminishes the period over which the plaintiff will suffer from the devaluation. If the supervening event is a tort, the second tortfeasor should be responsible for the additional devaluation caused by him.

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Jobling v Associated Dairies [1982] AC 794

Here the plaintiff suffered a back injury at work through the tort of the defendant. He later developed a disease to which he had a predisposition. The House of Lords held that the disease had to be taken into account in assessing damages. The award for lost earnings must be reduced to reflect the fact that such earnings would have stopped at a certain date in any event. From the point of view of the law of damages, this too makes perfect sense, because reductions will be made if there is a known *risk* of future incapacity independent of the tort, to avoid compensating for injuries that are not caused by a tort (they would have happened anyway). But there is an ugly clash with the *Baker* decision. Could they *both* be correct? Why should a second tort be different from a supervening *illness*? There really is no good answer to this and the House of Lords in *Jobling* expressed doubts about the solution reached in *Baker v Willoughby*.

The conflict between *Baker v Willoughby*, and *Jobling*, was considered by the House of Lords in the next case.

Gray v Thames Trains [2009] UKHL 33

The claimant had sustained minor physical injuries, but much more serious psychiatric injury, in the Ladbroke Grove rail crash, which was admitted to have been caused by the appellants' negligence. The appellants accepted liability for his physical and mental injuries including the reduction in his earnings to a lower level. The present case arose because, under the influence of his psychiatric condition, the claimant eventually armed himself with a knife and killed a man with whom he had had an altercation. He was

convicted of manslaughter. The appellants denied that they were liable for the consequences of this crime (detention of the claimant), and this aspect of their defence is considered in Chapter 7, where we deal with 'illegality'. The appellants also denied that they were liable for the continuation of the existing diminished earning claim, into the period after the claimant's conviction for manslaughter. There was now, they argued, a more significant (perhaps 'supervening') reason why the claimant could not earn at all, which was that he had been convicted of a criminal offence. It should be noticed that this is different from the other 'concurrent causes' cases discussed earlier for two reasons, one of which counted decisively against the claimant, the other of which ought to have counted against the defendant, but seemed to impress only Lord Brown.[6] The first is that, evidently, the claimant here had committed a criminal offence which led to his detention. The second is that the supervening event (the criminal offence and detention) would itself not have come about without the fault of the defendants. The second event was, at least in this sense, caused by the defendants' breach of duty.

On this point, Lord Hoffmann simply applied *Jobling v Associated Dairies*, without commenting on the correctness or otherwise of *Baker v Willoughby*. Lord Rodger was more detailed in his remarks, and clearly seemed to doubt the correctness of *Baker*. He concluded though that *Baker* could not apply to the present case in any event, because of the first factor above (the claimant's criminal act).

p. 371 **Lord Rodger, *Gray v Thames Trains***
[2009] UKHL 33

> 75. The immediately obvious objection to the claimant's formulation of his claim for loss of earnings is that it proceeds by ignoring what actually happened—he killed Mr Boultwood and was detained as a result. Yet it is well established that 'the court should not speculate when it knows'. In other words, the judge should base any award of damages on what has actually happened, rather than on what might have happened, in the period between the tort and the time when the award is to be made. So, even if the court were satisfied that the claimant would have continued to lose earnings after 19 August 2001, due to the PTSD [posttraumatic stress disorder] brought on by the accident, it would be highly artificial to ignore the fact that, by committing manslaughter, the claimant had created a new set of circumstances which actually made it impossible for him to work and to earn after that date. Why should the defendants pay damages on the basis that, but for his PTSD, the claimant would have been able to work after 19 August, when, as the court knows, because of the manslaughter, at all material times after that date he was actually in some form of lawful detention which prevented him from working?
>
> 76. The claimant's approach is, to say the least, unreal. If that were the worst that could be said against it, it might stand in the uncomfortable company of *Baker v Willoughby* [1970] AC 467. There the plaintiff was injured in a road accident which left him with a permanently stiff leg. About three years later, just before his action of damages was due to come on for trial, he was shot in the same leg, which had then to be amputated. This House held that the plaintiff's disability could be regarded as having two causes and, where the later injuries became a concurrent cause of the disabilities caused by the injury inflicted by the defendant, they could not reduce the amount of the damages which the defendant had to pay for those disabilities. So the defendants had to pay the same sum by way of damages for the plaintiff's stiff leg, even though it had actually been amputated. In *Jobling v Associated Dairies Ltd* [1982] AC 794, 806G, Lord Edmund-Davies described this approach as 'unrealistic' and Lord Keith of Kinkel concluded, at p 814E, that 'in its full breadth' the decision was 'not acceptable'. Happily, there is no need to review the merits of *Baker v Willoughby* in this case since there is a fundamental objection to this version of the claimant's claim for loss of earnings which, in my view, takes it well beyond any possible reach of the reasoning in that case. At this point I return to the desirability of different organs of the same legal system adopting a consistent approach to the same events.

The 'consistency principle' referred to in the final sentence requires that if criminal law treats the claimant as responsible, he cannot then seek compensation for the same act from the defendant. This would imply that he is not responsible after all, and would thus contradict the criminal law.

Lord Brown, ultimately, reached the same decision, also on grounds of consistency. But he seemed to accept the validity of *Baker v Willoughby* and also emphasized the role of the defendant in bringing about the criminal act of the claimant.

Lord Brown, *Gray v Thames Trains* [2009] UKHL 33

95. … two reasons are suggested why [the partial loss claim] too must fail. One is the basic principle that subsequent events affecting a loss of earnings claim have to be taken into account when assessing what loss is recoverable—see, for example, *Jobling v Associated* p. 372 *Dairies Ltd* [1982] AC 794. … This I shall refer to as 'the vicissitudes principle' (as it was called in *Jobling*) and, where the supervening event has already occurred, it applies in conjunction with a second principle, that the court will not speculate when it knows. The other reason is that the partial loss claim, no less than the total loss claim, falls foul of the consistency principle. Lord Hoffmann … emphasises the first of those reasons, Lord Rodger … the second.

96. For my part I question whether the first reason is in itself sufficient to dispose of the partial loss claim. *Baker v Willoughby* [1970] AC 467, where the claimant was injured by two successive tortfeasers …, demonstrates if nothing else that on occasion justice will require some modification of the vicissitudes principle. How precisely, in the case of successive torts, this modification is to be rationalised and applied—the subject of extensive discussion in the speeches in *Jobling* and some subsequent consideration by Laws LJ in the Court of Appeal in *Rahman v Arearose Ltd* [2001] QB 351 is not presently in point. Just as *Baker v Willoughby* was held to have no application in *Jobling* where 'the victim is overtaken before trial by a wholly unconnected and disabling illness' (Lord Edmund-Davies at p809E), so too here, where the respondent ('the victim' of the appellant's tort) has been 'overtaken before trial' by a continuing detention order disabling him from working, *Baker v Willoughby* cannot apply. Obviously neither *Jobling* nor the present case involved successive torts. But whereas the disabling subsequent event in *Jobling* (myelopathy) was 'wholly unconnected', that can hardly be said of the manslaughter and the respondent's consequential detention here. But for the appellants' negligence there would have been no manslaughter and no detention. That here is a given.

97. All these cases raise in one form or another the question: on what disabling supervening events is the initial tortfeasor entitled to rely to reduce or extinguish the consequences of his tort? Put another way: from what further misfortunes of the claimant should the tortfeasor be held entitled to benefit?

98. It is perhaps instructive in this context to consider the recent decision of the House in *Corr v IBC Vehicles Ltd* [2008] AC 884.[7] Shift the facts and suppose that Mr Corr had in fact failed rather than succeeded in his suicide attempt but had further injured himself so as to turn a partial loss of earnings into a total one. It inevitably follows from the House's decision that, so far from such a supervening event bringing the claimant's partial earning loss to an end, he would have been found entitled to recover the whole. Why? Why would the continuing loss claim not fall foul of the vicissitudes principle? Essentially, as it seems to me, for two reasons: first, because the original tort remained causative of the suicide attempt (certainly the latter was not 'wholly unconnected with the original injuries'), and, secondly, because there was no public policy reason for regarding the suicide attempt as a supervening vicissitude such as to extinguish the tortfeasor's liability for the continuing loss. The first of

> those reasons is common to this case too (which is why it seems to me that the vicissitudes principle is not sufficient in itself to defeat A's continuing loss claim). But what of the second reason, recognising of course that manslaughter, unlike suicide, *is* a criminal offence?

Ultimately, Lord Brown thought that this second reason—effectively, the consistency principle—was enough to distinguish this case from both *Baker* and *Corr v IBC*.

The authority of *Gray v Thames Trains* was affirmed by the Supreme Court in the following decision, which gives continued emphasis to the 'consistency principle'.

p. 373 ***Ecila Henderson (A Protected Party, by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC**

Lord Hamblen gave the judgment of the Court.

1. The appellant, Ms Ecila Henderson, suffers from paranoid schizophrenia or schizoaffective disorder. On 25 August 2010 she stabbed her mother to death whilst experiencing a serious psychotic episode. She was charged with her mother's murder but, in view of the psychiatric evidence, the prosecution agreed to a plea of manslaughter by reason of diminished responsibility. That plea was accepted by the court and on 8 July 2011 Foskett J sentenced the appellant to a hospital order under section 37 of the Mental Health Act 1983 <https://uk.westlaw.com/Document/ID71644B0E44811DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> ('the 1983 Act') and an unlimited restriction order under section 41 <https://uk.westlaw.com/Document/I3FB8F611E44A11DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> of the 1983 Act. The appellant has remained subject to detention pursuant to the 1983 Act ever since and she is not expected to be released for some significant time.
2. The respondent, Dorset Healthcare University NHS Foundation Trust, has admitted liability in negligence in failing to return the appellant to hospital on the basis of her manifest psychotic state. The tragic killing of her mother would not have occurred had this been done.
3. The appellant advances various heads of damages against the respondent as a result of its admitted negligence. Liability for these heads of damages is denied on the grounds that the damages claimed by the appellant are the consequence of: (i) the sentence imposed on her by the criminal court; and/or (ii) her criminal act of manslaughter, and are therefore irrecoverable by reason of the doctrine of ex turpi causa non oritur actio/illegality.
4. Similar claims for damages to those made by the appellant were held to be irrecoverable by the House of Lords in *Gray v Thames Trains Ltd [2009] UKHL 33; [2009] AC 1339* <https://uk.westlaw.com/Document/I70379CE05BB311DEA6B6998D754E0430/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> ('*Gray*'), also a case of manslaughter on the grounds of diminished responsibility. The appeal raises the question of whether *Gray* <https://uk.westlaw.com/Document/I70379CE05BB311DEA6B6998D754E0430/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> can be distinguished and, if not, whether it should be departed from, in particular in the light of the Supreme Court decision concerning illegality in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 <https://uk.westlaw.com/Document/IC59D00404E8011E6876795E8CB4258FD/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> ('*Patel*').

The Justices decided that *Gray* could not be distinguished; and that it should not be departed from. Although Lord Hoffmann, in *Gray*, had reasoned in terms of causation, the causal principle that he stated could be interpreted as based in policy. The 'consistency principle' was approached as a question of policy.

> 91. The court in *Gray* <https://uk.westlaw.com/Document/I70379CE05BB311DEA6B6998D754E0430/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> examined whether the narrower and the wider rules were, as was contended, 'a special rule of public policy'. As already explained, both Lord Hoffmann and Lord Rodger considered the policy reasons for the rules and concluded that they were justified as a matter of public policy. Even though Lord Hoffmann endorsed a causation approach to the application of the wider rule, that involved a causal rule based on policy considerations. As the Court of Appeal said at para 64 of its judgment, it was a 'combination of public policy and causation'.
>
> 106. In such circumstances, the majority in *Gray* <https://uk.westlaw.com/Document/I70379CE05BB311DEA6B6998D754E0430/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> justifiably considered that inconsistency would arise not only if he was allowed to recover damages resulting from the sentence imposed, but also if they resulted from the intentional criminal act for which he had been held responsible. To allow recovery would be to attribute responsibility for that criminal act not, as determined by the criminal law, to the criminal but to someone else, namely the tortious defendant. There is a contradiction between the law's treatment of conduct as criminal and the acceptance that such conduct should give rise to a civil right of reimbursement. The criminal under the criminal law becomes the victim under tort law.

p. 374 ↵ The discussion throughout this Section has illustrated the general point, that 'cause in fact' is by no means always an objective question. We will consider the cases of *Gray* and *Henderson* further in Chapter 7.4, in relation to the defence of 'illegality'.

We will leave 'cause in fact' for now, but return in Sections 5–7 of this Chapter. There we will particularly consider cases where *proof* of causation has been problematic; the possibility that there are further routes to causation in addition to being a 'but for' cause; and the difficult issue of 'lost chances'.

3 'Cause-in-Law'/ Remoteness/ Scope of Liability

3.1 Introduction: Three Versions of the Remoteness Question

In Section 1, we pointed out that there have been different interpretations of the 'remoteness' question, some more compatible than others with the idea that this is a question about 'causation'.

Imagine that the remoteness question is stated in the following three very different ways. This exercise will help us to understand diverging currents in the case law.

1. Is the full extent of the damage fairly attributable to the defendant's breach of duty or other tortious intervention?

This was the question adopted by the Privy Council in *The Wagon Mound (No 1)*, which is extracted in Section 3. Fairness of attribution was answered in terms of 'foreseeability'. In cases of negligence, this was meant to align remoteness with duty of care and breach. This has been the authoritative test since 1961, and as we will see later it was supposed to sweep away the problems associated with more 'causal' language. But it has failed to resolve all of the difficulties, and 'causal' language persists in certain areas. Equally, it is harder to reconcile with the more complex approach to duty of care. We saw at the end of Section 1 that questions to do with the complexity of the duty of care are now dealt with separately as the 'scope of duty' or 'duty nexus' question. If this is the case, is there any more to remoteness than a foreseeability test based in an outdated approach to 'duty'?

2. Is the damage a *direct* consequence of the defendant's breach, or has the chain of causation been broken?

This was the approach endorsed by the Court of Appeal in *Re Polemis and Furness Withy & Co* [1921] 3 KB 560. It appears to pose a factual question, but since the 'chain of causation' is not a real entity, it was never anything more than a metaphor. It was disapproved by the Privy Council in *The Wagon Mound*, yet vestiges of this approach tend to survive. In particular, some issues are framed in terms of 'new cause' or '*nova causa interveniens*' (or, in the case of human interventions, '*novus actus interveniens*'), even if analysis in terms of 'directness' is no longer expected to provide the answers. Again, the Supreme Court has described these in terms of an *additional* element of the 'legal responsibility' question, despite their origins as a distinct interpretation of remoteness. Because of their origins, and because of the uncertainties around the 'conceptual structure' set out by the Supreme Court, they are considered in this section of the Chapter.

3. Even if the defendant's breach is a condition of the damage suffered, so that it satisfies the 'but for' test, is it a 'cause' of that damage?

p. 375 ↵ This formulation opens up a range of possibilities, based on common sense, ordinary language, and intuition. It is more like question 2 than question 1. Unlike *The Wagon Mound* variant of 1, it does not address questions of what the *defendant* might have been able to foresee, in order to establish what is 'fair'. Instead, it looks with hindsight at what has occurred in order to identify whether a particular condition can be treated as having 'caused' the damage. However, it is broader than 2, because 'a break in the chain of causation' is not the only reason why a condition may not be considered a cause; and it does not seek a solution in logical or pseudo-scientific analysis of events. This can be seen within the broad 'common sense causal approach' of Hart and Honoré.

The above possibilities can be used to explain some continuing inconsistencies in the case law, to which we now turn. In Section 4, we turn to the 'scope of duty' or 'duty nexus' question.

3.2 Foreseeability of the Type of Harm: *The Wagon Mound (No 1)*

The Issue: *Re Polemis* and 'Direct Consequences'

In *The Wagon Mound (No 1)*, the Privy Council considered the correctness of a previous Court of Appeal decision, *Re Polemis and Furness Withy & Co* [1921] 3 KB 560 (generally known as *Re Polemis*). *Re Polemis* held that a defendant who is shown to have been at fault is liable for all *direct* consequences of that fault.

Re Polemis and Furness Withy & Co [1921] 3 KB 560

Through the negligence of stevedores employed by the defendant charterers, a board fell into the hold of a ship where tins of benzene and/or petrol were being shifted. The fall of the plank was followed by a rush of flames and the total destruction of the ship. On a claim against the charterers for the full value of the ship, arbitrators found that the fire which destroyed the ship was caused by a spark igniting vapour in the hold; that the spark was caused by the fall of the plank into the hold; and that the causing of the spark (and therefore the fire) could not reasonably have been anticipated from the falling of the board, though some mechanical damage to the ship might reasonably have been anticipated. The Court of Appeal held that the charterers were liable for all the direct consequences of the negligence of their servants, even though those consequences could not reasonably have been anticipated:

> **Warrington LJ, at 574**
>
> The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.

Martin Davies, 'The Road From Morocco: Polemis Through Donoghue to No-Fault' (1982) 45 MLR 534–55, at 534

> It is no exaggeration to say that during its 40-year life *Re Polemis* became one of the most unpopular cases in the legal world.

p. 376 ↵ Davies argues that *Polemis* was, initially, a perfectly acceptable decision, popular in the shipping world and not at the time criticized for creating over-expansive liability to defendants. Although he is critical of the later *Wagon Mound* decision, Davies does not seek to defend the general approach in *Re Polemis* as providing a better interpretation of causal questions. Rather, he argues that developments in the tort of negligence had, by the time of his article in 1982, created problems for both remoteness tests, and he simply points out that *Polemis* itself should be judged in terms of its effect at the time of the decision. In particular, having established that the successful claim was one in tort and not in contract,[8] Davies adds that the relevant *duty*

which was breached by the negligence of the stevedores was necessarily a specific one, since the case predated the recognition of a generalized duty of care in *Donoghue v Stevenson*. The specific duty in question was owed by the charterer of the ship, hired (chartered) from the ship owner.

> Why is it so important to establish the source of the defendants' duty of care in *Re Polemis*? It is important because that duty was, like all pre-Donoghue duties of care, a particularized relational one. It was owed by the defendants to the plaintiffs alone, and it arose from the nature of the special relationship between the parties. To forget this is to misunderstand why the *Re Polemis* rule took the form it did. The true original intention behind the *Re Polemis* remoteness rule can only be recognised by seeing it in the context of a pre-1932 duty of care. A wide remoteness rule was unexceptionable when duty was narrowly conceived. Extensive liability of defendants is not a problem when those defendants can only be liable to a limited class of plaintiffs, or even a single plaintiff only. …

We should notice that Davies here mentions only one reason why the *Polemis* rule was unpopular.[9] He does not mention that Viscount Simonds also took exception to the very idea that such cases should be dealt with in terms of causation. In the extract below, Viscount Simonds refers to the 'never-ending and insoluble problems of causation'. Elsewhere in his judgment, he was more scathing, suggesting that courts 'were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon' (at 419). Martin Davies suggests that the *Polemis* rule was 'self-applying', but in fact it threw up considerable difficulty. Nonetheless, the Privy Council was mistaken if it thought that the move to foreseeability would result in an easily applicable general test.

Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388

The facts of this case are set out in Section 1 of this chapter.

p. 377

Viscount Simonds (delivering the judgment of the Board), at 422–6

Enough has been said to show that the authority of *Polemis* has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct.' It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in *Polemis*. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or, alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in *Polemis*. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the 'direct' consequence) be substituted which leads to no-where but the never-ending and insoluble problems of causation. 'The lawyer,' said Sir Frederick Pollock, 'cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.' Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the 'chain of causation' is broken by a 'nova causa' or 'novus actus interveniens.' …

At an early stage in this judgment their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well-known dictum of Lord Sumner: 'This, however, goes to culpability not to compensation.' It is with the greatest respect to that very learned judge and to those who have echoed his words, that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

> Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is 'direct.' In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue v. Stevenson*: 'The liability for negligence, whether you style it such or treat it as in other systems as a species ↵ of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.' It is a departure from this sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural,' equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: cf. *Woods v. Duncan*. Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth v. Birmingham Waterworks Co*. [(1856)11 Ex. 781].

p. 378

Commentary

The Privy Council dismissed as an 'error' Lord Sumner's dictum in *Weld-Blundell v Stephens* [1920] AC 956, 999, that foreseeability 'goes to culpability, not to compensation'. On the face of it, *The Wagon Mound (No 1)* determines that there should no longer be different tests for the breach of duty, and the extent of the damage which is recoverable. This decision is not based on analysis of causation. In fact, the judgment shows a strong distaste for causal language, and in principle it ought to leave 'cause in fact' as the only remaining question of causation in tort law. This was precisely the interpretation of *The Wagon Mound* adopted by Glanville Williams, a strong supporter of a foreseeability-based approach, who saw *The Wagon Mound* as decisive.

G. Williams, 'The Risk Principle' [1961] 77 LQR 179–212, at 179

> … If *The Wagon Mound* is accepted by the English courts, as surely it must be … [w] e shall be spared most of what the Board called 'the never-ending and insoluble problems of causation,' together with the subtleties of *novus actus interveniens*, and shall be left with a comparatively simple rule the application of which involves merely an adjudication of fact. In future, broadly speaking, there will not be two questions in the tort of negligence, a question of initial responsibility and one of 'proximity,' [by which Williams means 'proximate cause' or remoteness] but only one question—was the defendant negligent as regards this damage? He will not be liable to the 'unforeseeable plaintiff,' nor even to the foreseeable plaintiff in respect of unforeseeable damage. This amounts to a complete acceptance of what is conveniently called the risk principle, namely, that negligence is to be considered not in the abstract but only in relation to a particular risk.

The ambition was to replace two tests (duty and remoteness) with one (foreseeability). But it swiftly became clear that this was over-ambitious. Subsequently, much use has been made of the particular 'risk' to which the duty of care is directed, but this is not equated with foreseeability. As the approach to duty has become more

nuanced, questions of 'duty nexus' or 'scope of duty' have been given new relevance as a distinct branch of enquiry (Section 4). In a sense, the 'risk principle' is vindicated, but not necessarily as an aspect of remoteness, and certainly not through being equated with foreseeability.

p. 379 ↵ Although the change in the law effected by *The Wagon Mound* had wide academic support, there were large ambiguities in the decision itself. It is clear that Viscount Simonds expected his approach to appeal to the sense of fairness. It is argued to be *unfair* to make a defendant liable for very extensive damage which was unforeseeable, simply because some trivial damage *was* foreseeable. But what exactly did *The Wagon Mound* decide would be the relevant rule? Attention to the detail of the judgment shows that the Privy Council distinguished between foreseeable and unforeseeable *types* of damage: 'the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen' (final paragraph extracted above). If this is taken literally, then if the damage is unforeseeable in extent, but foreseeable in *type*, then all of the damage will in fact be recoverable. This was the understanding of the case which immediately followed (see, for example, R. W. M. Dias, 'Trouble on Oiled Waters' [1967] CLJ 62, 72), and indeed it is the way that the rule in *The Wagon Mound* has generally been interpreted (see the discussions of *Smith v Leech Brain* and *Hughes v Lord Advocate*, as well as more recent case law, in Section 3.3). But importantly, this means that the rule as expressed is not fully consistent with the idea that only foreseeable harm is fairly recoverable. Some harm which was not foreseeable will be recoverable, if it is of the appropriate type. This in turn is not consistent with the rhetoric of 'fairness' at the start of the extract.

There is a further ambiguity. The Privy Council held that damage by fouling was foreseeable in this case, but that damage by fire was not. Is this consistent with the distinction mentioned earlier in terms of different *kinds* of damage, or does it suggest a different distinction, in terms of damage done by a different *process*? The interpretation of *The Wagon Mound* in later cases such as *Hughes v Lord Advocate* has approached foreseeability in terms of type of damage and *not* in terms of the process by which it comes about.

How to Judge Foreseeability

According to the Privy Council, the view taken by the courts below that the damage was direct and therefore recoverable, depended upon hindsight. This, the court argued, was unfair to the defendant, since '[a]fter the event even a fool is wise. But it is not the hindsight of a fool; it is only the foresight of a reasonable man which alone can determine responsibility'. Instead, the Privy Council adopted a test of reasonable foresight, judged from the point of view of a reasonable person *in the position of the defendant at the time of the breach*.

This form of foreseeability is referred to by Hart and Honoré as 'foreseeability in a practical sense'. We will need this idea again in addressing the case law that follows. According to Hart and Honoré, normal *causal* statements are not like this. They are generally retrospective and are to do with attribution rather than fault. The adoption of foreseeability in a 'practical' sense is a sign that remoteness is aligned with duty and breach, rather than being guided by 'causal' ideas.

3.3 Lingering Problems

Pre-existing Vulnerability: *Smith v Leech Brain and Co Ltd* [1962] 2 QB 405

The plaintiff was the widow of a steel galvanizer employed by the defendants. Part of his job involved lowering articles by means of an overhead crane into molten metal. He was afforded inadequate protection
p. 380 against splashing by molten metal and suffered a burn on his lower lip. ↵ The burn promoted cancer, from which he died three years later. In this first instance decision, Lord Parker CJ considered whether he was permitted by the Privy Council decision in *The Wagon Mound* to depart from the directness rule in *Re Polemis. Re Polemis* was a Court of Appeal decision and in principle binding upon the lower court; the Privy Council decision had only persuasive authority.

He held that *The Wagon Mound* made no difference to a case such as this. The initial injury (the burn) was of a readily foreseeable type, and the subsequent cancer was treated as merely extending the amount of harm suffered.

> **Lord Parker CJ, at 413–15**
>
> … I find that the burn was the promoting agency of cancer in tissues which already had a pre-malignant condition. In those circumstances, it is clear that the plaintiff's husband, but for the burn, would not necessarily ever have developed cancer. On the other hand, having regard to the number of matters which can be promoting agencies, there was a strong likelihood that at some stage in his life he would develop cancer. But that the burn did contribute to, or cause in part, at any rate, the cancer and the death, I have no doubt.
>
> The third question is damages. Here I am confronted with the recent decision of the Privy Council in *Overseas Tankship (U.K.) Limited v. Morts Dock and Engineering Co. Ltd (The Wagon Mound)*. But for that case, it seems to me perfectly clear that, assuming negligence proved, and assuming that the burn caused in whole or in part the cancer and the death, the plaintiff would be entitled to recover. …
>
> For my part, I am quite satisfied that the Judicial Committee in the *Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of Kennedy J. in *Dulieu v. White & Sons* [[1901] 2 KB 669], where he said [679]: 'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart'. …
>
> The Judicial Committee were, I think, disagreeing with the decision in the *Polemis* case that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated. I think that view is really supported by the way in which cases of this sort have been dealt with in Scotland. Scotland has never, so far as I know, adopted the principle laid down in *Polemis*, and yet I am quite satisfied that they have throughout proceeded on the basis that the tortfeasor takes the victim as he finds him.
>
> In those circumstances, it seems to me that this is plainly a case which comes within the old principle. The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim.

Lord Parker argued that *The Wagon Mound* decision did not alter the existing rule that the defendant must 'take his victim as he finds him'. He sought to make this rule compatible with *The Wagon Mound* by suggesting
p. 381 that the 'thin skull' or 'egg-shell skull' rule only ↵ operates so as to allow the defendant to be liable for *more extensive damage* than he might have foreseen. It does not allow defendants to be liable if, without the vulnerability, no damage (or no damage of the same type) would be foreseeable at all. Of course, acceptance of his approach depends on accepting that *The Wagon Mound* does not require the *extent* of the damage to be foreseeable.

Hart and Honoré argue that this attempt to reconcile the 'egg-shell skull' cases with *The Wagon Mound* is 'mere window dressing': 'the truth is that this aspect of common sense causal discourse has survived the *Wagon Mound*' (*Causation in the Law*, 2nd edn, 274). However, the decision in *Smith v Leech Brain* itself can be reconciled with the *Wagon Mound* if we accept Lord Parker's approach of treating the eventual damage suffered as the same in type as the damage that was foreseeable. Lord Parker argued that once the burn was foreseeable, the cancer only raised the issue of how extensive *damages* should be. Is cancer the same 'type' of damage as a burn? If cancer is the same type of damage as a burn, then it seems that personal physical injury is very generously treated for the purposes of this test, and it appears that the *Wagon Mound* does not do what it professed to do. On the other hand, if it is not the same type of damage, then the 'egg-shell skull' rule is a decisive departure from *The Wagon Mound*.

Glanville Williams, from whose important article we extracted earlier, also supported the retention of the egg-shell skull rule both for physical injury and for mental harm. He supported the rule on grounds of policy, justice, and fairness, and did not seek to make it compatible with the 'risk principle'. But this may be because he thought that *The Wagon Mound* would limit recovery to those damages that were foreseeable in *extent*.

Williams, 'The Risk Principle' [1961] 77 LQR 179, 196

> It seems to me that, balancing one consideration with another, and expressing the opinion with considerable doubt, the thin skull rule is on the whole a justifiable exception to the risk principle. In a situation where our sympathy for the plaintiff conflicts with our sense of justice towards the defendant, the risk principle normally requires us to concentrate our attention upon justice to the defendant, acquitting him of consequences in respect of which he was not at fault. However, where the plaintiff has suffered bodily injury, it is difficult to maintain the cold logical analysis of the situation. Human bodies are too fragile, and life too precarious, to permit a defendant nicely to calculate how much injury he may inflict without causing more serious injury.

It is clear from subsequent cases that the egg-shell skull rule has been retained. Examples include *Robinson v Post Office* [1974] 1 WLR 1176 (allergic reaction leading to very extensive injuries, further discussed under 'third party interventions', later in this chapter) and *Malcolm v Broadhurst* [1970] 3 All ER 508 (exacerbation of a long-standing nervous condition by a car accident: 'there is no difference in principle between an egg-shell skull and an egg-shell personality', per Geoffrey Lane J), applied in *Page v Smith* (considered in Chapter 5.1). *Malcolm v Broadhurst* applied the pre-*Wagon Mound* authority of *Love v Port of London Authority* [1959] 2 Lloyd's Rep 541, illustrating that the Privy Council case had less immediate impact than might have been expected.

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Lack of Funds: The Demise of *The Liesbosch Dredger*

In *The Liesbosch Dredger* [1933] AC 449, the plaintiffs' ship sank as the result of the defendant's negligence. The dredger was engaged in work under contract and a contractual penalty would be paid if the work was not completed on time. Because the plaintiffs were short of funds, they were unable to buy another dredger and had to hire one at great expense in order to avoid the contractual penalty. They claimed for the whole of their financial loss, but the House of Lords held that nothing attributable to the plaintiffs' own lack of funds or 'impecuniosity' could be recovered. This decision was approved by the Privy Council in *The Wagon Mound (No*

1), presumably because it did not allow for 'all direct consequences' to be recovered. It did, however, employ causal language in expressing the view that the cost of the hire of a dredger was not an 'immediate physical consequence' of the defendant's negligence. In the words of Donaldson LJ in *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433, 458, Lord Wright 'took the view that, in so far as the plaintiffs had in fact suffered more than the loss assessed on a market basis, the excess flowed directly from their lack of means and not from the tortious act'. This is a judgment as to cause.

The Liesbosch Dredger was taken to establish that the 'egg-shell skull rule' does not apply to financial vulnerability. The case was distinguished in a number of cases with strong disapproval (for example, *Alcoa Minerals v Broderick* [2002] 1 AC 371, a decision of the Privy Council; *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433). *The Liesbosch Dredger* was finally departed from by the House of Lords in the case of *Lagden v O'Connor* [2004] 1 AC 1067. This amounts to an overruling of the older decision.

It is a peculiarity of the egg-shell skull rule that it has not only been accepted, but also now extended to financial vulnerability, without a clear determination of whether it is an application of the foreseeability principle, or an exception to it.

Causal Sequence and Type of Damage: *Hughes v Lord Advocate* [1963] AC 837

A manhole in a city street was left open and unguarded. It was covered with a tent and surrounded by warning paraffin lamps. An 8-year-old boy entered the tent and somehow knocked one of the lamps into the hole (or perhaps lowered it in). An explosion occurred causing him to fall in to the hole and be severely burned. On appeal to the House of Lords, it was held that the workmen breached a duty of care owed to the boy, and that the damage was reasonably foreseeable.

> **Lord Reid, at 845**
>
> It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. That was not the ground of judgment of the First Division or of the Lord Ordinary and the facts proved do not, in my judgment, support that argument. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although
> p. 383 the damage may be a good deal ↵ greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.
>
> So we have (first) a duty owed by the workmen, (secondly) the fact that if they had done as they ought to have done there would have been no accident, and (thirdly) the fact that the injuries suffered by the appellant, though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The ground on which this case has been decided against the appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defender's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way.

The decision to allow recovery in this case, in which a known source of danger behaves in an unforeseeable way and thereby creates damage which is more extensive than might have been expected, decisively qualifies the claim that *The Wagon Mound* limits liability to foreseeable damage. In lower courts, subsequent case law has been inconsistent. For example, in *Doughty v Turner* [1964] 1 QB 518, the Court of Appeal drew a distinction between burning caused by a splash of hot liquid (foreseeable) and burning caused by an explosion (unforeseeable). In *Tremain v Pike* [1969] 1 WLR 1556, a first instance decision, it was suggested that illness contracted through contact with rat's urine (which was thought to be unforeseeable) was different in type from illness suffered through a rat bite (which was foreseeable). However, the principal reason for the decision in *Tremain* was that because the risk of infection from rat's urine was not foreseeable, there was no reason why the employer in that case should have taken the additional precautions necessary to protect against infection by rat's urine. Thus there was no breach of duty and the judge's remarks about remoteness were *obiter dicta*. Crucially, the steps necessary to protect against the *unforeseeable* infection would have been different from those needed to protect against the known danger associated with rat bites. In the other cases we have examined here (including *Page v Smith, Hughes v Lord Advocate*, and *The Wagon Mound* itself), there is only one set of steps required to remove the risk, however broadly or narrowly it is defined.

The authority of *Hughes v Lord Advocate* was reinforced through the following case.

Jolley v Sutton LBC [2000] 1 WLR 1082

A boat was left abandoned for about two years on land owned by the defendants. The council made plans to remove the boat, but these plans were not implemented. Two boys, the plaintiff and a friend, aged 13 and 14, used a car jack to prop up the boat and to repair it. The boat fell off the prop and crushed the plaintiff, who suffered serious spinal injuries leading to paraplegia. He brought an action against the council for negligence and breach of duty under the Occupiers Liability Act 1957, section 2(2)(3).[10] At first instance, judgment was given for the plaintiff subject to a reduction in damages of 25 per cent for contributory negligence (Chapter 7).
p. 384 The judge found that the presence of the boat would foreseeably attract ↵ children and that the type of accident and injury was reasonably foreseeable. The House of Lords agreed.

The judgment of Lord Steyn was chiefly concerned with examination of the facts of the case. He said that 'very little needs to be said about the law'. However, he defended the compatibility of *Hughes v Lord Advocate* (above) with *The Wagon Mound (No 1)* at 1090:

> … The speech of Lord Reid in *Hughes v. Lord Advocate* [1963] A.C. 837 is … not in conflict with *The Wagon Mound No. 1*. The scope of the two modifiers—the precise manner in which the injury came about and its extent—is not definitively answered by either *The Wagon Mound No. 1* or *Hughes v. Lord Advocate*. It requires determination in the context of an intense focus on the circumstances of each case. …

The judgment of Lord Hoffmann is far more concerned with the question of which approach to take as a matter of law:

> It is … agreed that the plaintiff must show that the injury which he suffered fell within the scope of the council's duty and that in cases of physical injury, the scope of the duty is determined by whether or not the injury fell within a description which could be said to have been reasonably foreseeable. *Donoghue v. Stevenson* [1932] A.C. 562 of course established the general principle that reasonable foreseeability of physical injury to another generates a duty of care. The further proposition that reasonable foreseeability also governs the question of whether the injury comes within the scope of that duty had to wait until *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd (The Wagon Mound)* [1961] A.C. 388 ('*The Wagon Mound No. 1*') for authoritative recognition. Until then, there was a view that the determination of liability involved a two-stage process. The existence of a duty depended upon whether injury of some kind was foreseeable. Once such a duty had been established, the defendant was liable for any injury which had been 'directly caused' by an act in breach of that duty, whether such injury was reasonably foreseeable or not. But the present law is that unless the injury is of a description which was reasonably foreseeable, it is (according to taste) 'outside the scope of the duty' or 'too remote.'
>
> It is also agreed that what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus. And the description is formulated by reference to the nature of the risk which ought to have been foreseen. …
>
> The short point in the present appeal is therefore whether the judge [1998] 1 Lloyd's Rep. 433, 439 was right in saying in general terms that the risk was that children would 'meddle with the boat at the risk of some physical injury' or whether the Court of Appeal were right in saying that the only foreseeable risk was of 'children who were drawn to the boat climbing upon it and being injured by the rotten planking giving way beneath them:' *per* Roch L.J. [1998] 1 W.L.R. 1546, 1555. Was the wider risk, which would include within its description the accident which actually happened, reasonably foreseeable?
>
> … The council admit that they should have removed the boat. True, they make this concession solely on the ground that there was a risk that children would suffer minor injuries if the rotten planking gave way beneath them. But the concession shows that if there were a wider risk, the council would
> p. 385 have had to incur no additional expense to eliminate it. ↵ They would only have had to do what they admit they should have done anyway. On the principle as stated by Lord Reid, the wider risk would also fall within the scope of the council's duty unless it was different in kind from that which should have been foreseen (like the fire and pollution risks in *The Wagon Mound No. 1) and* either wholly unforeseeable (as the fire risk was assumed to be in *The Wagon Mound No. 1*) or so remote that it could be 'brushed aside as far-fetched:' see Lord Reid in *The Wagon Mound No. 2* [1969] 2 A.C. 617.
>
> I agree with my noble and learned friend, Lord Steyn, and the judge that one cannot so describe the risk that children coming upon an abandoned boat and trailer would suffer injury in some way other than by falling through the planks. …
>
> … In the present case, the rotten condition of the boat had a significance beyond the particular danger it created. It proclaimed the boat and its trailer as abandoned, res nullius, there for the taking, to make of them whatever use the rich fantasy life of children might suggest.

> In the Court of Appeal, Lord Woolf M.R. observed, at p. 1553, that there seemed to be no case of which counsel were aware 'where want of care on the part of a defendant was established but a plaintiff, who was a child, had failed to succeed because the circumstances of the accident were not foreseeable.' I would suggest that this is for a combination of three reasons: first, because a finding or admission of want of care on the part of the defendant establishes that it would have cost the defendant no more trouble to avoid the injury which happened than he should in any case have taken; secondly, because in such circumstances the defendants will be liable for the materialisation of even relatively small risks of a different kind, and thirdly, because it has been repeatedly said in cases about children that their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated. For these reasons, I think that the judge's broad description of the risk as being that children would 'meddle with the boat at the risk of some physical injury' was the correct one to adopt on the facts of this case. The actual injury fell within that description and I would therefore allow the appeal.

We should notice two important features of the discussion by Lord Hoffmann above. First, at the beginning of the extract, Lord Hoffmann adopts terminology that was not present in *The Wagon Mound* but which he treats as compatible with that decision: was the damage within the scope of the duty owed by the defendants? Alternatively, was it 'within the risk' against which the defendant should protect the claimant? The language of 'within the risk' is familiar from Williams' article on 'The Risk Principle' (Section 3.2). But the language of 'scope of duty' is a relatively new development. Arguably, this development would allow us to interpret *The Wagon Mound*'s emphasis on foreseeability as just one aspect of a broader question, namely whether the damage suffered was within the scope of the duty. And that would reflect the fact that the test for a duty of care has become increasingly nuanced. This could in principle be a route to updating *The Wagon Mound*. We will see in Section 4, however, that the Supreme Court now treats questions about 'scope of duty' as separate from questions of remoteness. Does this mean that 'the risk principle' can no longer be seen as a way of determining remoteness questions, so that remoteness can only be understood in terms of foreseeability—though this has been less than satisfactory? Meanwhile, the kinds of causal questions the *Wagon Mound* was intended to do away with have simply reappeared as a separate element of the legal responsibility test.

Second, and less helpfully, Lord Hoffmann then merged the question of remoteness with the question of
p. 386 breach. Since the defendants should in any event have removed the boat in ↵ order to avoid the admittedly foreseeable danger of injury, he argues that there is no reason to suggest that the defendants were free to leave the boat in place because there was only a small possibility that the sort of events in question might happen. The truth is that such an approach, if applied without the 'kind of damage' limitation, would effectively do away with any separate question of remoteness based on foreseeability or scope of duty, and would simply ask whether avoidance of the damage would have required any other precautions than those already required by the need to avoid the *foreseeable* injury. For example, it would lead to reversal of the decision in *The Wagon Mound (No 1)* itself, on the basis that avoidance of the serious risk of damage by fire (unforeseeable) required no further precautions than avoidance of the trivial risk associated with fouling (foreseeable). The oil should not have been released. Since there is no obvious intention to depart from *The Wagon Mound* in this case, the idea that the avoidance of the wider risk would cost no greater precautions than avoidance of the lesser and more foreseeable risk should only operate *together with* the requirement that the damage suffered should be of a 'foreseeable type'. In this case the foreseeable risk posed by the rotten boat was held to be that children

'would meddle with the boat at the risk of some physical injury'. The risk is very broadly defined. Lord Hoffmann in his closing remarks invites the conclusion that this is a special approach adapted to known sources of hazard to children, since in such a case all manner of accidents are to be expected.

Intervening Acts: What is a *Novus Actus Interveniens*?

Cases involving a human act which intervenes between the defendant's breach of duty, and the claimant's loss, have traditionally been addressed through the expression '*novus actus interveniens*' ('new intervening act'). There are instances where no damage would have occurred at all but for the intervening act (for example, *Home Office v Dorset Yacht, Reeves v Commr of Police*); but there are also certain other cases where the intervention of a third party (or of the claimant) *adds to* the damage suffered, where there was some initial harm (*Knightley v Johns; Robinson v Post Office; McKew v Holland & Hannen & Cubbitts; Wright v Cambridge Medical Group*). In some cases in both categories, the defendant is released from liability to the extent that the damage flows from the intervening act. In other cases, the defendant is held liable for the full extent of the damage.

Traditionally, the question in such cases has been whether the intervening act is to be held to amount to a 'new cause', 'breaking the chain of causation'. Clearly, this is a 'causal' idea, and it is the origin of the expressions *novus actus interveniens*, and *nova causa interveniens*. These expressions were singled out in *The Wagon Mound* as providing a 'conspicuous example' of the problems caused by the *Polemis* approach, leading (in words borrowed from Pollock) to the 'logical and metaphysical controversies that beset the idea of cause'. But here *The Wagon Mound* has singularly failed to replace the causal approach. In these cases, the language of *novus actus* continues to be employed more often than the language of foreseeability. Can these cases be decided *without* recourse to the 'logical and metaphysical controversies' associated with causation?

On several occasions, an attempt has been made to resolve cases in this area by reference to foreseeability. However, foreseeability in these cases was never used in the true *Wagon Mound* sense, where it was applied to the type of damage. Rather, it was asked whether *the chain of events* was foreseeable. Could the intervention of the third party have been foreseen? Also, 'foreseeability' no longer, in such cases, referred to the question of whether the *defendant* could have foreseen the intervention of the third party. This was the 'practical' sense of
p. 387 foreseeability that we mentioned above in our commentary on *The Wagon Mound*. ↵ Instead, foreseeability was judged with hindsight. But even with this change, the 'foreseeability' approach has not proved successful and it is suggested below that it has now been abandoned.

What other possibilities are there? It is possible that the broader causal approach of Hart and Honoré can provide assistance. As we saw, this approach retains a focus on causal language, while denying that this might lead to highly technical or 'metaphysical' solutions. On this approach, the relevant distinction to be drawn would be between 'normal' and 'abnormal' interventions. This would not necessarily tally with the distinction between interventions that are foreseeable and unforeseeable, nor between those that are negligent and non-negligent, nor between those that are deliberate and accidental. All such factors may be relevant, but none decisive. This being so, much would be left to the opinion of the deciding tribunal. In some more recent cases, as well as a few older ones, a direct appeal to the purpose and extent of the relevant duty has been employed to resolve the issues. In some important respects, this approach based on distinct duties and their scope is better suited to the more purposive and nuanced approach to establishing the duty of care to be found in current

English law. But formally, the Supreme Court has described 'scope of duty' questions as separate from questions of intervening (or alternative) cause. The solutions to the cases below suggest that in fact, the duty route may in some instances be a preferable *alternative to* causal analysis. Removing the duty-focused route to analysing these cases, resorting purely to foreseeability or causation, would make it much harder to resolve the issues that arise.

Intervening Acts of Third Parties

In some cases, such as *Knightley v Johns* or *Lamb v Camden*, the initial negligence of the defendant provides the conditions for another party to cause more extensive damage. The question is whether these further effects are recoverable against the original defendant. In other cases, such as *Dorset Yacht v Home Office*, the defendant's negligence may consist in doing nothing to *prevent* a third party from causing harm. In the latter type of case, there will be a question concerning the nature of any *positive duty* to prevent third party acts.

Intervening Deliberate Acts: *Dorset Yacht v Home Office* [1970] AC 1004

A number of trainees (young offenders) were sent, under the control of three officers, to Brownsea Island on a training exercise. The officers were under instruction to keep the trainees in custody. However, the officers simply went to bed, leaving the trainees to their own devices. During the night, the trainees attempted to escape from the island and in the course of doing so they damaged the respondents' yacht. The claim in negligence was for property damage (to the yacht) caused by breach of the duty to maintain control over the trainees, all of whom had offending records and several of whom had a record of attempting escape. Lord Reid considered the case law, and continued (at 1030):

> **Lord Reid, at 1027**
>
> … it is said that the respondents must fail because there is a general principle that no person can be responsible for the acts of another who is not his servant or acting on his behalf. But here the ground
> p. 388 of liability is not responsibility for the acts of the escaping trainees; it ↵ is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendant's carelessness and the damage to the plaintiff.
>
> What, then, is the dividing line? Is it foreseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable result of what preceded it? There is a world of difference between the two. If I buy a ticket in a lottery or enter a football pool it is foreseeable that I may win a very large prize—some competitor must win it. But, whatever hopes gamblers may entertain, no one could say that winning such a prize was a natural and probable result of entering such a competition.

> These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely.

The final paragraph extracted from Lord Reid's judgment is peppered by references to different ways of judging either foreseeability, or likelihood. A 'mere foreseeable likelihood' is dismissed as insufficient. Rather, the act of the third party 'must at least be very likely' to happen. Here, the attempted escape and consequent damage are treated as the 'very kind of thing' that the officers 'ought to have seen to be likely'.

This approach is ambiguous. It mentions not only foreseeability but also probability ('likelihood'). Alternatively, the expression 'the very kind of thing' that would be likely to happen could be taken to refer to the *reason* for imposing a positive duty of care to keep the trainees in custody. This would amount to a particular version of 'the risk principle'. The duty here is a particular and positive duty, to exercise control over a third party where the defendants had a specific responsibility in connection with that third party.

That the role of the expression 'the very kind of thing' might be better explained in terms of the purpose and scope of the duty, rather than in terms of degrees of foreseeability or likelihood, is reinforced by *Stansbie v Troman* [1948] 2 KB 48, decided well before *The Wagon Mound* but generally accepted to be correct. A contractor carrying out decorations in the plaintiff's house was left alone and entrusted with a key; on going
p. 389 out, he left the door unsecured and burglars entered, stealing property. The case was one of ↵ breach of contract through negligent conduct, but the following explanation is of general importance to tort law:

> **Tucker LJ, at 51–2**
>
> [Counsel] referred to *Weld-Blundell v. Stephens* and, in particular, to the following passage in the speech of Lord Sumner: "In general (apart from special contracts and relations and the maxim respondent superior), even though A. is in fault, he is not responsible for injury to C. which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B's mischievous activity, B. then becomes a new and independent cause." I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened.

Perhaps the influence of *The Wagon Mound* led Lord Reid to superimpose on to this duty-oriented approach the confusing language of foreseeability and likelihood. In a sense, *Stansbie v Troman* vindicates a 'risk principle', but not a risk principle based on foreseeability. The purpose of the duty imposed is to prevent damage being done by a third party; therefore, such damage cannot be outside the risk for which the defendant is responsible.

Lamb v Camden LBC [1981] QB 625

The defendants were alleged to have been negligent in causing the bursting of a water main which led to the flooding of the plaintiff's house together with physical damage. Because of the need for repairs, the house remained empty for some time. It was eventually invaded by squatters who caused considerable damage. The plaintiff sought to recover damages from the council for the damage caused by the squatters. The judges in the Court of Appeal were agreed that the appeal by the owners of the house should be dismissed, but gave varying reasons. Oliver LJ attempted to apply a test of reasonable foreseeability to the case of third party acts. In his view, instead of holding that the damage was 'foreseeable but not likely', the official referee at first instance should have held that the damage was 'not reasonably foreseeable' at all. He proposed a *special* test—that the behaviour would be 'very likely to occur'—for use in determining the 'reasonable' foreseeability of a third party intervention. There is no such requirement for foreseeability to be based on something 'very likely' in the general run of negligence cases. As exemplified by *Bolton v Stone* and *The Wagon Mound (No 2)*, some relatively low probability events are nevertheless treated as foreseeable.

Can Lord Denning's judgment in the same case offer us an improved approach?

Lord Denning, at 636–8

> #### A question of policy
>
> … Looking at the question as one of policy, I ask myself: whose job was it to do something to keep out the squatters? And, if they got in, to evict them? To my mind the answer is clear. It was the job of the
> p. 390 owner of the house, Mrs Lamb, through her agents. That is how everyone ↵ in the case regarded it. It has never been suggested in the pleadings or elsewhere that it was the job of the council. No one ever wrote to the council asking them to do it. The council were not in occupation of the house. They had no right to enter it. All they had done was to break the water main outside and cause the subsidence.
>
> … On broader grounds of policy, I would add this: the criminal acts here—malicious damage and theft—are usually covered by insurance. By this means the risk of loss is spread throughout the community. It does not fall too heavily on one pair of shoulders alone. The insurers take the premium to cover just this sort of risk and should not be allowed, by subrogation, to pass it on to others.

Lord Denning suggests that the 'remoteness' analysis in such cases is really a mechanism for addressing the policy issues associated with liability for third party actions. Policy is of course a matter of judgment and opinion and it will vary from case to case. So in a sense, this insight provides relatively little guidance to the

likely outcome in future cases. On the other hand, the approach could be seen as concerned, not with open-ended and general 'policy', but with duty analysis wholly consistent with the modern approach to be found in *Caparo v Dickman* and subsequent cases. As we saw, *Caparo* asks for positive reasons to hold the defendant responsible for the damage done, precisely including questions concerning the appropriateness of identifying the defendant as the person who ought to take precautions.

A duty-based approach is also encapsulated in the following extract.

Perl (Exporters) Ltd v Camden LBC [1984] 1 QB 342

The defendants left their premises unsecured because of a broken lock. Burglars gained access to the defendants' premises and, by knocking a hole in the wall, made their way into the adjoining premises. These premises were let by the defendants to the plaintiffs, who were retailers of knitwear. Garments were stolen.

> **Robert Goff LJ, at 360**
>
> It is of course true that in the present case the plaintiffs do not allege that the defendants should have controlled the thieves who broke into their storeroom. But they do allege that the defendants should have exercised reasonable care to prevent them from gaining access through their own premises; and in my judgment the statement of principle by Dixon J. is equally apposite in such a case. I know of no case where it has been held, in the absence of a special relationship, that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff. … Indeed, the consequences of accepting the plaintiffs' submission in the present case are so startling, that I have no hesitation in rejecting the suggestion that there is a duty of care upon occupiers of property to prevent persons from entering their property who might thereby obtain access to neighbouring property. Is every occupier of a terraced house under a duty to his neighbours to shut his windows or lock his door when he goes out, or to keep access to his cellars secure, or even to remove his fire escape, at the risk of being held liable in damages if thieves thereby obtain access to his own house and thence to his neighbour's house? I cannot think that the law imposes any such duty.

p. 391 ↵ It is an attractive feature of Goff LJ's approach that it does not suggest that any degree of foreseeability will generally justify liability for the deliberate acts of a third party. Rather, there is generally no duty to prevent their actions. I owe no duty to my neighbour that would prevent me from leaving a window open for my (hypothetical) cat, even if it is 'foreseeable'—and perhaps 'reasonably foreseeable'—that someone will gain access through the window to my property and thus to my neighbour's. The approaches of Lord Reid in *Dorset Yacht*, and of Oliver LJ in *Lamb v Camden*, are a reflection of negligence law's experiment with foreseeability as a generalizing guide to liability in the period surrounding *The Wagon Mound* and, later, *Anns v Merton*, and it now seems clearer that they belong in the past.

As we have seen in Chapter 4, a 'no duty' approach was adopted by the House of Lords in *Mitchell v Glasgow City Council* [2009] UKHL 11, in the context of an omission to warn.

Attempted Rescues

Haynes v Harwood [1935] 1 KB 146 is in tune with the general law on rescuers. In general, rescuers are treated as foreseeable; it is accepted that they are often acting in the heat of the moment so that the standard of care applied to them must take this into account; and it is recognized that they are often put in the position of deciding whether to attempt a rescue by the circumstances that confront them.[11] But in *Knightley v Johns* [1982] 1 WR 349, a rescue—or elements of it—were found to have been unreasonably executed. Stephenson LJ struggled to find any single description of the reasons for his conclusion, employing a wide variety of language in order to seek to explain why the chain of causation should be seen as having been broken. Among these is the language of foreseeability, but also of that which is 'natural and probable'—language that is equally associated with *Re Polemis* and which was supposed to be superseded by foreseeability as a result of *The Wagon Mound*. Also prominently featured was the language of 'chains of events'; and elsewhere the negligence of the fourth defendant was referred to as 'the real cause' of the accident. Clearly, this is 'causal' language. We can glean from this case that a very unusual sequence of events involving the carelessness of a third party rescuer (especially but not only if this involves an extended sequence of links) may be sufficient to make the damage too remote a consequence of the defendant's initial negligence; we can also be clear that it will not be sufficient simply to show some fault, carelessness, error, or perhaps even 'folly' on the part of third parties after the event, so simple negligence will not do. And it is also clear that the defendant must accept the risk of *some* 'expected mischances'. A complex series of unexpected events of this nature *may,* however, be sufficient to break the causal chain. As to when that will be the case, Stephenson LJ suggested that this will be a matter of opinion.

This messy solution in the case of *Knightley* is consistent with the prediction of Glanville Williams. In his article 'The Risk Principle', to which we have referred already in this chapter, Williams described cases like this one (where the initial harm of the defendant's negligence is added to in rather unexpected ways involving the acts of a third party) as cases of 'ulterior harm'. In respect of these cases, he conceded that the foreseeability approach is in effect seeking to replicate a more 'causal' approach. He also accepted that (just like the causal approach) foreseeability would not give a tidy answer:

p. 392

> ↵ In respect of ulterior harms … I think that Hart and Honoré are right in saying that the test of foreseeability is a way of distinguishing between normal and abnormal consequences … The question is whether the harm is within ordinary experience. I would add, however, that the distinction is governed to some extent not only by statistical considerations but by notions of policy. That this is an imprecise rule is shown by the divergent results obtained by different courts at different times. It is here that we reach the limits of predictability in determining the consequences for which a tortfeasor will be held liable [p. 200].

Intervening Medical Negligence

In *Robinson v Post Office* [1974] 1 WLR 1176, the plaintiff slipped on an oily ladder, and suffered a grazed shin. This injury was treated as being caused through the defendant employer's breach of duty. A doctor administered an anti-tetanus injection which, due to a pre-existing susceptibility on the part of the plaintiff, resulted in encephalitis and permanent disability. It was found that although there was some negligence on the part of the doctor, that negligence was not an operating cause of the plaintiff's injuries because it did not

pass the 'but for' test: even if the doctor had followed approved procedures, these would still not have indicated that the plaintiff's particular reaction was likely. This in turn was taken to be significant in holding that the employers were fully liable in that the chain of causation was not broken; the actions of the doctor in administering the injection were not a '*novus actus*'. However, it seems from the approach in *Knightley v Johns*, supported by the views of Glanville Williams, that even if medical negligence were to be established, this need not necessarily amount to a *novus actus*. This is compatible with the decision of the Court of Appeal in *Wright v Cambridge Medical Group* (Section 2). That was a different case because the defendant had not caused the need for medical treatment, but had delayed the claimant's access to that treatment and thus increased the risk that she would not be successfully treated. There, too, the negligent medical treatment did not break the chain of causation. Even Elias LJ, the dissenting judge, thought that in the normal sort of case, where the defendant's negligence creates the need for medical treatment, which proves to be negligent, the damage is generally not too remote. As Smith LJ put it, the defendant's initial negligence continues to be an 'operating cause'.

Intervening Act of the Claimant

Reeves v Commissioner of Police for the Metropolis [2000] 1 AC 360

The deceased was held in custody in a police cell. Police officers had been warned that he might commit suicide, although when attended by a doctor he was found not to be showing signs of clinical depression or other psychiatric disorder. He could be regarded as being at risk, but of sound mind. The deceased took advantage of the fact that the flap of his cell door had been left open, and hanged himself. The House of Lords held that his suicide did not constitute a *novus actus interveniens*, and that his death was caused by the officers' breach of their duty to protect him. Damages were reduced on account of his contributory negligence, which can only be the case if there is considered to be 'fault' on both sides (Law Reform (Contributory Negligence) Act 1945, s 1(1), see Chapter 7).

p. 393

> **Lord Hoffmann, at 367–9**
>
> It would make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have been prevented negatived causal connection between the breach of duty and the loss. This principle has been recently considered by your Lordships' House in *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* [1998] 2 W.L.R. 350. In that case, examples are given of cases in which liability has been imposed for causing events which were the immediate consequence of the deliberate acts of third parties but which the defendant had a duty to prevent or take reasonable care to prevent.
>
> Mr Pannick accepted this principle when the deliberate act was that of a third party. But he said that it was different when it was the act of the plaintiff himself. Deliberately inflicting damage on oneself had to be an act which negatived causal connection with anything which had gone before.
>
> This argument is based upon the sound intuition that there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed. But, once it is admitted that this is the rare case in which such a duty is owed, it seems to me self-contradictory to say that the breach could not have been a cause of the harm because the victim caused it to himself.

The approach taken here focuses on the particular duty in question, which was conceded by the police commissioner to be owed to the deceased. If a prisoner at risk who commits suicide is held solely responsible for the consequences of his actions in these circumstances, then the admitted duty to protect prisoners who are at risk of suicide would be entirely empty of content. The actions of the deceased were readily foreseeable, but this is not the reason given by Lord Hoffmann in the extract above, just as Lord Reid rejected foreseeability as sufficient to extend the defendant's liability in cases of first party intervening acts, in the *McKew* case. Rather, this is a case where the purpose of the duty is to protect the recipient of the duty against harm done to himself. It could be seen as connected to the decisions in Section 4.

Corr v IBC [2008] UKHL 13; (2008) 1 AC 884

In *Reeves*, the defendants owed a duty to take steps to prevent the deceased from committing suicide. Here, there had been an accident at work. The accident very nearly killed the deceased, but instead injured him quite seriously. The accident and injury led to clinical depression, which led to suicide. The question was whether the suicide was attributable to the initial breach of duty. The House of Lords held that it was. On the question of whether the suicide amounted to a 'novus actus', there was more than one possible approach to the question, though these approaches yielded the same answer. Lord Bingham took the view that although the deceased had made a choice (to take his own life), he had not made a free and voluntary choice because of the effect on his mind of the accident and its effects. The fact that he was not described as 'insane' (a term which Lord Bingham approached with some scepticism) was not decisive. Consistently with this, he would not support a reduction in damages ↵ for contributory negligence in such a case (we discuss this element in

p. 394 Chapter 7). Lord Scott approached the question through application of the 'egg-shell skull' principle, discussed earlier in this section, as extended to psychiatric harm by *Page v Smith*: the employer must take the employee as he finds him, even if his susceptibility is toward psychiatric injury. Lord Scott would have been prepared to reduce damages for contributory negligence, though in the event he thought there was insufficient evidence before the court to do this.

Lord Bingham, *Corr v IBC*

15. The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less so where the independent, supervening cause is a voluntary, informed decision taken by the victim as an adult of sound mind making and giving effect to a personal decision about his own future. …

16. In the present case Mr Corr's suicide was not a voluntary, informed decision taken by him as an adult of sound mind making and giving effect to a personal decision about his future. It was the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgments about his future, such illness being, as is accepted, a consequence of the employer's tort. It is in no way unfair to hold the employer responsible for this dire consequence of its breach of duty, although it could well be thought unfair to the victim not to do so.

Lord Scott

27. … The question in this case … is whether Mr Corr's deliberate act of jumping from a high building in order to kill himself, an apparent novus actus, albeit one that was causally connected, on a 'but-for' basis, to the original negligence, broke the chain of causative consequences for which Mr Corr's negligent employers must accept responsibility.

28. The answer to this question does not, in my opinion, require the application of a reasonable foreseeability test. To ask whether it was reasonably foreseeable that an accident of the sort that injured Mr Corr might have psychiatric as well as physical consequences and, if it did have psychiatric consequences, whether those consequences might include suicidal tendencies and an eventual suicide would be unlikely, on the facts of this case, to result in an affirmative answer.

29. Authority, however, discourages attempts to decide cases like the present by the application of a reasonable foreseeability test. The general rule is that in a case where foreseeable physical injuries have been caused to a claimant by the negligence of a defendant the defendant cannot limit his liability by contending that the extent of the physical injuries could not have been reasonably foreseen; the defendant must take his victim as he finds him.

… *Page v Smith* … extended the rule as stated in *Smith v Leech Brain* so as to include psychiatric injury. If a duty of care to avoid physical injury is broken and psychiatric injury is thereby caused, whether with or without any physical injury being caused, the negligent defendant must accept liability for the psychiatric injury. He must take his victim as he finds him. That this is so is a consequence of the House's decision in *Page v Smith*. That decision has been the subject of some criticism but not in the present case. If Mr Corr's psychiatric ↵ damage caused by the accident at work is damage for which his employers must accept liability, it is difficult to see on what basis they could escape

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> liability for additional injury, self-inflicted but attributable to his psychiatric condition. If Mr Corr had not suffered from the clinical depression brought about by the accident, he would not have had the suicidal tendencies that led him eventually to kill himself. In my opinion, on the principles established by the authorities to which I have referred, the chain of causal consequences of the accident for which Mr Corr's negligent employers are liable was not broken by his suicide. For tortious remoteness of damage purposes his jump from the multi-storey car park was not, in my opinion, a novus actus interveniens. Mrs Corr is entitled, in my opinion, to a Fatal Accidents Act claim against his employers.

Here, a voluntary act of the party to whom a duty was owed did not break the chain of causation and was not treated as a 'supervening event'. The suicide was, in this sense, 'caused by' the tort of the defendant. We have already seen that by contrast in *Gray v Thames Trains*, the House of Lords held that a criminal act by the person to whom the duty is owed does break the chain of causation, and/or is a supervening cause akin to the medical condition in *Jobling*. The decisive difference appears to be that the claimant's act in *Gray* is a criminal act, and the law of tort cannot be seen to hold people responsible for the acts of others in conditions where the criminal law is prepared to punish the actor, or otherwise hold him criminally responsible. It seems relatively clear that this is not altogether a claim about 'causation', independent of judgments about responsibility.

These difficult cases involve acts by claimants which bring about intended outcomes. In a wider range of cases, injured claimants may make poor decisions which result in their suffering further injury. One such case is *Spencer v Wincanton Holdings* [2009] EWCA Civ 1404. Here, the claimant had lost a leg through an accident for which the defendant was vicariously liable. His injuries were considerably exacerbated when he fell at a petrol station, having attempted to refuel his car without first securing his prosthetic leg. The Court of Appeal found that he had not acted so unreasonably as to break the chain of causation from the first accident. Rather, the burden of the additional injuries would be shared between the parties, by application of contributory negligence principles (Chapter 7).

Sedley LJ, *Spencer v Wincanton Holdings*
[2009] EWCA Civ 1404

> 13 It seems to me problematical, with respect, to try to explain remoteness in terms of foreseeability. If anything, it is foreseeability which has to be explained in terms of remoteness. …

In essence, the 'remoteness' or (now) 'legal responsibility' question was defined as concerned with the *fairness* of extending liability to incorporate the injury. In the present case, that test was satisfied, subject to a reduction for contributory negligence. Fairness, not foreseeability, is the guiding principle. We may point out that the second accident was in no way coincidental: the claimant was at risk of further injury of this sort due
p. 396 to the consequences of the initial tort. A compatible case is *Dalling v Heale & Co* [2011] EWCA Civ 365, where
↵ responsibility for the claimant's newly excessive drinking after a head injury—leading to a fall and further injury—was shared between claimant and defendant. The claimant's failure to control his drinking was causally related to the tort.

Conclusion: Intervening Acts

Foreseeability does not provide a sufficient criterion for determining whether there is a *novus actus*—a point made very clearly through the last few extracts above. 'Common sense' causal principles along the lines suggested by Hart and Honoré may provide guidance by focusing our attention on 'normal' or 'abnormal' events, rather than the culpability or otherwise of those who intervene. As Glanville Williams concedes, this judgment will be a personal one on the facts of the case and in respect of these cases, 'the limits of predictability' may have been reached. In at least some of these cases, an alternative is to approach the question of *novus actus* in light of an analysis of the purpose and scope of the duty of care. The language used by Lord Reid in *Dorset Yacht*, where he described the incident as 'the very kind of thing' that would be foreseen, could be taken to reflect such an approach, as can the case of *Stansbie v Troman*. In *Dorset Yacht*, the approach was only obscured by the language of foreseeability and probability employed, and more recent cases have frankly acknowledged that such concepts will not provide the answers to remoteness questions. Duty analysis is also apparent in the cases of *Perl Exporters* (Goff LJ) and *Reeves v Commissioner of Police for the Metropolis* (Lord Hoffmann). Analysis of this type is more in tune with the approach to duty currently taken since it is dependent on consideration of the nature, scope, and purpose of the duty owed by the defendant. However, analysis in terms of 'scope of the duty' has now been carved out as a separate question from both remoteness, and alternative cause. Taken at face value, this division might cut off the possibility of more satisfactory solutions to questions of intervening cause—though courts could continue to consider these cases as raising issues in relation to either causation, or duty, to be resolved accordingly.

4 'Scope of Duty' Analysis

In his article 'The Road From Morocco', extracted in Section 3.1, Davies contended that if there was any injustice created by the remoteness test in *Re Polemis*, it stemmed from the development of over-extensive and non-specific duties of care. *The Wagon Mound* could be said to be a response to this development; perhaps also it shared the general optimism of the period which led to a ground-swell of support for generalization in the law of tort and in the tort of negligence in particular. In more recent years as we saw in Chapters 4 and 5, the concept of 'duty' has become more specific to particular circumstances. The generalization in *The Wagon Mound* may be out of place.

The following decision, like the cases of *Jolley* and *Reeves*, gives priority to analysis of the 'scope of the duty'. However, it seeks to resolve a new problem. That problem is partly created by the evolution of duty analysis in the field of economic losses. For example, where information is relied upon, the duty is owed only in respect of reliance for certain defined purposes (*Caparo v Dickman*). The solution reached could be seen as a version of the 'risk principle', amended to take account of change in the nature of the duty of care. As we saw at the end of Section 1, 'scope of duty' analysis has been recognized as a distinct stage in attributing damage to the breach in more recent decisions. But as we also saw, it is no longer seen as answering the 'remoteness' question.

p. 397 ***South Australia Asset Management Corporation v York Montague Ltd ('SAAMCO')*** **[1997] AC 191; on**

appeal from *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*

This decision, which dealt with three appeals, raised important questions concerning losses of value in the UK property market during the early 1990s. In each of the cases, it was found at first instance that the defendants had negligently over-valued certain properties and that the plaintiffs in reliance on these valuations had advanced loans secured upon the properties. Subsequently, the borrowers defaulted and the lenders' security proved to be worth less than the sums advanced. A general fall in the market value of property had enhanced the losses suffered. Would the valuers be liable for the full extent of the losses suffered, or only for some portion of those losses which could be 'attributed' to their breach of duty?

Lord Hoffmann, at 210–13

My Lords, the three appeals before the House raise a common question of principle. What is the extent of the liability of a valuer who has provided a lender with a negligent overvaluation of the property offered as security for the loan? The facts have two common features. The first is that if the lender had known the true value of the property, he would not have lent. The second is that a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered.

The Court of Appeal (*Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd* [1995] Q.B. 375) decided that in a case in which the lender would not otherwise have lent (which they called a 'no-transaction' case), he is entitled to recover the difference between the sum which he lent, together with a reasonable rate of interest, and the net sum which he actually got back. The valuer bears the whole risk of a transaction which, but for his negligence, would not have happened. He is therefore liable for all the loss attributable to a fall in the market. They distinguished what they called a 'successful transaction' case, in which the evidence shows that if the lender had been correctly advised, he would still have lent a lesser sum on the same security. In such a case, the lender can recover only the difference between what he has actually lost and what he would have lost if he had lent the lesser amount. Since the fall in the property market is a common element in both the actual and the hypothetical calculations, it does not increase the valuer's liability.

The valuers appeal. They say that a valuer provides an estimate of the value of the property at the date of the valuation. He does not undertake the role of a prophet. It is unfair that merely because for one reason or other the lender would not otherwise have lent, the valuer should be saddled with the whole risk of the transaction, including a subsequent fall in the value of the property. Much of the discussion, both in the judgment of the Court of Appeal and in argument at the Bar, has assumed that the case is about the correct measure of damages for the loss which the lender has suffered ...

I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action.

The lender sues on a contract under which the valuer, in return for a fee, undertakes to provide him with certain information. Precisely what information he has to provide depends of course upon the
p. 398 terms of the individual contract. There is some dispute on this point in ↵ respect of two of the appeals, to which I shall have to return. But there is one common element which everyone accepts. In each case the valuer was required to provide an estimate of the price which the property might reasonably be expected to fetch if sold in the open market at the date of the valuation.

There is again agreement on the purpose for which the information was provided. It was to form part of the material on which the lender was to decide whether, and if so how much, he would lend. The valuation tells the lender how much, at current values, he is likely to recover if he has to resort to his security. This enables him to decide what margin, if any, an advance of a given amount will allow for

> a fall in the market, reasonably foreseeable variance from the figure put forward by the valuer (a valuation is an estimate of the most probable figure which the property will fetch, not a prediction that it will fetch precisely that figure), accidental damage to the property and any other of the contingencies which may happen. The valuer will know that if he overestimates the value of the property, the lender's margin for all these purposes will be correspondingly less.
>
> On the other hand, the valuer will not ordinarily be privy to the other considerations which the lender may take into account, such as how much money he has available, how much the borrower needs to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial considerations which may induce the lender to lend.
>
> Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see *Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 145. But the scope of the duty in tort is the same as in contract.
>
> A duty of care such as the valuer owes does not, however, exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares …
>
> In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.
>
> How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: *Gorris v. Scott* (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the *Caparo* case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of
p. 399 the agreement as a whole ↵ in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer:

> neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.
>
> What therefore should be the extent of the valuer's liability? The Court of Appeal said that he should be liable for the loss which would not have occurred if he had given the correct advice. The lender having, in reliance on the valuation, embarked upon a transaction which he would not otherwise have undertaken, the valuer should bear all the risks of that transaction, subject only to the limitation that the damage should have been within the reasonable contemplation of the parties.
>
> There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act. Hart and Honoré, in *Causation in the Law*, 2nd ed. (1985), p. 120, say that it would, for example, be perfectly intelligible to have a rule by which an unlicensed driver was responsible for all the consequences of his having driven, even if they were unconnected with his not having a licence. One might adopt such a rule in the interests of deterring unlicensed driving. But that is not the normal rule …
>
> Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct.

It should be clear that Lord Hoffmann here is setting out what he takes to be the 'normal' approach of the tort of negligence, namely that there is only liability in respect of the aspect of the defendant's acts which made them wrongful: he is not seeking to create a novel rule, but to apply this approach to a new, and not uncommon problem. Applying the approach set out in the above extract, Lord Hoffmann reasoned that in the first of the appeals, *SAAMCO v York Montague* itself, the plaintiffs could recover the entire loss caused by the fall in market value, subject to a deduction for contributory negligence (for an explanation of this defence, see generally Chapter 7). The property had been valued at £15 million, and the true value was ↵ £5 million;

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£11 million had been advanced. After the market fall, the property was sold for just under £2.5 million, a loss of just over £9.5 million. The plaintiffs were entitled to recover their full loss (subject to deduction for contributory negligence) because (at 222):

> The consequence of the valuation being wrong was that the plaintiffs had £10 million less security than they thought. If they had had this margin, they would have suffered no loss. The whole loss was therefore within the scope of the defendants' duty.

The novelty does not lie in the 'scope of duty' analysis, but in the solution to the problem. In reaching this solution, the active question in Lord Hoffmann's analysis is what would have been the case if the valuation which *was* given had turned out to be correct? This is an application of a 'counterfactual' and in this sense, appears similar to the 'but for' test for causation. It is, however, a different test, as explained below. The plaintiffs would have had an extra £10 million security. Their loss was just over £9.5 million, which was within this bracket, so they were entitled, prima facie, to recover that amount. As Lord Hoffmann put it, if the information had been correct, there would have been no loss.

His language—expressed in causal terms—tends to obscure the novelty of the solution. Asking what was the 'consequence of the valuation being wrong' is not in this instance the same as asking what would have happened if the defendant had given a correct valuation. The latter is a question of 'but for' causation and it was the one asked by the Court of Appeal. The answer given was that the plaintiffs would not have entered into the transaction and so they would have suffered no loss on that property. Instead, Lord Hoffmann is asking which losses flowed from the element of the defendant's acts which made them wrongful: this, rather than the 'counterfactual' aspect of his approach, is now rightly understood to be the core of the 'scope of duty' question.[12] The difference is made clear by the result of applying the approach to the other appeals.

In the other appeals, the valuations were less grossly inaccurate. The plaintiffs would still have suffered some loss if the valuation given had turned out to be correct, so they were awarded less than the full amount. For example, in the case of *Bank of Kuwait v Prudential Property Services Ltd* the lenders advanced £1.75 million on the security of a property valued at £2.5 million. The correct value was between £1.8 million and £1.85 million. After the market fall, it was sold for £950,000. According to Lord Hoffmann (at 222):

> In my view the damages should have been limited to the consequences of the valuation being wrong, which were that the lenders had £700,000 or £650,000 less security than they thought. …
>
> I would therefore allow the appeal and reduce the damages to the difference between the valuation and the correct value.

Stapleton argues ([1997] 113 LQR 1) that in each case the effect is to place a 'cap' on damages so that they should not exceed the difference between the valuation given (which she calls V) and an accurate valuation at the time (V*). The damages may of course be less than this amount, if the plaintiff's loss is lower than the misevaluation. This was the case in the ↵ *SAAMCO* appeal itself as explained above. But we should be careful to note that although this is the *effect* of the decision in these cases, the *method* is not to place a cap. Lord Hoffmann made this clear in *SAAMCO* (at 219–20):

> An alternative theory was that the lender should be entitled to recover the whole of his loss, subject to a 'cap' limiting his recovery to the amount of the overvaluation. This theory will ordinarily produce the same result as the requirement that loss should be a consequence of the valuation being wrong, because the usual such consequence is that the lender makes an advance which he thinks is secured to a correspondingly greater extent. But I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong and in any case, as Mr Sumption said on behalf of the defendants York Montague Ltd, it seems odd to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap. The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed.

It is worth noting that the counsel referred to as advancing this (successful) argument later, as Lord Sumption, did much to clarify as a Justice of the Supreme Court that the approach in *SAAMCO* does not turn on a causal test, and that the 'counterfactual' question in such cases is only a 'cross-check' on the answer reached by analysing nature of the duty breached or wrongful element.[13]

The point was reinforced shortly after *SAAMCO* in a subsequent decision concerning calculation of interest.

Lord Hoffmann, *Nykredit v Edward Erdman Ltd (No 2)*
[1997] 1 WLR 1627, at 1638–9

> … in order to establish a cause of action in negligence [the plaintiff] must show that his loss is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct.
>
> It is important to emphasise that this is a consequence of the limited way in which the House defined the valuer's duty of care and has nothing to do with questions of causation or any limit or 'cap' imposed upon damages which would otherwise be recoverable. It was accepted that the whole loss suffered by reason of the fall in the property market was, as a matter of causation, properly attributable to the lender having entered into the transaction and that, but for the negligent valuation, he would not have done so. It was not suggested that the possibility of a fall in the market was unforeseeable or that there was any other factor which negatived the causal connection between lending and losing the money. There was, for example, no evidence that if the lender had not made the advance in question he would have lost his money in some other way. Nor, if one started from the proposition that the valuer was responsible for the consequences of the loan being made, could there be any logical basis for limiting the recoverable damages to the amount of the overvaluation. The
p. 402 essence ↵ of the decision was that this is not where one starts and that the valuer is responsible only for the consequences of the lender having too little security.
>
> Proof of loss attributable to a breach of the relevant duty of care is an essential element in a cause of action for the tort of negligence. Given that there has been negligence, the cause of action will therefore arise *when the plaintiff has suffered loss in respect of which the duty was owed*. … [Emphasis added]

This is not an exercise in 'but for' causation. In terms of 'but for', it can be accepted that the breach was, as the Court of Appeal said, a cause of the loss. But that is not sufficient to establish that the loss is recoverable. The loss must be attributable to the element that makes the defendant's actions wrongful.

Given the significance of the decision and its legacy, we will say a little more about the ways in which it was controversial and distinctive, before turning to later interpretation.

4.1 The Reasoning

Scope of Duty

It will be apparent from the extracts above that Lord Hoffmann's reasoning turns on identifying 'the scope of the duty'. This is the first of two steps in his reasoning. At this first stage, Lord Hoffmann determined that the scope of the duty was to offer a correct valuation.

In relation to the 'scope of duty' analysis, Lord Hoffmann offers the analogy of a mountaineer who approaches a doctor for advice on the condition of his knee. If the doctor says that the knee is sound and this particular information is incorrect, it might lead the mountaineer to undertake an expedition when otherwise he would have stayed at home. If he then suffers a fall which is unrelated to the condition of the knee, then the doctor's misinformation will pass the 'but for' test: it will be a 'condition precedent' of the accident. Nevertheless, it would be wrong to attribute the injury to the incorrect information. The doctor's role was only in respect of the condition of the knee. In the course of criticizing the approach in *SAAMCO*, Jane Stapleton nevertheless accepts that this example illustrates effectively that issues of 'but for' causation do not provide all the answers in cases of this sort ((1997) 113 LQR 1, 2). She further suggests, however, that Lord Hoffmann is mistaken when he treats the nature of the 'wrong' in such cases as failure to give *accurate information*, rather than failure to give a *careful valuation* (at 5). But Lord Hoffmann gives clear reasons for suggesting that where a defendant is called upon only to give particular and specific *information* in relation to a transaction or other course of action, the only duty is to take care to give that information accurately. In other cases, there may be a broader duty to offer advice. In the latter sort of case, there may, for example, be a duty to advise on the possibility of a general market fall and loss of security. We can agree that there is room to differ in this interpretation of the scope of the duty. 'Scope of duty' analysis will be subjective at both stages. But for the same reason it seems too simplistic to describe it as mistaken. Indeed, application of scope of duty analysis is now well established, though the specific distinction between 'information' and 'advice' has been accepted to be less clear cut than may appear, amounting to a continuum. The greater controversy exists at the next stage.

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Identifying the 'Consequences'

At the next stage, Lord Hoffmann applied an unprecedented kind of 'but for' test. He asked what would have happened if the defendant's valuation (which is to say the valuation *actually given* by the defendants) had been correct. As we have already seen, this is not the same as asking what would have happened if the defendant had provided a correct valuation. That would have been a question of factual causation, and this is not. It is designed specifically to establish which losses will be treated as *attributable to* the breach of duty. Lord Hoffmann's approach can be regarded as playing a similar role to remoteness in the sense that it determines

attribution. It does not, however, employ the language of foreseeability, which would also give too broad an answer. It identifies the scope and purpose of the duty with some precision (a subjective exercise nonetheless), and then asks which aspects of the damage suffered are attributable to breach of the duty so understood. To express this second stage in terms of 'but for' causation is to use familiar language in an unfamiliar way. This stage has been described in more recent decisions as essentially a 'cross check' on outcomes reached by applying the 'scope of duty' stage above, and not as an independent test in its own right. This should remove confusion about the role of causal language in the 'scope of duty' question.

That the apparently 'causal' element in *SAAMCO* was merely a cross-check on damages was later clarified by the Supreme Court in the following decision.

Lord Sumption, *Gabriel v Little; Hughes-Holland v BPE Solicitors* [2017] UKSC 21.

> 45. As for the SAAMCO 'cap' or restriction, which excludes loss that would still have been suffered even if the erroneous information had been true, that is simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong and (ii) loss flowing from the decision to enter into the transaction at all. Mr Halpern submitted that the distinction is incoherent, because it does not achieve the professed object of the principles stated by Lord Hoffmann. Similar criticisms have been made by academic commentators, including Professor Stapleton and Professor Murdoch. It is of course true that the restriction does not systematically exclude loss arising from collateral risks with which the defendant was not concerned. Thus in the lead case in the SAAMCO litigation itself, York Montague overstated the value of the property by a factor of three, valuing at £15m a property worth £5m. Damages were limited to £10m, which exceeded the whole of the loss flowing from the transaction including the loss flowing from the fall in the market. The whole of that loss was accordingly awarded. In other cases, where the negligence of the valuer was less egregious, only part of the loss on the loan account was recoverable.
>
> 46. Criticism of this result is in my opinion unjustified. The principle laid down in SAAMCO depends for its application on the award of loss which is within the scope of the defendant's duty, not on the exclusion of loss which is outside it. In a simple case, they may amount to the same thing. It may, for example, be possible in a valuation case to strip out the effect of the fall in the market if that is the only extraneous source of loss. Even there, however, the exercise will be complicated by the common practice of lenders to allow a margin or 'cushion' between the loan and the value of the property to allow for contingencies including some adverse market movement. Where the loss arises from a variety of commercial factors which it was for the claimant to identify and assess, it will commonly be difficult or impossible as well as unnecessary to quantify and strip out the financial impact of each one of them. In York Montague's case, the valuer's duty had been to value the property at £5m instead of £15m. Given his duty to exercise reasonable care to get it right, £10m was the
> p. 404 measure of the increased risk to which he exposed the lender by getting it wrong. That increased risk was the maximum measure of his own responsibility for what happened, and therefore provided the limit to what was recoverable by way of damages. It is fair to say that as a tool for relating the recoverable damages to the scope of the duty the SAAMCO cap or restriction may be mathematically imprecise. But mathematical precision is not always attainable in the law of damages. As Lord Hobhouse observed in Platform Home Loans Ltd v Oyston Shipways Ltd [2000] 2 AC 190, 207, the principle is 'essentially a legal rule which is applied in a robust way without the need for fine tuning or a detailed investigation of causation'.

4.2 Continuing Influence: ‘Scope of Duty’ in the Supreme Court

The Supreme Court has confirmed, but also clarified the significance of the decision in *SAAMCO* since *Gabriel v Little* (also known as *Hughes-Holland v BPE*), in *Manchester Building Society v Grant Thornton*; and *Khan v Meadows*. We have already seen that *Gabriel v Little* defended *SAAMCO* from its critics while clarifying the limited use being made of causal ideas. Here we consider some significant points arising from the latter two decisions in particular. In both decisions—which were handed down together—the Supreme Court set out a six-stage approach to determining whether damage was recoverable, and this was extracted in Section 1 of this Chapter. Consideration of the ‘scope of duty’ was stage 2 of this approach; ‘duty nexus’ (essentially applying scope of duty to the damage claimed) is stage 5.

Kahn v Meadows [2021] UKSC 21: How broadly does ‘scope of duty’ analysis apply?

To date, all of the cases in which the Supreme Court has been called on to apply the ‘scope of duty’ approach derived from *SAAMCO* have been, like *SAAMCO* itself, cases of professional negligence.[14] In *Khan v Meadows,* however, ‘scope of duty’ analysis was applied not in a case of valuation or advice likely to lead to purely economic loss, but to a case of medical negligence, in which the claimant had sought to be advised of the risk of a particular condition in her unborn child, namely haemophilia. The claimant also sought to recover for the additional costs and harms associated with the child’s autism.

Autism was an additional condition, causally unrelated to the risk of haemophilia. It was specifically against the risk of haemophilia that the defendant had been asked to advise. However, the additional condition—like the fall in value of the property market in *SAAMCO*—had the effect of very considerably magnifying the harm suffered. The dispute before the Supreme Court concerned the amount of damages recoverable, and whether they extended to the impact of autism. An essential aspect of this question was whether the approach in *SAAMCO* extended to such a case.

> **Khan v Meadows**
>
> 9. Adejuwon’s autism has made the management of his treatment for haemophilia more complicated. He does not understand the benefit of the treatment he requires and so his distress is heightened. He will not report to his parents when he has a bleed. He is likely to be unable to learn and retain information, to administer his own medication, or to manage his own treatment plan. New therapies for treatment of haemophilia may mean that his prognosis in respect of haemophilia is significantly improved. However, in itself, his autism is likely to prevent him living independently or being in paid employment in the future.
> 10. In view of these factual findings, which we have taken from Yip J’s admirably succinct summary, it is unsurprising that the sum needed to compensate the appellant if she were entitled to claim for the additional costs of bringing up her son that are associated with both conditions was agreed by the parties at a figure which was over six times the sum to be awarded for the additional costs associated with his haemophilia alone.

p. 405 ↵ The 'but for' test was clearly passed, since the claimant would not have proceeded with the pregnancy had she been given correct advice in relation to the haemophilia. However, the considerable additional losses did not fall within the scope of the duty owed, because they were not due to the realization of the risk against which the professional's advice was sought. Importantly, the Supreme Court underlined that 'scope of duty' analysis did not originate with *SAAMCO*, and that—as Lord Sumption put it in *Hughes-Holland*—it is a 'general principle of the law of damages'. There was no reason to confine it to cases of economic loss associated with financial dealings.

> **Khan v Meadows**
>
> 33. The second question is the scope of duty question. Lawyers have focussed on the scope of duty question since the decision of the House of Lords in SAAMCO but the question was not conjured up in that case and arises in a wider context. As Lord Sumption pointed out in Hughes-Holland, paras 21–24, it is an established principle that the law addresses the nature or extent of the duty of the defendant in determining the defendant's liability for damage. Thus, in Roe v Minister of Health [1954] 2 QB 66 Denning LJ said that the questions of duty, causation and remoteness run continually into one another and continued (p 85):
>
> > 'It seems to me that they are simply three different ways of looking at one and the same problem. Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it: but otherwise not.'

The Supreme Court also clarified the important question of how 'scope of duty' analysis should be applied to a case of clinical negligence such as this:

61. In essence Mr Havers' submission boils down to two points, that the scope of duty principle as applied in SAAMCO does not apply to claims arising out of clinical negligence, and that if the court were to conclude that that principle did apply generally, an exception should be crafted for cases of clinical negligence. We are unable to accept either submission.

p. 406

62. First, there is no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. Nor is there any principled basis for confining the principle to pure economic loss arising in commercial transactions. As we have already observed, Lord Sumption stated in Hughes-Holland (para 47), that the principle is a general principle of the law of damages. It is therefore not relevant to its applicability whether a claim is characterised as one for economic loss consequent upon a physical injury or as pure economic loss. That distinction may on the other hand be relevant to the outcome of the application of the principle because in cases where there is a duty to take care to avoid causing physical injury, the economic loss consequent upon that injury will generally be within the scope of duty and will be recoverable if it is not excluded by the legal filters which we have described in our discussion of the sixth question.

63. In many, and probably a large majority of, cases of clinical negligence the application of the scope of duty principle results in the conclusion that a type of loss or an element of a claimant's loss is within the scope of the defendant's duty, without the court having to address the SAAMCO counterfactual. Where a surgeon negligently performs an operation and causes both physical injury and consequent economic loss to the patient, both types of loss will normally be within the scope of the defendant's duty of care. In other words, by undertaking the operation on the patient the surgeon takes responsibility for physical harm caused by any lack of skill and care in performing the operation and for consequential economic loss. Similarly, when a general medical practitioner negligently prescribes unsuitable medication, thereby causing injury or failing to prevent the development of an otherwise preventable medical condition, both the injury or condition and the consequential economic loss will generally be within the scope of the defendant's duty. The negligent care of a mother in the final stages of pregnancy can sadly have the result of the birth of a baby with brain damage and the defendant is normally liable to pay compensation for both the injury and the consequential additional cost of caring for the disabled child. In the Parkinson and Groom cases the object of the service undertaken was to prevent the birth of any child as in each case the mother did not want to have any more children. In Parkinson the service undertaken was to prevent a pregnancy while in Groom the task which should have been performed was to make sure that the mother was not pregnant notwithstanding her recent sterilisation. In both cases the added economic costs of caring for a disabled child, whatever his or her disability, were within the scope of the defendant's liability because of the nature of the service which the defendant had undertaken. In none of those cases did the SAAMCO counterfactual have a role to play. But it is necessary in every case to consider the nature of the service which the medical practitioner is providing in order to determine what are the risk or risks which the law imposes a duty on the medical practitioner to exercise reasonable care to avoid. That is the scope of duty question.

> 64. Secondly, Mr Havers is correct that Adejuwon would not have been born but for the defendant's mistake because Yip J accepted Ms Meadows' evidence that, if she had been correctly advised, she would have had the foetus tested and would have terminated the pregnancy on discovering that Adejuwon carried the haemophilia gene. But that conclusion as to factual causation does not provide any answer to the question as to the scope of the defendant's duty.
>
> 65. Thirdly, the foreseeability of the possibility of a boy being born with both haemophilia and an unrelated disability, such as autism, which is a risk in any pregnancy, is a relevant consideration when addressing the scope of the duty of care undertaken by a defendant. p. 407 That is because the absence of foreseeability would militate against there being a duty of care in relation to such a risk. But the foreseeability of such unrelated disability is in no sense determinative of the question of the scope of the duty of care. That is because the scope of duty question depends principally upon the nature of the service which the defendant has undertaken to provide to the claimant. One asks: 'what is the risk which the service which the defendant undertook was intended to address?' Where a medical practitioner has not undertaken responsibility for the progression of the pregnancy and has undertaken only to provide information or advice in relation to a particular risk in a pregnancy, the risk of a foreseeable unrelated disability, which could occur in any pregnancy, will not as a general rule be within the scope of the clinician's duty of care. Foreseeability is, of course, also relevant to the legal filters such as remoteness of damage, which arise once it has been established that the defendant's duty of care extends beyond particular risks in the pregnancy.
>
> 66. Finally, Yip J asked herself whether it is fair, just and reasonable to impose liability in negligence for the totality of Adejuwon's disabilities. But, as Nicola Davies LJ stated, this case does not concern a novel application of the law of negligence in which it is necessary for the court to address that question because established principles provide an answer: Robinson … para 27 per Lord Reed.

In the final paragraph of this extract, the Supreme Court emphasises that the 'scope of duty' question is relevant to all duty situations, and not only those which fall to be considered using the guidance of *Caparo* because they are not 'established' duty situations. Analytically, 'scope of duty' is a pertinent question in any case of negligence; but in many established duty situations, the question is very easily answered. This echoes Lord Hoffmann's explanation in *SAAMCO*, that he was reflecting the *general* approach in the law of negligence, but in a specific, and problematic context of valuation against the background of declining property values.

MBS v Grant Thornton [2021] UKSC 20—advice/information, and counterfactuals

MBS v Grant Thornton was a more typical case for application of *SAAMCO* reasoning, involving professional advice relating to financial dealing. In particular, the defendant had advised on the viability of 'hedge accounting' as a means of reducing the volatility involved in certain 'swap' agreements. The claimant suffered considerable losses when it was discovered that the recommended means of accounting was not in fact viable,

therefore having to restate its financial position and thus being obliged to close certain agreements at a large loss. The value of the swaps was now negative, because of a significant fall in interest rates. This resembles the falling property market in *SAAMCO* itself.

Differing from the courts below, the Supreme Court took the view that losses suffered did fall within the scope of the duty of the expert accountants; but that the principles of contributory negligence applied to reduce recovery to 50% of the losses suffered. The proportionate response of contributory negligence offers a different and important route to achieving some fairness between parties in such a case, and is generally discussed in Chapter 7. The Court also took the opportunity to clarify some elements of the 'scope of duty' question, in addition to the point that this is a general aspect of the law, pointed out above in our discussion of *Khan v Meadows*.

p. 408 ***MBS v Grant Thornton***

> 4 In summary, our view is that (i) the scope of duty analysis should be located within a general conceptual framework in the law of the tort of negligence;[15] (ii) the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given (in the context of this judgment, we use the expression 'purpose of the duty' in this sense); (iii) in line with the judgment of Lord Sumption JSC in Hughes-Holland [2018] AC 599, paras 39–44, the distinction between 'advice' cases and 'information' cases drawn by Lord Hoffmann in his speech in SAAMCO should not be treated as a rigid straitjacket; and, following on from this, (iv) counterfactual analysis of the kind proposed by Lord Hoffmann in SAAMCO should be regarded only as a tool to cross-check the result given pursuant to analysis of the purpose of the duty at (ii), but one which is subordinate to that analysis and which should not supplant or subsume it. …
>
> 17 … in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk. This is the point of the mountaineer's knee example given by Lord Hoffmann in SAAMCO at p 213.
>
> (iii) 'Advice' cases and 'information' cases
>
> 18 The distinction drawn by Lord Hoffmann in SAAMCO between advice cases and information cases has not proved to be satisfactory. Put shortly, as explained by Lord Sumption JSC in Hughes-Holland at paras 39–44, the distinction is too rigid and, as such, it is liable to mislead. In reality, as Lord Sumption JSC emphasises at para 44, the whole varied range of cases constitutes a spectrum. At one extreme will be pure advice cases, in which on analysis the adviser has assumed responsibility for every aspect of a transaction in prospect for his client. At another extreme will be cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act. In some cases (such as those involving valuers) it is readily possible to say that the purpose of the advice given is limited and that the adviser has assumed responsibility under a duty the scope of which is delimited by that purpose, which Lord Hoffmann called an information case. However, Lord Sumption JSC observed (para 44), Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated.
>
> 19 In our view, for the purposes of accurate analysis, rather than starting with the distinction between advice and information cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant: see section (ii) above. Ascribing a case to one or other of these categories seems to us to be a conclusion to be drawn as a result of examination of that prior question.

20 This also corresponds with Lord Sumption JSC's explanation at paras 40 and 41 of what is involved in an advice case and an information case, respectively. In an advice case, the adviser's duty is to consider all relevant matters and not only specific factors (and what counts as a relevant matter for the adviser is determined by the purpose for which he has
p. 409 agreed to give advice: see para 44). Where the adviser is responsible for guiding the whole decision-making process, the adviser's responsibility extends to the decision. In that circumstance, as Lord Sumption JSC explains (para 40), if the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.

21 By contrast, in an information case (Hughes-Holland, para 41), the adviser contributes a limited part of the material to be relied on, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (emphasis added), and in such a case the defendant's legal responsibility does not extend to the decision itself; the result then is that the defendant is liable only for the financial consequences of [the information] being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater.

22 We welcome Lord Leggatt JSC's proposal (para 92) to dispense with the descriptions information and advice to be applied as terms of art in this area. As Lord Sumption JSC points out in Hughes-Holland, para 39, both advice and information cases involve the giving of advice. For the reasons we give, we think it is important to link the focus of analysis of the scope of duty question and the duty nexus question back to the purpose of the duty of care assumed in the case in hand.

(iv) Application of SAAMCO-style counterfactual analysis

23 Related to the issues examined in sections (i) to (iii) above is the use of counterfactual analysis as set out by Lord Hoffmann in SAAMCO. Lord Hoffmann proposed a form of counterfactual analysis as a way to assist in identifying the extent of the loss suffered by the claimant which falls within the scope of the defendant's duty, by asking in an information case whether the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct. This procedure generates a limit to the damages recoverable which has been called the SAAMCO 'cap'. As Lord Sumption JSC said in Hughes-Holland, para 45, this is 'simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong [i e the loss falling within the scope of the defendant's duty] and (ii) loss flowing from the decision to enter into the transaction at all [i e by application of a simple 'but for' test]. As so explained, it is clear that the use and, in particular, the correct framing of the counterfactual scenario follows from the prior question, which is, what purpose was the duty of care assumed by the defendant supposed to serve? In that regard, we agree with Lord Burrows JSC (paras 195–203) that the counterfactual test may be regarded as a useful cross-

check in most cases, but that it should not be regarded as replacing the decision that needs to be made as to the scope of the duty of care (albeit he describes that as a policy decision, whereas we think it reflects more fundamental issues of principle: see section (ii) above).

24 In SAAMCO the House of Lords had to explain why the Court of Appeal in that case had erred by simply applying the general tests of foreseeability and remoteness of loss, and the counterfactual analysis was deployed by Lord Hoffmann as a way of giving emphasis to the importance of the scope of duty principle which he applied in that case. It helped to show why the valuers could not be taken to have assumed responsibility for the whole loss owing from the fall in the market. But it would have been sufficient to arrive at that conclusion (and to determine the amount of recoverable damages) to ask what was the purpose of the valuer's duty to advise: it was to allow the lender to determine at market values current at the time of the advice the amount of security which it would take.

p. 410

25 Also, linking the use of the counterfactual analysis to information cases in the advice and information framework is unhelpful, because of the problems associated with that framework: see section (iii) above. By contrast, examination of the purpose of the duty provides an appropriate and reasoned basis for identifying, out of what may be a wide range of factors which contribute to the claimant's loss, the factors for which defendant is responsible.

26 Another problem associated with counterfactual analysis of this kind is the danger of manipulation, in argument, of the parameters of the counterfactual world. Lord Leggatt JSC points out (paras 128–132) that the counterfactual test can yield the right result if it is properly applied. However, the more one moves from the comparatively straightforward type of situation in the valuer cases, as illustrated by SAAMCO, the greater scope there may be for abstruse and highly debatable arguments to be deployed about how the counterfactual world should be conceived. One has to take care, therefore, not to allow the counterfactual analysis to drive the outcome in a case. To do so would create a risk of litigation by way of contest between elaborately constructed worlds advanced by each side, which would become increasingly untethered from reality the further one moves from the relatively simple valuer case addressed in SAAMCO. There was an element of this in the present appeal, as Mr Salzedo QC for Grant Thornton sought to persuade us that the counterfactual world in this case should be constructed in such a way as to show that Manchester Building Society (the society) would have suffered the same loss if Grant Thornton's advice had been correct and the society responded in kind with elaborations of its own. This in part explains why an aspect of the society's submissions took the form which Lord Leggatt JSC criticises at para 151 et seq, even though its pleaded case was a straightforward one to the effect that Grant Thornton were aware, when they advised in 2006 and thereafter, of the commercial significance of hedge accounting for the society in terms of its impact on its regulatory capital position and, had non-negligent advice been given, the society would not have engaged in the business of matching swaps and mortgages at all and would not have been exposed to the loss which it eventually suffered when it had to unwind that business to protect and so far as possible restore its capital position. Lord Leggatt JSC engages in a sophisticated analysis to answer the elaborate variants of the submissions advanced by the

> parties (para 143 et seq), but the fact is that a distinguished constitution of the Court of Appeal fell into error because of them. Again, it seems to us that the better approach is to focus more directly on the purpose for which the defendant gave the advice in question. There is no need to apply a counterfactual test to arrive at the correct conclusion and it has the potential to confuse rather than assist the correct analysis.
>
> 27 The points which we make in this judgment are interrelated. Identifying the scope of the duty of care by reference to its purpose is a reasonably determinate test, applicable in principle from the outset of the parties' relationship. It seems to us that a focus on this criterion is a surer and simpler guide than a causation-based analysis as proposed by Lord Leggatt JSC. It is fair to say that the two modes of analysis may often lead to the same outcome, but problems arise where it is unclear whether they do or not. A choice then has to be made, and in our view it should be in favour of clear adoption of the purpose of the duty of care as the relevant test. Analysis using the counterfactual tool as deployed in SAAMCO was designed to assist with looking at the scope of duty question from a causation-based perspective. Therefore, once it is accepted that the scope of duty inquiry turns on identifying the purpose of the duty, it can readily be seen that a SAAMCO-type counterfactual analysis is just a cross-check, rather than the foundation of the relevant analysis. By contrast, if emphasis is given to a causation-based analysis of the scope of duty question and the related duty nexus question, then SAAMCO-type counterfactual analysis moves centre stage and appears to assume greater significance than it should do.

p. 411 ↵ It will be apparent that as a consequence of these two decisions, it has been accepted that asking whether damage suffered falls within the 'scope of duty' owed has been accepted to be a general principle within the law of negligence. This is not presented as an 'application of' *SAAMCO*. Rather, the decision in *SAAMCO* is presented as having brought the issue to prominence. The principle is not confined to a narrow range of cases. At the same time, the final part of the above extract underlines that 'scope of duty' is not a causal notion, and the use of 'counterfactuals' is capable of being problematic, as parties may seek to construct complex 'hypothetical worlds'. It is important therefore that the use of counterfactuals in *SAAMCO* is merely a cross-check on the outcome of the essential method of seeking the scope and purpose of the duty. Equally, there is no stark distinction between 'information cases' and 'advice cases', which might provide a shortcut to deciding whether the whole loss associated with a transaction is likely to be recoverable. Rather, there is a continuum between information (narrow) and advice (broad), and there is no substitute for analysis of the scope and purpose of the duty owed.

4.3 Remoteness, Legal Cause, and Scope of Duty—Summary

It cannot be argued that the problems of remoteness have been satisfactorily resolved, either by *The Wagon Mound* or subsequently. The case law on remoteness still presents an unsatisfactory mosaic of different approaches and apparent 'rules' depending on the type of case in hand. We have identified that 'foreseeability' has never wholly succeeded in displacing causal language, and we have also identified the emergence of a new emphasis on the scope and purpose of the duty of care. This new approach could be regarded as an updated interpretation of 'the risk principle', which holds that the defendant is liable only for those consequences

falling within the scope of the risk created by his or her breach of duty. But it has been identified by the Supreme Court as an additional stage in determining legal responsibility, and not as an interpretation of 'remoteness' or intervening cause. This leaves a rather thin and unsatisfactory notion of 'remoteness' based, for no secure reason, on foreseeability, unless the courts are brave enough to develop a distinct notion of 'legal cause' which is not purely based on intervening cause, along the lines proposed by Hart and Honore. Perhaps the separation of these various ideas should not be taken too strictly. After all, the Supreme Court did, at the same time, suggest that the various questions of legal responsibility also tend to blend into one another.

5 Multiple Potential Causes: Introducing Some Difficulties

Here, we return to questions which have been clearly categorized in terms of 'causation'. In Section 1, we introduced the traditional division of causal questions into two stages. First, the defendant's breach must be a 'cause in fact' of the injury (explored in Section 2). Second, the law must determine whether the damage caused is 'too remote' from the breach (explored in Section 3). The first of these seems to work as a 'filter', ensuring that all events designated by the law as causes have 'in fact' made a difference to the outcome suffered. The very description of this stage in terms of cause '*in fact*' seems to make an appeal to something outside the law, whether that is philosophy, natural science, or ordinary language. In ↵ the remaining sections of this Chapter, we look more closely at problems concerned with multiple potential causes which may act either independently, or 'cumulatively', to cause damage to the claimant.

p. 412

Traditionally, as we have seen in Section 2, a 'cause in fact' is identified by asking what would have happened 'but for' the breach. The essence of the 'but for' question is that it seeks *necessary* causes, without which the damage would not have come about. In some cases, however, it is recognized that the 'but for' test does not yield satisfactory results. This is the case, for example, where more than one event would have been sufficient to cause the harm. Neither passes the 'but for' test, because in the absence of either of them, the harm would come about in any event through the intervention of the other. The law is, understandably, reluctant to conclude that neither event is a cause. In these circumstances, 'but for' is an unhelpful test, and the result is 'over-determined'. Maybe therefore not all 'causes' are 'necessary' causes.

What test can be used in place of 'but for' in such cases? One approach, which has been influential in academic circles but appears not to have been entertained by the courts, is to ask whether the breach of duty was a 'Necessary Element of a Sufficient Set' of factors leading to the harm: the 'NESS' test.[16] Since it has not been adopted by the courts, 'NESS' will not be discussed at length here. However, we should note that it is designed to respond to cases where the result is 'over-determined', which is to say that there are 'duplicate' causes: for example, where two fires each reach a house and it is destroyed, and each fire would suffice to destroy it. The key to the NESS approach is to consider what would have occurred if one such duplicate cause was removed. Would the remaining factors, including the breach of duty, be *sufficient* to bring about the harm? If so, was the breach of duty a *necessary* element of that set of factors? NESS therefore maintains an element of necessity, but also incorporates an element of 'sufficiency'.

Continuing the focus on unnecessary causes, Jane Stapleton has suggested that as an overarching principle, the law should recognize as causes those factors which *contribute to* outcomes. This is designed to include both 'but for' causes, and causes that satisfy the 'NESS' criterion just sketched. Most recently, Stapleton has

explained that some factors may properly be said to *operate upon* events (for example, D may literally exert force on an object which is also being subjected to other forces), without being either necessary, or sufficient, to bring about a result. These factors are properly called 'causes' of the events which lead to damage as, for example, where D pushes a car towards a cliff while several others do the same.[17] D's pushing is a cause of the car falling from the cliff because it contributes to the process by which this occurs. There need be no evidential difficulties for this to be selected as an appropriate analysis; and evidence that the other forces on the car would probably have sufficed without D's contribution does not displace its status as a part of the causal mechanism.

This opens up the possibility that the notion of a 'material contribution', which as we will see has been employed by the courts, is not merely a way of overcoming evidential difficulties. There is, however, a sting in the tail because Stapleton's approach reintroduces hypothetical reasoning to determine whether a contributory 'cause' of an event can *also* be said to have resulted in *damage* to the claimant. These are not questions which the law, so far, has dealt with separately. Rather, the question addressed by the law is, simply,
p. 413 whether the breach was a cause of relevant harm (which is within the scope of the duty, and/or not ↵ too remote). The new approach appears to introduce 'causal influence' cause in fact') as the first stage of three, rather than the traditional two, questions about causation of recoverable damage: 'causal influence'; 'but for' applied to damage suffered; and remoteness or, as Stapleton would prefer, 'scope of liability for consequences'.[18] We return to this account at the end of the next section, in relation to 'material contribution'.

Another possibility is to argue that far from there being three stages of enquiry, there are not even two stages in determining causation, one 'factual' and one 'legal'. Rather, there is only one enquiry, aimed at addressing whether the causal requirements of a specific legal rule have been satisfied. Writing in a non-judicial capacity, Lord Hoffmann suggested that this is, in fact, how courts approach issues of causation; and that this explains why judges show little sign of sharing the concerns of academics who seek a general test for 'factual' causation.[19] Indeed, where the questions in this chapter are concerned, Lord Hoffmann has said that 'the concept of cause in fact seems to me to add nothing of value to the discussion'. When courts address causation, in his view, they simply seek to determine whether the particular requirements of a particular legal rule are satisfied. In other words, it may not be going too far to say that the law does not adopt, and does not need, a theory of causation; though as Hart and Honoré proposed, it is influenced by the way that causal language and concepts are ordinarily used and understood.

6 'Material Contribution': Before and After *Fairchild*

This Section looks in more detail at some important cases in which the courts have made use of a notion of 'material contribution' in addressing causation. Rationalising the decisions in these cases has become increasingly difficult as new challenges arise.

Particularly when dealing with diseases caused by toxic agents, courts have in some circumstances determined that causation is established where the breach of duty can be shown to have made a 'material contribution' to the damage. The landmark case of *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32 went further than this, holding that it would be sufficient *proof* of a causal link that the breach

had made a material contribution to the *risk* of harm; but in doing this, it necessarily built upon and interpreted the idea of 'material contribution'. The starting point therefore is the 'material contribution' test itself.

6.1 Material Contribution Before *Fairchild*

Bonnington Castings v Wardlaw [1956] AC 613

A steel dresser was exposed to silica dust at work, and as a result contracted pneumoconiosis. Part of his exposure (from use of swing grinders) was in breach of his employers' statutory duty under the Grinding of Metals (Miscellaneous Industries) Regulations 1925, because dust guards used with the grinders were not kept clear from obstruction. However, some of his exposure (caused by use of a pneumatic hammer) was treated as 'innocent' because no practicable precautions could have been taken to reduce the exposure.

p. 414 **Lord Reid, at 621–2**

> The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is: which was the most probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material....
>
> ### At 622
>
> I think that the position can be shortly stated in this way. It may be that, of the noxious dust in the general atmosphere of the shop, more came from the pneumatic hammers than from the swing grinders, but I think it is sufficiently proved that the dust from the grinders made a substantial contribution. The respondent, however, did not only inhale the general atmosphere of the shop: when he was working his hammer his face was directly over it and it must often have happened that dust from his hammer substantially increased the concentration of noxious dust in the air which he inhaled. It is therefore probable that much the greater proportion of the noxious dust which he inhaled over the whole period came from the hammers. But, on the other hand, some certainly came from the swing grinders, and I cannot avoid the conclusion that the proportion which came from the swing grinders was not negligible. He was inhaling the general atmosphere all the time, and there is no evidence to show that his hammer gave off noxious dust so frequently or that the concentration of noxious dust above it when it was producing dust was so much greater than the concentration in the general atmosphere, that that special concentration of dust could be said to be substantially the sole cause of his disease.

The House of Lords held that there was no need to show that the contribution of the defendant's breach to the dust inhaled exceeded or even approached 50 per cent. It only had to make a 'material' contribution. In this case, it was recognized that more of the dust in the atmosphere came from the 'innocent' source, than from the breach of duty, but the defendants were still liable for the disease.

In the case of a progressive disease, greater exposure worsens the *disease*, not just the *risk* of the disease. Did the result in *Bonnington* depend on this? There is more than one potential answer. It may be that the House of Lords was simply saying that the greater exposure added to the harm suffered, by worsening the condition. That would make the notion of 'material contribution' entirely compatible with the 'but for' test: the tortious exposure is a 'but for' cause of some *part* of the harm. But alternatively, it may be that the tortiously created agent in the atmosphere was regarded as exerting a causal influence, regardless of whether the same harm *would* have been suffered without it. On that hypothesis, then 'material contribution' is an *alternative to* 'but

for' causation, and making such a contribution is another way of being a 'cause' of an outcome. The fact that the defendant was liable in full to the claimant, rather than for a share in the damage suffered which would
p. 415 reflect the likely ↵ contribution of the tortious exposure, appears to point to the second interpretation. But this may simply reflect the fact that the defendants never raised the issue, and focused on resisting liability altogether. Because these issues were not addressed in *Bonnington*, it remains an ambiguous decision.

Non-progressive Diseases and Contribution to Risk of Harm: *McGhee v National Coal Board* [1973] 1 WLR 1

The plaintiff was employed emptying brick kilns in hot and dusty conditions, and developed dermatitis. He alleged that this was caused by the defendants' breach of duty in that he should have been provided with washing facilities, including showers. The plaintiff had been forced to cycle home caked in dust and sweat. The difficulty faced by the plaintiff was one of evidence. In the course of his judgment in *Fairchild v Glenhaven* (at [17]), Lord Bingham offered an extract from the first instance decision in *McGhee* on the part of the Lord Ordinary (Lord Kissen), which is reported at 1973 SC (HL) 37. It very effectively analyses the problem of evidence in *McGhee*.

Lord Kissen

> As I have maintained earlier, the pursuer, in order to succeed, must also establish, on a balance of probabilities, that this fault on the part of the defenders 'caused or materially contributed to his injury', that is to his contracting dermatitis. Dr Hannay's evidence was that he could not say that the provision of showers would probably have prevented the disease. He said that it would have reduced the risk materially but he would not go further than that. Dr Ferguson said that washing reduces the risk. Pursuer's counsel maintained that a material increase in the risk of contracting a disease was the same as a material contribution to contracting the disease and that Dr Hannay established this by his evidence. I think that defenders' counsel was correct when he said that the distinction drawn by Dr Hannay was correct and that an increase in risk did not necessarily mean a material contribution to the contracting of the disease. The two concepts are entirely different. …

In the House of Lords, Mr McGhee's appeal was allowed. But what exactly was the reason for that decision? Lord Reid appears to have decided to reject the very clear (and correct) distinction referred to by Lord Kissen (above). Lord Wilberforce on the other hand may have accepted that distinction, but decided that the particular facts of this case required that 'contribution to risk' was to be *treated* as being the same as contribution to injury. Lord Simon seems to have blurred the distinction altogether.

Lord Reid, at 4–5

> It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury. That is well illustrated by the decision of this House in *Bonnington Castings Ltd v. Wardlaw* [1956] A.C. 613. ...
>
> p. 416 ↵ In the present case the evidence does not show—perhaps no one knows—just how dermatitis of this type begins. It suggests to me that there are two possible ways. It may be that an accumulation of minor abrasions of the horny layer of the skin is a necessary precondition for the onset of the disease. Or it may be that the disease starts at one particular abrasion and then spreads, so that multiplication of abrasions merely increases the number of places where the disease can start and in that way increases the risk of its occurrence.
>
> I am inclined to think that the evidence points to the former view. But in a field where so little appears to be known with certainty I could not say that that is proved. If it were, then this case would be indistinguishable from *Wardlaw's* case. But I think that in cases like this we must take a broader view of causation. The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. But experience shows that it is so. Plainly that must be because what happens while the man remains unwashed can have a causative effect, though just how the cause operates is uncertain. I cannot accept the view expressed in the Inner House that once the man left the brick kiln he left behind the causes which made him liable to develop dermatitis. ... Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence.

Lord Wilberforce, at 5–6

> But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail—a logic which dictated the judgments below. The question is whether we should be satisfied, in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is

> impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences.

Lord Simon of Glaisdale, at 8

> ... In my view, a failure to take steps which would bring about a material reduction of the risk involves, in this type of case, a substantial contribution to the injury. ...

p. 417 ↵ *McGhee* treated contribution to the risk of a non-progressive disease as equivalent to material contribution to the disease, or to use Lord Reid's expression, to the 'development' of the disease. But the nature of the House of Lords' judgment did not clearly set out an intention to change the law. *McGhee* was a mystery at the time, as Smith LJ has recounted:

Smith, J, 'Causation—The Search for Principle' (2009) JPIL 101–13, at 106

> Those of us who were in practice at the time were puzzled by that decision but we just had to see it as an extension of the usual rule on material contribution to the disease; no one had any idea when the extension would apply.

In the following case, the House of Lords confined the impact of *McGhee*, in a case concerning medical negligence.

Wilsher v Essex Area Health Authority [1988] AC 1078

A prematurely born baby suffered a condition known as RLF, which led to blindness. This condition may have been caused by the defendants' breach of duty in exposing the baby to excess oxygen. However, there were a number of other possible causes which were not related to the defendants' actions but were the natural consequence of premature birth. The House of Lords rejected an argument (accepted by the Court of Appeal) that *McGhee* should apply to assist the plaintiff, in that the defendants materially contributed to the risk that the baby would suffer RLF and could therefore be treated as materially contributing to the injury. The House of Lords endorsed the dissenting opinion of Sir Nicolas Browne-Wilkinson V-C in the Court of Appeal, as follows:

Sir Nicolas Browne-Wilkinson V-C
[1987] QB 730, at 771–2

> There are a number of different agents which could have caused the RLF. Excess oxygen was one of them. The defendants failed to take reasonable precautions to prevent one of the possible causative agents (e g excess oxygen) from causing RLF. But no one can tell in this case whether excess oxygen did or did not cause or contribute to the RLF suffered by the plaintiff. The plaintiff's RLF may have been caused by some completely different agent or agents, e.g. hypercarbia, intraventricular haemorrhage, apnoea or patent ductus arteriosus. In addition to oxygen, each of those conditions has been implicated as a possible cause of RLF. This baby suffered from each of those conditions at various times in the first two months of his life. There is no satisfactory evidence that excess oxygen is more likely than any of those other four candidates to have caused RLF in this baby. To my mind, the occurrence of RLF following a failure to take a necessary precaution to prevent excess oxygen causing RLF provides no evidence and raises no presumption that it was excess oxygen rather than one or more of the four other possible agents which caused or contributed to RLF in this case. The position, to my mind, is wholly different from that in the *McGhee* case [1973] 1 WLR 1, where there was only one candidate (brick dust) which could have caused the dermatitis, and the failure to take a precaution against brick dust causing dermatitis was followed by dermatitis caused by brick dust. In such a case, I can see the common sense, if not the logic, of holding that, in ↵ the absence of any other evidence, the failure to take the precaution caused or contributed to the dermatitis. … A failure to take preventative measures against one out of five possible causes is no evidence as to which of those five caused the injury.

p. 418

The House of Lords declined to extend *McGhee* to a case in which there were several possible causes for the injury other than exposure to the same substance or agent (on this occasion, excess oxygen; in the case of *McGhee*, coal dust) that is present through the breach of the defendant. This distinction is hard to explain. Indeed, no reason is given for supporting it. But it would preserve the authority of *McGhee* in single agent cases, and has been endorsed by a later House of Lords and by the Supreme Court in each of *Fairchild, Barker v Corus*, and *Sienkiewicz* (below).

In *Wilsher,* however, the House also cast doubt on the general authority of *McGhee*. Lord Bridge suggested (at 1090) that *McGhee* 'laid down no new principle of law whatever', and that the majority decision was based not on an adaptation of legal principle but on an 'inference of fact'. Thus considerable doubt surrounded the status of *McGhee*, until the case of *Fairchild* was heard in the House of Lords.

6.2 The Decision in *Fairchild*

Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32

Fairchild restored the status of *McGhee* in single agent cases. It both (a) ensured that 'material contribution to damage' will be an important issue in future tort claims and (b) allowed the claimants to succeed although the only connection they could prove was a material contribution not to damage, but to the risk of damage. *Fairchild* is the key case around which the litigation in this Section has developed.

The claimants had been exposed to asbestos dust by more than one employer in different periods of employment. All had developed mesothelioma, a fatal cancer. It was common ground that the mechanism initiating the genetic process which culminated in mesothelioma was unknown, and that the trigger might be a single, a few, or many fibres.[20] It was also accepted that once caused the injury was not aggravated by further exposure but that the greater the quantity of fibres inhaled the greater the risk of developing the disease. On the other hand, there is no known 'safe' level of exposure. The Court of Appeal, applying *Wilsher* rather than *McGhee*, concluded that the claimants had not established on the balance of probabilities which employer had caused their injury. The claimants therefore could not succeed in their actions. The House of Lords allowed appeals by the claimants.

Each of the five judges in *Fairchild* presented their views at substantial length. Our focus will be on the various ways in which their Lordships interpreted *McGhee*, and the ways in which they stated the limits within which the special approach to proof of causation derived from *McGhee* would be applied. Was it essential, for example, that this is a case where several *tortious* exposures each fails to pass the 'but for' test?

p. 419 **Lord Bingham of Cornhill**

> 2 The essential question underlying the appeals may be accurately expressed in this way. If (1) C was employed at different times and for differing periods by both A and B, and (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and (3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and (4) C is found to be suffering from a mesothelioma, and (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together, is C entitled to recover damages against either A or B or against both A and B? To this question (not formulated in these terms) the Court of Appeal … gave a negative answer. It did so because, applying the conventional 'but for' test of tortious liability, it could not be held that C had proved against A that his mesothelioma would probably not have occurred but for the breach of duty by A, nor against B that his mesothelioma would probably not have occurred but for the breach of duty by B, nor against A and B that his mesothelioma would probably not have occurred but for the breach of duty by both A and B together. So C failed against both A and B. The crucial issue on appeal is whether, in the special circumstances of such a case, principle, authority or policy requires or justifies a modified approach to proof of causation. …

Lord Bingham set out the facts of the case and analysed the relevant English case law on causation including *Bonnington* and *McGhee* (Section 6.1) before continuing:

> 21 This detailed review of *McGhee* permits certain conclusions to be drawn. First, the House was deciding a question of law. Lord Reid expressly said so, at p 3. The other opinions, save perhaps that of Lord Kilbrandon, cannot be read as decisions of fact or as orthodox applications of settled law. Secondly, the question of law was whether, on the facts of the case as found, a pursuer who could not show that the defender's breach had probably caused the damage of which he complained could none the less succeed. Thirdly, it was not open to the House to draw a factual inference that the breach probably had caused the damage: such an inference was expressly contradicted by the medical experts on both sides; and once that evidence had been given the crux of the argument before the Lord Ordinary and the First Division and the House was whether, since the pursuer could not prove that the breach had probably made a material contribution to his contracting dermatitis, it was enough to show that the breach had increased the risk of his contracting it. Fourthly, it was expressly held by three members of the House (Lord Reid at p 5, Lord Simon at p 8 and Lord Salmon at pp 12–13) that in the circumstances no distinction was to be drawn between making a material contribution to causing the disease and materially increasing the risk of the pursuer contracting it. Thus the proposition expressly rejected by the Lord Ordinary, the Lord President and Lord Migdale was expressly accepted by a majority of the House and must be taken to represent the ratio of the decision, closely tied though it was to the special facts on which it was based. Fifthly, recognising that the pursuer faced an insuperable problem of
> **p. 420** proof if the orthodox test of causation was applied, but regarding the case as one in which justice demanded a remedy for the pursuer, a majority of the House adapted the orthodox test to meet the particular case. The authority is of obvious importance in the present appeal since the medical evidence left open the possibility, as Lord Reid pointed out at p 4, that the pursuer's dermatitis could have begun with a single abrasion, which might have been caused when he was cycling home, but might equally have been caused when he was working in the brick kiln; in the latter event, the failure to provide showers would have made no difference. In *McGhee*, however, unlike the present appeals, the case was not complicated by the existence of additional or alternative wrongdoers.

Lord Bingham further outlined the facts and decision in *Wilsher v Essex Area Health Authority* (Section 6.1), and disapproved of the comments of Lord Bridge in relation to *McGhee*. Lord Bingham went on to explore 'the wider jurisprudence', considering case law from around the world on similar issues, before turning to policy issues:

Policy

33 The present appeals raise an obvious and inescapable clash of policy considerations. On the one hand are the considerations powerfully put by the Court of Appeal [2002] 1 WLR 1052, 1080, para 103 which considered the claimants' argument to be not only illogical but

> 'also susceptible of unjust results. It may impose liability for the whole of an insidious disease on an employer with whom the claimant was employed for quite a short time in a long working life, when the claimant is wholly unable to prove on the balance of probabilities that that period of employment had any causative relationship with the inception of the disease. This is far too weighty an edifice to build on the slender foundations of *McGhee v National Coal Board* [1973] 1 WLR 1, and Lord Bridge has told us in *Wilsher v Essex Area Health Authority* [1988] AC 1074 that *McGhee* established no new principle of law at all. If we were to accede to the claimants' arguments, we would be distorting the law to accommodate the exigencies of a very hard case. We would be yielding to a contention that all those who have suffered injury after being exposed to a risk of that injury from which someone else should have protected them should be able to recover compensation even when they are quite unable to prove who was the culprit. ...'

The Court of Appeal had in mind that in each of the cases discussed in paragraphs 14–21 above (*Wardlaw, Nicholson, Gardiner, McGhee*) there was only one employer involved. Thus there was a risk that the defendant might be held liable for acts for which he should not be held legally liable but no risk that he would be held liable for damage which (whether legally liable or not) he had not caused. The crux of cases such as the present, if the appellants' argument is upheld, is that an employer may be held liable for damage he has not caused. The risk is the greater where all the employers potentially liable are not before the court. ... It can properly be said to be unjust to impose liability on a party who has not been shown, even on a balance of probabilities, to have caused the damage complained of. On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several
p. 421 employers, ↵ the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law. It seems to me, as it did to Lord Wilberforce in *McGhee* [1973] 1 WLR 1, 7 that:

> 'the employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default.'

Conclusion

34 To the question posed in paragraph 2 of this opinion I would answer that where conditions (1)–(6) are satisfied C is entitled to recover against both A and B. That conclusion is in my opinion consistent with principle, and also with authority (properly understood). Where those conditions are satisfied, it seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him. I consider that this conclusion is fortified by the wider jurisprudence reviewed above. Policy considerations weigh in favour of such a conclusion. It is a conclusion which follows even if either A or B is not before the court. It was not suggested in argument that C's entitlement against either A or B should be for any sum less than the full compensation to which C is entitled, although A and B could of course seek contribution against each other or any other employer liable in respect of the same damage in the ordinary way. No argument on apportionment was addressed to the House. I would in conclusion emphasise that my opinion is directed to cases in which each of the conditions specified in (1)–(6) of paragraph 2 above is satisfied and to no other case. It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development. Cases seeking to develop the principle must be decided when and as they arise. For the present, I think it unwise to decide more than is necessary to resolve these three appeals which, for all the foregoing reasons, I concluded should be allowed.

Lord Hoffmann

61 What are the significant features of the present case? First, we are dealing with a duty specifically intended to protect employees against being unnecessarily exposed to the risk of (among other things) a particular disease. Secondly, the duty is one intended to create a civil right to compensation for injury relevantly connected with its breach. Thirdly, it is established that the greater the exposure to asbestos, the greater the risk of contracting that disease. Fourthly, except in the case in which there has been only one significant exposure to asbestos, medical science cannot prove whose asbestos is more likely than not to have produced the cell mutation which caused the disease. Fifthly, the employee has contracted the disease against which he should have been protected.

62 In these circumstances, a rule requiring proof of a link between the defendant's asbestos and the claimant's disease would, with the arbitrary exception of single-employer cases, empty the duty of content. ...

p. 422

63 So the question of principle is this: in cases which exhibit the five features I have mentioned, which rule would be more in accordance with justice and the policy of common law and statute to protect employees against the risk of contracting asbestos-related diseases? One which makes an employer in breach of his duty liable for the employee's injury because he created a significant risk to his health, despite the fact that the physical cause of the injury *may* have been created by someone else? Or a rule which means that unless he was subjected

> to risk by the breach of duty of a single employer, the employee can never have a remedy? My Lords, as between the employer in breach of duty and the employee who has lost his life in consequence of a period of exposure to risk to which that employer has contributed, I think it would be both inconsistent with the policy of the law imposing the duty and morally wrong for your Lordships to impose causal requirements which exclude liability. …
>
> 73 … I would suggest that the rule now laid down by the House should be limited to cases which have the five features I have described.
>
> 74 That does not mean that the principle is not capable of development and application in new situations. As my noble and learned friend, Lord Rodger of Earlsferry has demonstrated, problems of uncertainty as to which of a number of possible agents caused an injury have required special treatment of one kind or another since the time of the Romans. But the problems differ quite widely and the fair and just answer will not always be the same. For example, in the famous case of *Sindell v Abbott Laboratories* (1980) 607 P 2d 924 the plaintiff had suffered pre-natal injuries from exposure to a drug which had been manufactured by any one of a potentially large number of defendants. The case bears some resemblance to the present but the problem is not the same. For one thing, the existence of the additional manufacturers did not materially increase the risk of injury. The risk from consuming a drug bought in one shop is not increased by the fact that it can also be bought in another shop. So the case would not fall within the *McGhee* principle. But the Supreme Court of California laid down the imaginative rule that each manufacturer should be liable in proportion to his market share. Cases like this are not before the House and should in my view be left for consideration when they arise. For present purposes, the *McGhee* principle is sufficient. I would therefore allow the appeals.
>
> ### Lord Rodger of Earlsferry
>
> 168 … Following the approach in *McGhee* I accordingly hold that, by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants are taken in law to have proved that the defendants materially contributed to their illness.

Lord Nicholls of Birkenhead delivered a concurring judgment, also rejecting the idea that *McGhee* was based on a factual inference. Lord Hutton concurred in the result but thought *McGhee* was based on a factual inference.

The effect of *Fairchild* is that in certain circumstances, a claim is not defeated by the impossibility of proving that the breach of duty caused the injury suffered. But this works two ways: proof of causation must be *impossible*, for the claimant to benefit from the exceptional approach. In the course of reaching this conclusion, most members of the House of Lords (with the clear exception of Lord Hutton) accepted that the *McGhee* case laid down a principle of law, and did not rest purely on a 'robust' inference of fact. Lord Hope
p. 423 (who was ↵ Junior Counsel for the Coal Board in *McGhee*) has expressed the view that Lord Bingham in particular (at [21], extracted earlier) correctly interprets that case:

Lord Hope of Craighead, 'James McGhee—A Second Mrs Donoghue?' [2003] 62 CLJ 587–604, at 599

> … Lord Bingham grasped the point of Lord Reid's judgment precisely when he said that, recognising that the pursuer faced an insuperable problem of proof if the orthodox test of causation was applied, but regarding the case as one in which justice demanded a remedy for the pursuer, a majority of the House adapted the orthodox test to meet the particular case. As Lord Rodger explained [para 142], what Lord Reid has done is to accept that the pursuer must prove that the defender's conduct materially contributed to the onset of the condition and then to hold, as a matter of law, that the proof that the defender's conduct materially increased the risk was sufficient for this onus to be discharged.

The House of Lords in *Fairchild* clearly noted that proof of material contribution to a *risk* of injury is not the same as proof of material contribution to the injury itself, particularly in the case of a non-progressive disease. This is the distinction that was blurred in *McGhee*. But the House accepted that *as a matter of law*, in certain circumstances proof of contribution to the risk will be sufficient evidence of causation. The pressing question was of course, 'in which circumstances?' The extracts above show that different members of the Court identified the relevant features in different ways.

6.3 Applying *Fairchild*: Uncertainty, Single Agents, and Non-tortious Sources

Immediately after *Fairchild*, what appeared to be the necessary features of a claim for the *Fairchild* approach to apply?

'Uncertainty'

First, it was plainly necessary to show that the state of scientific knowledge is such that proof of causation of damage is *impossible*. That was the 'rock of uncertainty', as Lord Bingham put it, on which the claim would otherwise founder. But the 'rock' of uncertainty is now the solid foundation on which a *Fairchild* claim must be based, for without it there can be no departure from the usual approach to proof of causation. Two challenges to this alleged impossibility have arisen. First, it has been suggested that understanding of mesothelioma has now developed to the point where the assumptions made in *Fairchild* are no longer correct. In particular, no experts now appear to accept the idea that a 'single fibre' can cause the cancer. The Supreme Court in *Sienkiewicz* (Section 6.4) decided that the essential element of uncertainty remains, because it cannot be established which fibres, and therefore which exposures, did in fact make such a contribution. Though some exposures may operate cumulatively, others may play no part at all in the causation of the disease (as opposed to, the risk).

In reaching this conclusion, the Supreme Court in *Sienkiewicz* dealt with a second challenge to the rock of
p. 424 uncertainty. To the extent that statistical estimates as to contribution to ↵ *risk* can be devised in order to determine contribution between liable parties, why can these same estimates not be used to demonstrate whether *or not* the usual 'but for' test has been passed, thus removing the very uncertainty on which *Fairchild*

is built? This problem too was resolved in the claimants' favour in *Sienkiewicz*. The possibility of generating purely statistical estimates as to risks does not erode the rock of uncertainty on which a *Fairchild* claim is based.

Single Agents

It was also clear after *Fairchild* that the *McGhee-Fairchild* approach will not be applied to a case like *Wilsher*, in which the claimant is exposed to a variety of different risks. It will apply only where the claimant's injury was caused by exposure to the same type of risk (or the same 'noxious substance') to which the defendant exposed him or her. That position was approved in *Barker* and it is plain that it remains the case, even in the absence of a convincing explanation. Lord Phillips, in *Sienkiewicz* ([104]), floated the idea that whatever the initial reason for adopting it, the 'single agent' criterion is now justified by the information that mesothelioma is probably caused by the interaction of a number of asbestos fibres, potentially from different sources.

'Innocent' or Self-imposed Periods of Exposure

In *Fairchild*, Lord Rodger specifically reserved his judgment on one particular issue. This issue was of central importance to later developments.

> 170 ... the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where, as in *McGhee*, the other possible source of the injury is a similar, but lawful, act or omission of the same defendant. I reserve my opinion as to whether the other possible source of the injury is a similar but lawful act or omission of someone else or a natural occurrence.

This issue was not resolved in any of the judgments. But the remarks suggested that if there is a case where one former employer who exposed the claimant to asbestos dust can be shown to have been *not negligent* (for example, because they took proper precautions, or because their exposure of the claimant took place before the date on which such exposure could be said to give rise to foreseeable harm), then the solution reached in *Fairchild* may not apply.

These issues were core to the litigation in both *Barker v Corus* and *Sienkiewicz v Greif* (below). In the latter case, the tortious exposure was at a very low level and was assessed by the judge to be much less likely to have caused the cancer than the background, non-tortious sources. In both *Barker* (where the answer was balanced by a proportionate approach to damages), and *Sienkiewicz* (where it was not), this question too has been answered in favour of claimants.

6.4 Apportionment and Non-tortious Potential Causes

In neither *Bonnington, McGhee*, nor *Fairchild* was the House of Lords invited to address the issue of apportionment. This is specifically pointed out in the judgment of Lord Bingham, at [34]: 'no argument was
p. 425 addressed to the House that ... there should be an apportionment of ↵ damages because the breaches of duty of a number of employers had contributed to cause the disease ...' (the full paragraph is extracted in

Section 6.2). But why should Lord Bingham have mentioned apportionment at all? As we have explained, mesothelioma (unlike asbestosis, for example, or progressive deafness caused by occupational exposure)[21] is an indivisible disease. Successive defendants did not worsen the disease by further exposure, though they did add to the risk.[22] Once the cancer begins to form, further exposures do no further harm. This was not, therefore, a case like *Bonnington*.

The controversy that would attach to apportionment in such a case is encapsulated in the following extract, which followed the Court of Appeal judgment in *Barker v Corus*, but predates the House of Lords' judgment (extracted below). The author responds to the comment of Lord Bingham quoted above, and states the orthodox view which was later disturbed by *Barker*.

C. McCaul, '*Holtby* and the End Game' (2006) JPIL 6–11, 7

> It is impossible to understand this observation [of Lord Bingham] in the light of legal principles as they currently stand. Apportionment of damage does not arise because there has been a breach of duty by a number of different defendants. To adopt such an approach is to look at the problem from the wrong end of the telescope. It is necessary to look at the damage, not the breach, in order to see whether apportionment is appropriate. If the damage is indivisible, then it matters not how many defendants' breaches of duty have caused it.

In *Barker v Corus* [2006] UKHL 20, the House of Lords stepped away from this orthodoxy. *Barker* appears to have been the first UK case to apportion an indivisible injury.[23] In fact, the majority of the court appears to have apportioned damages on the basis that it was able to apportion not the injury, but the risk to which the defendants had contributed in allegedly identifiable proportions. We will soon analyse the reasoning which led to this conclusion; and then consider the immediate legislative rejection of what the House of Lords had done (section 3 of the Compensation Act 2006); and subsequent reinterpretations as a matter of common law, in the *Trigger Litigation* and *IEG v Zurich Insurance plc*.

Apportionment before *Barker*

The *Holtby* case marks an important development but it is important to note that it does not deal with the same issue as *Fairchild*. The key difference is that it concerned a progressive disease. The harm could therefore
p. 426 be divided: each defendant had—provided ↵ scientific evidence could supply appropriate guidance—caused an identifiable injury which was less than the whole. This approach could in principle apply to facts like those in *Bonnington* itself.

Holtby v Brigham & Cowan (Hull) Ltd [2000] 3 All ER 423

The claimant was exposed to asbestos dust for several years in his work as a marine fitter. For about half of the relevant period, he worked for the defendant. He developed asbestosis. Asbestosis, unlike mesothelioma, is a progressive disease. It is made worse by each exposure. At first instance, Judge Altman held that the defendant was liable only for the extent that he had contributed to the disability. Rejecting an approach based simply on the length of exposure, he reduced the general damages by 25 per cent.

The Court of Appeal upheld the decision of Judge Altman. The court referred to the judgment of Mustill J in *Thompson v Smiths Shiprepairers* [1984] QB 405 (extracted in Chapter 7). Here, there had been exposure over a number of years to dangerous noise levels leading to deafness. Since a substantial part of the *damage* could be shown to have been done before the time that the defendants were in breach of duty, Mustill J suggested that the right approach was to attempt an apportionment of damage accordingly. In *Holtby*, the judge had been right to err on the side of the claimant in making the apportionment, so that a reduction of 25 per cent could not be criticized. Clarke LJ dissented, on the basis that this placed too great a burden on the claimant. He pointed out that if this was the right approach it was odd that it had not been mentioned by any of the judges in the cases of *Bonnington* or *Nicholson* quoted earlier (at [34]).

However, *Holtby* has not been seriously doubted in subsequent decisions, and Smith LJ has suggested that if a case like *Bonnington* was argued again today, it could lead to an apportionment of damages between tortious and non-tortious causes (provided there is sufficient evidence to attempt a quantification).[24] This suggests an interpretation of *Bonnington* in which it is the progressiveness of the disease which made it possible to say that there had been a material contribution from the breach. By the same token, if scientific evidence can quantify this contribution (to harm, not to risk), then damages will be apportioned accordingly: this would make for a *Holtby*-style case. But this has no application to *Fairchild*, which deals with a different problem. This should help to indicate the controversial nature of the decision in *Barker*.

Barker v Corus [2006] UKHL 20; [2006] 2 WLR 1027

Like *Fairchild*, in the appeals heard here, the claimants (or their husbands) had contracted mesothelioma through occupational exposure to asbestos dust over a number of years. Unlike *Fairchild*, in addition to periods of exposure on the part of employers including the defendant, in one case the deceased had also been self-employed for a period of time, and had been exposed to asbestos dust during this period of self-employment. Thus the question arose whether the *Fairchild* approach to proof of causation could apply where the disease had not necessarily been caused by a breach of duty, and where it might have been caused by the actions of the claimant himself. At first instance, Moses J had determined that this possibility was adequately dealt with by reducing damages on the basis of contributory negligence. He applied a reduction of 20 per cent.

p. 427 ↵ The second issue to be resolved was the general issue of apportionment. The defendant argued that the damages awarded should have been reduced to reflect the limited extent to which the defendant could be proven to be responsible for the damage suffered. The trial judge, Moses J, held that there should be no apportionment of damages. The Court of Appeal upheld his decision on both issues.

Issue 1: Self-exposure

The House of Lords had no difficulty in agreeing with the Court of Appeal in relation to self-exposure. Where there was a period of self-employment, this did not defeat the *Fairchild* principle, since that was in any case based on *McGhee* where there was a potential non-tortious cause. In developing this point, the House also explicitly endorsed the 'single agent' rule, as a way of limiting the operation of the *Fairchild* principle. In single agent cases, there is no need to show that all of the exposures were tortious. Self-exposure which was also negligent (as here) would, however, be the basis for a reduction in damages pursuant to the contributory

negligence legislation (Chapter 7). The difference is that the damages are reduced to reflect the claimant's share of responsibility; the defendant's liability is, other than this, for the full damage suffered, and not for their contribution to the overall risk.

Although this issue did not dominate the judgments of the House of Lords in *Barker*, it subsequently became very important. The House in *Barker* doubtless felt their judgment on this point was balanced by their approach on the second issue; now, however, that aspect of their judgment is not to be followed in cases to which section 3 of the Compensation Act applies.

Issue 2: Apportionment

This issue occupied far more of their Lordships' attention. Most of the majority judges (though not Baroness Hale who agreed in the outcome purely on grounds of fairness and policy—as to which views have of course differed) adopted a view of *Fairchild* which would make it possible to distinguish the existing case law on indivisible damage. That is, they said that in *Fairchild*, the House of Lords had *not* held that 'material contribution to risk' was treated as equivalent, within the exception, to 'material contribution to damage'. Lord Rodger, in dissent, argued persuasively that this is precisely what had been said in *Fairchild* and that this must be so, because their Lordships had all applied *McGhee*, which proceeded on this basis. Lord Rodger's judgment later appeared to be vindicated in *Sienkiewicz* and *Trigger*. Nevertheless, the outcome in *Barker* was recognized as still binding, outside the ambit of section 3 of the Compensation Act 2006, in *IEG v Zurich Insurance plc* [2015] UKSC 33.

Lord Hoffmann and Lord Scott took a novel approach. They suggested that since *exposure to risk* is itself the only harm which can be shown to have been caused by the defendants' breach of duty, risk of harm is the damage which they must compensate; and, further, that this was the basis of the decision in *Fairchild*.

Lord Hoffmann, *Barker v Corus*

[31] My Lords, the reasoning of Moses J and the Court of Appeal would be unanswerable if the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* had proceeded upon the fiction that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. The disease is
p. 428 undoubtedly an indivisible injury and the reasoning of Devlin LJ in *Dingle v Associated Newspapers Ltd* would have been applicable. But only Lord Hutton and Lord Rodger adopted this approach. The other members of the House made it clear that the creation of a material risk of mesothelioma was sufficient for liability. ...

Creating a risk as damage

[35] Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterize the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for the chances of an event happening, in the way that a person who buys a whole book of tickets in a raffle has a separate and larger chance of winning the prize than a person who has bought a single ticket. ...

Fairness

[43] ... In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.

Quantification

[48] Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has actually been contracted. Mr Stuart-Smith, who appeared for Corus, was reluctant to characterise the claim as being for causing a risk of the

> disease because he did not want to suggest that someone could sue for being exposed to a risk which had not materialised. But in cases which fall within the *Fairchild* exception, that possibility is precluded by the terms of the exception. It applies only when the claimant has contracted the disease against which he should have been protected. And in cases outside the exception, as in *Gregg v Scott*, a risk of damage or loss of a chance is not damage upon which an action can be founded.

Lord Scott also considered the damage caused by the defendants in this case to be increase in the risk of mesothelioma. Baroness Hale took an approach which was based on 'fairness', and not on recasting the nature of the damage caused. This approach was quoted with approval by Lord Mance in *IEG v Zurich* (below).

p. 429 **Lord Rodger (dissenting)**

> [89] As Mr Gore QC rightly emphasised on behalf of Mr Patterson, the real reason why the defendants want to get rid of liability in solidum is that quite a number of the potential defendants and their insurers in the field of mesothelioma claims are insolvent. So, if held liable in solidum, solvent defendants or, more particularly, their insurers will often find that they have to pay the whole of the claimant's damages without in fact being able to obtain a contribution from the other wrongdoers or their insurers, if any. So their only hope of minimising the amount they have to pay out by way of damages is to have liability to the claimant apportioned among the wrongdoers. Therefore they are asking for the introduction of apportionment because of this entirely contingent aspect of the situation regarding mesothelioma claims. If *Fairchild*-exception claims had first arisen in an area where the wrongdoers and their insurers were in good financial heart, matters could have been resolved satisfactorily for all concerned on the basis of liability in solidum and the use of the 1978 Act.
>
> [90] Of course, it may seem hard if a defendant is held liable in solidum even though all that can be shown is that he made a material contribution to the risk that the victim would develop mesothelioma. But it is also hard—and settled law—that a defendant is held liable in solidum even though all that can be shown is that he made a material, say 5%, contribution to the claimant's indivisible injury. That is a form of rough justice which the law has not hitherto sought to smooth, preferring instead, as a matter of policy, to place the risk of the insolvency of a wrongdoer or his insurer on the other wrongdoers and their insurers. Now the House is deciding that, in this particular enclave of the law, the risk of the insolvency of a wrongdoer or his insurer is to bypass the other wrongdoers and their insurers and to be shouldered entirely by the innocent claimant. As a result, claimants will often end up with only a small proportion of the damages which would normally be payable for their loss. The desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me.

As already mentioned, the effect of this decision on claims for mesothelioma was immediately reversed by legislation, which sought to ensure that liability under *Fairchild*, like liability under *McGhee*, would be joint and several. Apart from this reversal, the section also provides that those defendants who are thereby exposed to an inequitable burden of liability because of insolvent liability insurers may be indemnified in a manner to be settled. The first step is to turn back the clock; but provision for greater fairness to liable parties can be

developed. As the court in *Barker* will have been well aware from counsels' argument, the insurers had already responded to *Fairchild* through the introduction of a voluntary Code of Practice on apportionment of *Fairchild* liabilities between insurers according to the rough measure of time on cover in respect of tortious exposure.[25]

Compensation Act 2006

Parliament responded to the impact of *Barker* by restoring full liability in cases of mesothelioma. This does not alter common law principles, but provides for a solution in these cases in particular.

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3 Mesothelioma: damages

(1) This section applies where:

(a) a person ('the responsible person') has negligently or in breach of statutory duty caused or permitted another person ('the victim') to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos.

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable—

(a) in respect of the whole damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos—

(i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or,

(ii) by the responsible person in circumstances in which he has no liability in tort, and

(b) jointly and severally with other liable person.

(3) Subsection (2) does not prevent—

(a) one responsible person from claiming a contribution from another, or,

(b) a finding of contributory negligence.

(4) In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply—

(a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or

(b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case.

...

(7) The Treasury may make regulations about the provision of compensation to a responsible person where—

(a) he claims, or would claim, a contribution from another responsible person in accordance with subsection (3)(a), but

> (b) he is unable or likely to be unable to obtain the contribution, because an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.

Regulations have been produced in respect of section 3(7), enabling a person who is liable in tort within the terms of section 3 (or their insurer) to recover a contribution from the Financial Services Compensation Scheme. This scheme is funded by levies on insurers.

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Sienkiewicz v Greif (UK) Ltd; Willmore v Knowsley MBC [2011] UKSC 10; [2011] 2 AC 229

This was by no means the end of the asbestos litigation. The Supreme Court was required to consider the question of non-tortious exposures again in these joined appeals, which illustrate starkly the implications of our earlier observation that there is no safe level of exposure to asbestos. *Willmore v Knowsley BC* differs from all the cases of mesothelioma considered so far in that it was not a case of occupational exposure. The particular exposures which formed the basis of the claim were argued to have occurred while the deceased had been at a school operated by the defendant, and these were argued to have materially increased the risk of contracting the disease. There is a strong sense from the judgments of the Supreme Court that the judge's decision to accept the claimant's view of the evidence was generous (Baroness Hale described it as 'heroic'), but the findings of fact were not disturbed.

Sienkiewicz v Greif (UK) Ltd was an action brought on behalf of the deceased's estate by her daughter. Mrs Costello had been an office worker from 1966 until 1984 at factory premises of the defendant in Ellesmere Port. Although she chiefly spent her time in an office block, her duties took her all over the factory and she spent some time in areas which were contaminated with asbestos. The judge had found the defendants to be in breach of duty in exposing the deceased to asbestos dust throughout the years of her employment. However, he also found that like all inhabitants of Ellesmere Port, Mrs Costello had been exposed to a low level of asbestos in the general atmosphere. Since it is accepted that mesothelioma may be triggered by low-level exposures, though of course the risk increases with greater levels, there was thus a significant potential cause of mesothelioma which did not arise from the tort of an employer.

The defendant argued that in these circumstances, where there was only one employer,[26] it ought to be possible to show on the balance of probabilities whether the disease was or was not caused by the tortious exposure. Thus, there was no need to apply the special rule introduced by *Fairchild*, and the claimant should have to prove that the tort of the defendant had caused the deceased's mesothelioma on the normal 'balance of probabilities' test. In order to discharge this test, she must show that the occupational exposure had more than doubled her risk of contracting the disease. The judge accepted the defendants' argument, and carried out an assessment of the cumulative occupational and environmental exposures, concluding that it could not be shown in this case that the occupational exposure had more than doubled the risk. The claimant appealed, arguing both that the judge had been wrong in law, and that his assessment of the contribution to risk was incorrect. The 'doubling of risk' argument had not been set out in the original defence, and the claimant therefore had not obtained her own expert advice on the point.

In the Court of Appeal, Smith LJ said that she could not rule out that the House of Lords in *Fairchild* might have agreed with a proposition that in the case of a sole employer and a non-occupational exposure, the *Fairchild* exception was not required. However, she also argued that section 3 Compensation Act 2006 (above) now prevented this route from being taken: Parliament allowed claimants to establish causation either by reason of
p. 432 'material contribution to risk', or 'for any other reason' (section 3(1)(d)). She considered it to be clear
↵ from the statutory wording (extracted above) that proof of contribution to risk would now be sufficient proof of causation in any mesothelioma case in which conditions (a)–(c) of section 3(1) were satisfied, whether or not the House of Lords would have applied the test to the case in hand.

In the Supreme Court, the Justices rejected Smith LJ's reading of section 3. The change effected by the legislation came in section 3(2), and it ensured that liability, once established, was 'joint and several'. There was no intention to change the basis on which a causal link was established. The Supreme Court, therefore, set about assessing what *Fairchild* and *Barker* could be said to have established, where not all potential causes are tortious and most particularly, where the contribution of the tortious cause to the overall risk is relatively small. Two key issues emerged. First, does *Fairchild* apply to cases where there is only one tortious exposure?[27] Second, in such a case, can the same statistical evidence, which appears to be capable of being used to estimate the defendant's contribution to the risk of damage, also be used to establish whether the tortious exposure did, or did not, cause the damage?

Single Tortious Exposure

The Supreme Court determined that *Fairchild* applies to cases where only one source of the exposure is tortious, and where the contribution of that exposure is at a relatively low level. Members of the Court displayed varying degrees of contentment or unease with this result, but acknowledged that it follows logically from the reasoning in *Fairchild* and *Barker*. Perhaps the most willing to accept the implications was Lord Rodger.

Lord Rodger, *Sienkiewicz v Greif*

> 141 The response of English law to the problem posed by the rock of uncertainty in mesothelioma cases is … to be found in the combination of the common law, as laid down in *Fairchild* and *Barker* and section 3 of the 2006 Act. Defendants whose breaches of duty materially increase the risk that the victim will develop mesothelioma are liable jointly and severally for the damage which the victim suffers if he does in fact develop mesothelioma. This is the current version of the *Fairchild* exception, as it applies in cases of mesothelioma.
>
> 142 Of course, the *Fairchild* exception was created only because of the present state of medical knowledge. If the day ever dawns when medical science can identify which fibre or fibres led to the malignant mutation and the source from which that fibre or those fibres came, then the problem which gave rise to the exception will have ceased to exist. At that point, by leading the appropriate medical evidence, claimants will be able to prove, on the balance of probability, that a particular defendant or particular defendants were responsible. So the *Fairchild* exception will no longer be needed. But, unless and until that time comes, the rock of uncertainty which prompted the creation of the *Fairchild* exception will remain.

Lord Brown accepted that this was the logical consequence of the law's development to date, but was far from content with the result.

p. 433 **Lord Brown, *Sienkiewicz v Greif***

> 185 In short, the die was inexorably cast in *Fairchild*—although, as already suggested, it is doubtful if that was then recognised and it is noteworthy too that, even when in *Barker* it came to be recognised, it was then thought palatable only assuming that compensation was going to be assessed on an aliquot basis. Parliament, however, then chose—although, of course, only in mesothelioma cases—to go the whole hog.
>
> 186 The result must surely be this. As I began by saying, mesothelioma cases are in a category all their own. Whether, however, this special treatment is justified may be doubted. True, as Lord Phillips PSC observes at the outset of his judgment, mesothelioma is indeed a hideous disease. (And it is perhaps also the case, as Lord Phillips PSC suggests at para 104, that mesothelioma, after all, may result from the cumulative effect of exposures to asbestos dust.) The unfortunate fact is, however, that the courts are faced with comparable rocks of uncertainty in a wide variety of other situations too and that to circumvent these rocks on a routine basis—let alone if to do so would open the way, as here, to compensation on a full liability basis—would turn our law upside down and dramatically increase the scope for what hitherto have been rejected as purely speculative compensation claims. Although, therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the 'but for' test of causation at its peril.

Statistical Evidence

Lord Phillips pointed out what he considered to be a 'conundrum' arising from the defendants' arguments. If the state of medical knowledge makes it impossible to ascertain the cause of the claimant's mesothelioma, how is it nevertheless possible to make findings of fact based on statistical evidence, quantifying the defendant's particular 'contribution to the risk'? In other words, why cannot the same kind of evidence be used to estimate whether or not, on the balance of probabilities, a particular party's breach of duty has caused the cancer, in the usual way? If such evidence is accepted in relation to the contribution to risk, why does it not erode the 'rock of uncertainty'? If this is accepted, the rationale for *Fairchild* disappears altogether: there would be no impossibility of proof, because evidence of probability would exist. All of the Justices rejected these suggestions. Importantly, Lord Phillips made a distinction between 'material contribution' cases, and cases where 'but for' causation must be proved on the balance of probabilities, where in his view a 'doubling of risk' test may be applied.

Lord Phillips, *Sienkiewicz v Greif*

> 90 … I see no scope for the application of the 'doubles the risk' test in cases where two agents have operated cumulatively and simultaneously in causing the onset of a disease. In such a case the rule in *Bonnington* applies. Where the disease is indivisible, such as lung cancer, a defendant who has tortiously contributed to the cause of the disease will be liable in full. Where the disease is divisible, such as asbestosis, the tortfeasor will be liable in respect of the share of the disease for which he is responsible.

p. 434 ↵ This clarifies that 'material contribution' is not *merely* applicable in cases of divisible disease; it applies also in cases of indivisible injury, though the effects of showing a 'material contribution' vary between divisible and indivisible injuries. It suggests that 'material contribution' is a test which is *appropriate to* certain sorts of case, and that it does not merely apply because of evidential difficulties. That in itself is an important recognition. We return to the point in the final part of this section.

Epidemiological Evidence

Lord Phillips debated the applicability of epidemiological evidence at some length, concluding that it was not sufficiently reliable in this particular instance to form the basis of conclusions as to causation. The other Justices were less convinced that the discussion needed to be had; but their observations are potentially significant for other 'toxic tort' cases. The key issues are outlined by Lord Dyson in the following discussion.

Lord Dyson, *Sienkiewicz v Greif*

216 Lord Rodger JSC draws a distinction between claimant A, who proves on the balance of probability that a defendant *probably* injured him, and claimant B, who proves on the balance of probability that a defendant *actually* injured him. He says that, as a matter of law, claimant B will succeed but claimant A will fail. A claimant who seeks to prove his case on the balance of probability in reliance entirely on statistical evidence will inevitably fail, since he is able to do no more than prove on the balance of probability that the defendant probably injured him.

217 I am grateful to Lord Rodger JSC for drawing attention to the article by Steve Gold, 'Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence' (1986) 96 Yale LJ 376. The article distinguishes between 'fact probability' and 'belief probability'. The former is a more than 50% statistical probability of an event having occurred. An illustration of this is the 75% probability that the victim was run down by a blue cab in the example given by Brachtenbach J in *Herskovits v Group Health Cooperative of Puget Sound* (1983) 664 P 2d 474: see para 95 of Lord Phillips PSC's judgment. The latter is a more than 50% *belief* in the decision-maker that a knowable fact has been established. Mr Gold points out that, particularly in toxic tort cases, US courts have often 'collapsed' the distinction between fact probability and belief probability and simply asked the question whether the fact that the claimant seeks to prove has been established as 'more likely than not'.

218 In my view, this is an important distinction and it is of particular relevance in relation to causation in toxic torts. It is often the basic impossibility of proving individual causation which distinguishes toxic tort cases from ordinary personal injury cases. As Mr Gold points out, epidemiology is based on the study of populations, not individuals. It seeks to establish associations between alleged causes and effects. With proper scientific interpretation, these correlations lend great weight to an inference of causation. However, in an individual case, epidemiology alone cannot *conclusively* prove causation. At best, it can establish only a certain probability that a randomly selected case of disease was one that would not have occurred absent exposure.

219 Ultimately, questions of burden and standard of proof are policy matters for any system of law. It is trite law that our system requires a civil claim to be proved by a claimant on the balance of probability. It is a matter of policy choice whether and, if so, in what
p. 435 circumstances the courts are willing to find causation proved on the balance of probability on the basis of epidemiological evidence alone. In the United States, some courts have been willing to find causation established on the balance of probability on the basis of epidemiological evidence alone. They have been criticised by Mr Gold for collapsing the distinction to which I have referred.

220 As I have said, the House of Lords produced in the *Fairchild* exception a particular policy response to the causation problems created by the lack of scientific knowledge about the aetiology of mesothelioma. This response has been confirmed by the 2006 Act. In these

> circumstances, I agree with Lord Phillips PSC and Lord Rodger JSC that there is no room for the application of a different test which would require a claimant to prove (whether on the basis of doubling of the risk or otherwise) that on the balance of probability the defendant caused or materially contributed to the mesothelioma.

What can we conclude from the discussions in *Sienkiewicz*? It seems clear that the law *selects* material contribution as sufficient causal link in cases where it is appropriate to do so, and not only because of a difficulty of proof. Equally, that 'material contribution' is not merely a form of 'but for' causation. This can apply in the case of an indivisible disease. In the case of a divisible disease, it appears to collapse into 'but for' cause, but this is either because there is not one harm to which the breach contributes, but a range of harms; or perhaps because the principles applied to assessment of damages would insist that the law takes into account what is known, namely that some elements of the injury would be suffered anyway.

So far as proof is concerned, where the relevant causal connection is 'material contribution', only this contribution needs to be proved. Lord Phillips proposed that this was the case in relation to 'cumulative concurrent causes'. 'Material contribution to *risk*' cases, making up a very small group including *McGhee* itself and mesothelioma claims, are for the same reason also outside the need to establish causation as a matter of probabilities. That means that causation also cannot be *disproved* as a matter of probabilities. The possibility of reaching an informed statistical estimate of the degree of contribution to risk cannot, logically, affect this position. Beyond that, the judges have expressed *caution* in relation to purely statistical or epidemiological evidence, and found it insufficient in this particular case. It is clear both for these specific and more general reasons that the possibility of making informed statistical estimates as to contribution to risk does not erode the rock of uncertainty on which *Fairchild*, in particular, is built.

Lower courts now have, of course, the task of determining other cases of occupational cancer where there are also background or non-tortious exposures, after *Sienkiewicz*. In this process, the question of when 'material contribution' is or is not the correct test has become crucial. We return to these issues in Section 6.6, when we consider material contribution beyond mesothelioma. Before that, we complete the saga (to date) of asbestos.

6.5 Insurance Issues and Further Interpretation

In two consecutive cases, the Supreme Court has considered arguments raised by liability insurers about their liabilities to indemnify employers who are liable under *Fairchild*. In addition to their important consideration of principles of insurance law, these cases have also interpreted the nature of *Fairchild* liability and the status of *Barker v Corus* as a matter of common law.

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Durham v BAI: The Trigger Litigation

The *Trigger* litigation brought to the surface the central role of insurance in the entire *Fairchild* saga. It has always been apparent that the defendants in the key cases were liability insurers, even if this has only intermittently been mentioned by the courts. Insurers have not only defended the claims and paid compensation where required, but have shaped the entire litigation by selecting cases in which to resist liability. *Sienkiewicz* and *Willmore,* for example, were particularly weak claims given the low levels of tortious

exposure. The suspension of the usual approach to proof of causation in *Fairchild* would have been entirely fruitless had the liabilities not been insured. In the *Trigger* litigation, insurers turned from denying liability in tort, where their arguments had been lost, to denying insurance cover for those liabilities. With the exception of Lord Phillips, the Supreme Court was unanimous in rejecting this 'extraordinary' outcome.

It will not be possible to do full justice to the insurance issues in the context of a chapter concerned with causation in tort law.[28] The judgment of Lord Mance is a tour de force drawing upon and clarifying principles of interpretation of commercial contracts; overarching insurance law principles and policies; and the evolution of the *Fairchild* exception. It is worth noting that Lord Mance and the rest of the majority crafted their opinions on the basis of existing legal principles, including centrally the idea that the words of commercial contracts should be interpreted where possible to make 'commercial sense' (which is to say, to reflect the purpose of the contract), and not on general 'policy' grounds.

The dispute between the parties concerned the meaning of insurance policies which had been written to cover employers' liability to their employees. The various defendants argued that liabilities under *Fairchild* fell outside the wording of their policies, because they had undertaken to pay in respect of liability for injuries either 'sustained', or 'contracted', during the policy period. The Court of Appeal had opened a potential 'black hole' in cover[29] by determining that although 'contracted' was capable of meaning, in effect, 'caused', 'sustained' did not naturally bear that meaning, so that policies containing 'sustained' wording responded only if the disease was actually suffered by the worker during the period of cover. Since employers often change their insurer; workers often change their employment and of course ultimately leave employment; and mesothelioma has a very long latency period during which no disease occurs with or without the knowledge of the sufferer, this would lead to many cases where no insurance cover responded to the injuries.

This appeared startling in itself, for a number of reasons. One reason is that none of the parties to the insurance contracts had thought there was any distinction between the two alternative forms of wording. Another is that diseases of long latency were hardly unknown before the recognition of mesothelioma, and it was assumed that employers who purchased insurance were covered in relation to their liability for these diseases. A further reason is that from 1972, when the Employers' Liability (Compulsory Insurance) Act 1969
p. 437 came into force, employers were *required* to be insured against their liabilities to employees, and the
↵ policies in question had plainly been purchased on the understanding that they provided the mandated cover. Rix LJ carefully analysed the requirements of that Act and held—in an aspect of his judgment approved by the Supreme Court—that only policies written on a 'causation' basis would satisfy these demands. He therefore also concluded that employers buying policies with a 'sustained' wording were unknowingly in breach of their statutory obligations. Finally, the decision threatened to unravel what the House of Lords in *Fairchild*, and to some extent *Barker*, had sought to achieve.

A much bigger challenge arose in the Supreme Court. Lord Phillips raised the question of whether, if the true basis of *Fairchild* was actually liability for exposure to risk, either one of the wordings referred to above was capable of responding to the liabilities in question. In other words, Lord Phillips went far further than the Court of Appeal, and took a view which meant that very few *Fairchild* liabilities would be covered by available insurance policies at all: no 'injury' could be said to have been sustained or contracted in the policy period, because *Barker* tells us that what is taken to be proved is not causation of injury but causation of the risk of

injury. Lord Phillips argued that the aim of the House of Lords in *Fairchild* had simply been to ensure that no party in breach escaped *liability* through the impossibility of causation—its aim was not, therefore, to secure compensation.[30]

Note: in the following extract, Lord Mance refers to the decision in Rothwell:

Lord Mance, *Durham v BAI (Trigger Litigation)*
[2012] 1 WLR 867

58 Lord Phillips PSC in his judgment addresses the basis of *Fairchild* in the light of *Barker*, the 2006 Act and *Sienkiewicz*. He accepts that, if *Fairchild* is now correctly to be understood as a special rule deeming employers who have exposed an employee to asbestos to have caused any subsequently suffered mesothelioma, then the insurance policies should apply (para 109). But he concludes, at para 124, that *Fairchild* must be understood as creating liability not for the disease, but 'for the creation of the risk of causing the disease'. It follows in his view that employers and employees gain no assistance from the special rule in asserting that mesothelioma suffered by any person was caused or initiated in any particular policy period. On this basis, even though the insurances respond to injuries caused or initiated during their periods, the employers and employees fail for want of proof.

... 61 However, on further analysis, the distinction identified in paras 58–59 above proves more elusive. Even in *Barker* [2006] 2 AC 572 itself, Lord Walker described exposing the employee to the risk of mesothelioma as being 'equated with causing his injury' and the result as 'an explicit variation of the ordinary requirement as to causation' (para 104), and spoke of the
p. 438 rule as one 'by which exposure to the risk of injury is equated with legal responsibility for that injury' (para 109). However, it is conceivable that he meant that the ordinary requirement of causation of the disease was entirely replaced by another liability-creating rule. It is in the later authority of *Sienkiewicz* that the difficulty of drawing any clear-cut distinction between creating a risk and causation of the disease becomes most apparent.

...

65 In reality, it is impossible, or at least inaccurate, to speak of the cause of action recognised in *Fairchild* and *Barker* as being simply 'for the risk created by exposing' someone to asbestos. If it were simply for that risk, then the risk would be the injury; damages would be recoverable for every exposure, without proof by the claimant of any (other) injury at all. That is emphatically not the law: see Rothwell and the statements in *Barker* itself, cited above. The cause of action exists because the defendant has previously exposed the victim to asbestos, because that exposure *may* have led to the mesothelioma, not because it did, and because mesothelioma has been suffered by the victim. As to the exposure, all that can be said (leaving aside the remote possibility that mesothelioma may develop idiopathically) is that *some* exposure to asbestos by someone, something or some event led to the mesothelioma. In the present state of scientific knowledge and understanding, there is nothing that enables one to know or suggest that the risk to which the defendant exposed the victim actually materialised. What materialised was at most a risk of the same kind to which someone, who may or may not have been the defendant, or something or some event had exposed the victim. The actual development of mesothelioma is an essential element of the cause of action. In ordinary language, the cause of action is 'for' or 'in respect of' the mesothelioma, and in ordinary language a defendant who exposes a victim of mesothelioma to asbestos is, under the rule in *Fairchild* and *Barker*, held responsible 'for' and 'in respect of' both that exposure and the mesothelioma.

> 66 This legal responsibility may be described in various ways. For reasons already indicated, it is over-simple to describe it as being for the risk. Another way is to view a defendant responsible under the rule as an 'insurer', but that too is hardly a natural description of a liability which is firmly based on traditional conceptions of tort liability as rooted in fault. A third way is to view it as responsibility for the mesothelioma, based on a 'weak' or 'broad' view of the 'causal requirements' or 'causal link' appropriate in the particular context to ground liability for the mesothelioma. This third way is entirely natural. It was adopted by Lords Reid and Wilberforce in *McGhee v National Coal Board* [1973] 1 WLR 1, by Lord Hoffmann, Baroness Hale and (possibly) Lord Walker in *Barker v Corus UK Ltd* [2006] 2 AC 572 and by Lord Hoffmann in his extra-judicial commentary. It seems to have received the perhaps instinctive endorsement of a number of members of this court, including myself, in *Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229. Ultimately, there is no magic about concepts such as causation or causal requirements, wherever they appear. They have the meanings assigned to them and understood in ordinary usage in their context. A logician might disagree with a reference to causation or a causal link in a particular context, but that is not the test of meaning: see Lord Wilberforce's words in *McGhee*, at p 6 c–f (cited in para 56 above). The present appeals concern the meanings we assign to the concept of causation, first in the context of considering employers' liability to their employees and then in considering the scope of employers' insurance cover with respect to such liability.

Lord Mance concluded that liability under *Fairchild* was liability for causation of damage, applying the particular causal tests which the law had decided to adopt in light of the difficulties of proving causation in such cases. Having made that determination, he also concluded that on their proper construction, the
p. 439 insurance policies did indeed respond to the ↵ 'causation' of injury, whether they adopted the 'sustained' or 'contracted' wording. The law did not steer into a 'black hole' after all. Lord Clarke expressed the sense that any other outcome would be extraordinary:

Lord Clarke, *Durham v BAI*

> 88 I would only add this. It appears to me that, once it is held that, on these facts, the employers are liable to the employees, it would be remarkable if the insurers were not liable under the policies. Rather as in *AXA General Insurance Ltd v HM Advocate* [2011] 3 WLR 871, the whole purpose of the policies was to insure the employers against liability to their employees. That purpose would be frustrated if the insurers' submissions on this point were accepted. I agree with Lord Mance JSC, for the reasons he gives at paras 69–73, that these policies respond to these claims.

International Energy Group v Zurich Insurance plc UK [2015] UKSC 33; [2016] AC 509

The implication of the judgments of the Supreme Court in *Trigger* appeared to be that the full force of *Fairchild* was restored, without the exercise in proportionate recovery set out in *Barker. Fairchild* had determined, not that liability was for contribution to risk of injury; but that contribution to risk of injury was to be treated as a *sufficient causal link*: liability continued to be for the injury itself. But in *IEG v Zurich*, the Supreme Court

unanimously held that as a question of common law, *Barker* continues to apply. What has changed since *Trigger* therefore is not the proportionality of recovery, but the rationale for that proportionality: it is an understandable response to the fact that a broad notion of 'causation' has been applied. Liability is imposed on an 'unconventional basis' ([30]), and there is no reason to think that a conventional approach to the 'measure of damages' should apply. The common law was directly relevant in *IEG* because section 3 of the Compensation Act 2006 does not apply in Guernsey, where the exposure took place.

Delivering the leading judgment in *IEG*, Lord Mance quoted at length from the judgment of Baroness Hale in *Barker.* Notably, Baroness Hale was concerned not with recognizing risk as a new form of injury, but with fashioning a response that was *fair*. It was in this way that the decision in *Trigger* could not be said to be inconsistent with *Barker: Barker* had not been impliedly overruled or departed from by the Supreme Court in *Trigger*.

Lord Mance, *IEG v Zurich*

27 In IEG's submission, *Barker* [2006] 2 AC 572 is fatally undermined by the Compensation Act 2006 and/or the decision in '*Trigger*' [2012] 1 WLR 867. IEG points out that section 16(3) of the 2006 Act provides that 'section 3 shall be treated as having always had effect', and suggests that the Act was in section 3 declaring what the common law 'has always been'. I do not accept that. Section 16 is a section dealing with 'Commencement', and the 2006 Act was clearly passed to change a common law rule expounded in *Barker*. It is true that the 2006 Act leads to a result which the common law *might* itself have accepted as appropriate: '*Trigger*', para 70. But the common law did not do so, and the reasons why it did not are in my view
p. 440 both coherent and understandable. They are set out extensively in *Barker*, and I need not repeat them here. What the House did in *Barker* was to treat proportionality as a concomitant of the exceptional liability which derives from the special rule in *Fairchild* [2003] 1 AC 32 and which the House was, on that basis, prepared in *Barker* to extend to situations beyond those which *Fairchild* had held covered by it. The United Kingdom Parliament's reaction was its right, but does not alter the common law position apart from statute, or have any necessary effect in jurisdictions where the common law position has not been statutorily modified.

28 In '*Trigger*' [2012] 1 WLR 867 the court looked closely at *Barker*, and saw itself as applying what *Barker* established: see paras 63–66 and 72 of my judgment. At para 66 I noted that the speeches of 'Lord Hoffmann, Baroness Hale and (possibly) Lord Walker in *Barker* "all viewed an employer's legal responsibility" as "based on a "weak" or "broad" view of the "causal requirements" or "causal link" appropriate in the particular context to ground liability for the mesothelioma.' To those references can be added that Lord Scott of Foscote, at para 50, and Lord Walker, at para 103, in *Barker* both expressly agreed with Lord Hoffmann's reasons for allowing the appeals on the issue of apportionment. Further, there was in '*Trigger*' no issue about or challenge to the correctness of *Barker*. In these circumstances, it would on the face of it be surprising to find that '*Trigger*' had consigned that decision to history.

29 IEG submits that, under '*Trigger*', an employer shown to have significantly exposed a mesothelioma victim to asbestos dust is liable for having caused (in a weak or broad sense) the mesothelioma, and that anyone who is liable for causing a disease must answer for the whole loss resulting from that disease. In the Court of Appeal [2013] 3 All ER 395 that submission was accepted by Toulson LJ, at paras 30–31, and Aikens LJ, at paras 53–55. No doubt the submission is (subject to conventional limitations like remoteness and mitigation) generally correct in a conventional case where causation must exist in its ordinary sense of conduct which 'on a balance of probability brought about or contributed to' the disease. But causation in a 'weak' or 'broad' sense is unconventional. *Barker*, as analysed in '*Trigger*', accepted causation in this weak or broad sense and none the less held an employer's responsibility to be proportionate to that part for which that employer was responsible of the victim's total exposure to asbestos dust. '*Trigger*' cannot therefore be said to affect or undermine the reasoning or decision in *Barker*.

In interpreting insurance liabilities in *Trigger*, the 'injury caused' was clearly mesothelioma: the interpretation of *Barker* which says that the damage done is the risk of injury is no longer tenable. But the decision in *Barker* that liability is proportionate can be defended on other grounds; and as a matter of common law, that principle does not fall, as was widely thought (including by the third edition of this text), as a consequence of the decision in *Trigger*.

This having been clarified, the bulk of the judgments in *IEG v Zurich* concern the response of insurance law. Given that the liability of the employer was proportionate to the period of exposure which was attributable to them, what was the liability of an insurer who was on cover for only a proportion of that time? Should they have to cover the full liability of the assured employer? Or should their liability also reflect the period of time for which they were 'on cover'? This point divided the Supreme Court. The majority decided that the reasoning in *Trigger* made it inevitable that the insurer's liability was to indemnify its assured (the employer) in full: as Lord Hodge put it at [104], in that case 'the majority imported into the insurance contract the weak or broad concept of causation, which the House of Lords [in *Barker*] had adopted in imposing tortious liability
p. 441 on the employer'. However, in a case ↵ where the insurer had been on cover for less than the full period of exposure, this could lead to anomalies. These should be dealt with, however, by adapting principles of contribution between insurers in order to achieve an equitable result: though initially liable in full, the insurer could proceed against other insurers for a share of the liability. This was supported by the provisions of the Mesothelioma Act 2014, which provides for compensation where there is employer insolvency and no identifiable insurer. This compensation is unavailable where there is recovery from another employer, because it is assumed by the legislation that any such compensation will be made in full. Liability on a pro rata basis by an insurer would be inconsistent with this scheme (Lord Mance, at [81]). In a further extension of existing principles, given that the assured had for some periods not carried insurance at all, they should be treated as 'self-insurers', so that the liable insurer could also seek a contribution against them.

Lord Mance, *IEG v Zurich*

> 82 Finally, if Lord Sumption JSC be right and he has identified significant potential anomalies on the approach which has been advocated by counsel representing insurers before us and which in my opinion should be adopted, the reality is that the Fairchild enclave has necessitated adjustment from time to time of the legal and regulatory framework by the courts, the legislature and regulatory authorities. As Wikeley notes,[31] 'further attempts to engineer improvements to the underlying compensation arrangements [are] almost inevitable': p 82. I do not myself see such a process of adjustment as one from which courts should withdraw.

Lord Mance also recognized that the process of innovation sparked by the decision in *Fairchild* is still in process, and that it is hard to predict what further anomalies will need to be dealt with. That, however, he does not see as a reason to return to orthodoxy: the courts should continue to seek just and practicable solutions, in association with statutory developments.

The decision in *IEG v Zurich* resolved the question of the insurer's liability, where the insured employer was liable under *Fairchild* principles. There was no way of knowing which period of insurance was relevant to the liability attached to the employer, who could therefore 'spike' their claims—ie, claim in full against an insurer who had been 'on risk' for only part of the period of exposure. This would directly affect the source of compensation for the claimant, since insurance would typically provide that source. The remaining question was whether the same principle would carry over to the reinsurance stage: could a liable insurer 'spike' their own claims against reinsurers, rather than being forced to make claims against a range of reinsurers, to the extent they had reinsured in different periods with different reinsurers? In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 2019, the Court of Appeal attempted to draw a line and decided that the *Fairchild* approach should not be allowed to extend to reinsurance contracts, thus reversing the decision of the Judge Arbitrator, Flaux J. In order to achieve what it deemed to be a more orthodox outcome, the Court of Appeal used strikingly unorthodox reasoning, suggesting that English law required restraint from a party
p. 442 who had an apparently unrestrained right of choice or ↵ power. In this context, the insurer was obliged to present its claims by reference to 'time on risk'.[32] Although leave to appeal was granted, the claim was settled before the Supreme Court had a chance to hear argument.

Despite the difficulties to which *Fairchild* has given rise, it has since been extended to cases of occupational lung cancer: *Heneghan v Manchester Dry Docks Limited* [2016] EWCA Civ 86. Lung cancer is different from mesothelioma in that it is often caused by factors other than exposure to asbestos dust: the influence of smoking, for example, is well recognized. Thus, cases of lung cancer are generally not 'single agent' cases, as *Fairchild* was. This point did not deter the Court of Appeal from applying *Fairchild* to such cases. Of course, outside mesothelioma cases, section 3 of the Compensation Act does not apply, and thus on the authority of *IEG v Zurich*, damages were proportionate to the contribution to risk.[33]

Lord Dyson MR, *Heneghan v Manchester Dry Docks Ltd*
[2016] EWCA Civ 86

> 47 The response of the law to the problem posed in a case where the scientific evidence does not permit a finding that the exposure attributable to a particular defendant contributed to the injury is to apply the *Fairchild* exception. The factors identified in the *Fairchild* case for the application of this solution exist in the present case: (i) all the defendants concede their breach of duty; (ii) all increased the risk that the deceased would contract lung cancer; (iii) all exposed the deceased to the same agency that was implicated in causation (asbestos fibres); but (iv) medical science is unable to determine to which (if any) of the defendants there should be attributed the exposure which actually caused the cell changes which initiated the genetic changes culminating in the cancer.
>
> 48 In short, I can see no reason not to apply the *Fairchild* exception to the facts of the present case. There can be no objection in principle to extending it to situations which are not materially different from *Fairchild's* case. Indeed, principle requires that in a situation which is truly analogous to that considered in that case, the *Fairchild* exception should be applied. Otherwise, the law in this area would be inconsistent and incoherent.
>
> 49 There is some support for this view in the Supreme Court decision in *International Energy Group Ltd v Zurich Insurance plc (Association of British Insurers intervening)* [2016] AC 509. Thus, Lord Neuberger PSC and Lord Reed JSC said, at para 191, that the *Fairchild* exception is 'applicable to any disease which has the unusual features of mesothelioma'. The possibility of its application in cases concerning other injuries or diseases was also expressly contemplated by Lord Hodge JSC (para 109) and Lord Sumption JSC: para 127.
>
> ### Conclusion
>
> 50 To summarise, Mr Allan concedes that causation cannot be established against any of the defendants on the conventional 'but for' test. For the reasons that I have given, I do not accept his submission that it is possible to infer from the epidemiological evidence that all or any of the defendants made a material contribution to Mr Heneghan's contracting of lung cancer. All of the defendants did, however, materially contribute to the risk that he would contract lung cancer. The judge was, therefore, right to apply the *Fairchild* exception.

p. 443

6.6 'Material Contribution' After the *Fairchild* Saga

In the cases we have been discussing, more than one potential cause is in play. It appears from the judgments in *Sienkiewicz* that in some such cases the relevant causal link is 'material contribution to damage'; others require proof that the breach is a cause of the damage, on the balance of probabilities. According to Lord Phillips, where causes are *cumulative*, which is to say that they operate in combination, it will not be appropriate to demand proof that they caused the injury on *balance of probabilities*. The more significant impact of *Fairchild* on the surrounding law may lie in the application of the 'material contribution to damage' test.

A number of recent cases have explored the 'material contribution to damage' test in relation to 'cumulative causes'. *Sienkiewicz* supports the idea that proof on balance of probabilities is not required in such cases, and that this is not simply because such proof is impossible, but because the law selects an alternative approach to causation as more appropriate.

Bailey v Ministry of Defence [2008] EWCA Civ 883; [2009] 1 WLR 1052

This was a case of medical negligence, in which 'material contribution' to damage was adopted as the appropriate causal test. That in itself is significant, since *Wilsher* (Section 2) and *Hotson* and *Gregg* (Section 6, below) previously appeared to rule out variation of the 'but for' test in the medical context: this development is plainly supported by the subsequent case of *Williams v Bermuda Hospitals Board* (extracted later in this section).

The claimant had been admitted to a hospital managed by the defendants for surgery. She had become very weak due in part to negligent lack of post-operative care, but in part also to pancreatitis, which was not due to the defendants' negligence. She was then transferred to the renal ward at another hospital. She vomited after taking a drink and due to her weakened state (which had both tortious and non-tortious causes) she was unable to clear her airways, suffering a cardiac arrest and sustaining brain damage. The Court of Appeal found that the negligent lack of care had made a material contribution to the injury, so that the defendants were liable.

On the way to this conclusion, the Court distinguished the issues dealt with in *Wilsher* and *Hotson*, applying *Bonnington* instead. On one reading of *Bonnington* as we have said, material contribution to injury could be shown in the sense that any exposure will have worsened the injury: it was a progressive disease. On a slightly different reading of *Bonnington*, it was the interaction of different sources of dust which was taken to have caused the injury: it was a case of material contribution to causation of damage. The second reading of *Bonnington* is supported by the Supreme Court's decision in *Sienkiewicz*, and might extend to the facts of *Bailey*.

In the *Bailey* case itself, the weakness to which the breach contributed was no doubt progressive, but the weakness was not the injury. The injury was brain damage, which was brought about through weakness, to
p. 444 which a combination of factors including the ↵ defendant's breach materially contributed.[34] Brain damage is a single indivisible injury, but the weakness was regarded as the cumulative effect of different causes—like the dust-heavy air in *Bonnington*. It remains true that this case is different from *Wilsher* (there, it is shown on the balance of probabilities that the negligence probably played no part in causing the blindness), and it is different from *Hotson* (where again, the evidence is generally taken to have shown that probably the injury was independent of the medical negligence). Nor is it a *Fairchild* case. In *Bailey*, it can be shown that the negligence did more than contribute to the *risk*: it was one of two cumulative causes of the condition which led to the outcome. What cannot be said is that it contributed a *proportion* of the final injury (ascertainable or not), because the injury, like the injury in *Fairchild*, cannot be divided into proportions at all.[35]

Bailey was reasoned as a case where the negligence has played a material but unquantifiable part in the events which between them (cumulatively) brought about the injury. In this instance, the negligence is known to play a part in the weakness. That is not the case in *Fairchild*, where it remains the case that not all exposures will

contribute to the effects, even if the interaction of a number of fibres creates the disease.

It has been suggested that since it is known that the negligence in *Bailey* contributed to the weakness, the judgment should simply have been expressed in terms of 'but for' cause.[36] One reason why it was, rather, expressed in terms of 'material contribution' is the unquantifiable role played by the breach in the final injury. The hypothetical question required by 'but for' is 'what would have happened without the breach?' In *Bonnington*, there was a progressive disease and therefore the answer is presumably, 'there would have been a less severe injury'.[37] In *Bailey*, it would appear that the hypothetical question cannot be answered. Although the breach contributed to the weakness, it is not known whether the claimant would have been sufficiently weak to suffer the injury (which is indivisible) without the contribution of the breach. It is also possible that the 'but for' test is in any event not the most appropriate test for a case of cumulative causes. To return to Jane Stapleton's analysis outlined in the first section of this chapter, the negligence in this instance is known to contribute causally, *even though* it is not known what would have happened without it. And to follow Stapleton's reasoning, which on this point is compatible with the comments of Lord Phillips in *Sienkiewicz*, this may be a case where the 'material contribution' analysis is *superior to* the 'but for' question in determining factual causation.

Waller LJ, *Bailey v Ministry of Defence*
[2008] EWCA Civ 883; [2009] 1 WLR 1052

> 46. … I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed.
>
> 47. The instant case involved cumulative causes acting so as to create a weakness and thus the judge in my view applied the right test, and was entitled to reach the conclusion he did.

p. 445

This passage suggests that 'but for' is the dominant test, and that material contribution is used only where it is not possible to answer the 'but for' question. In *Williams v Bermuda Hospitals,* however, *Bailey* was somewhat surprisingly reinterpreted as a conventional case: the outcome was correct, but the Court of Appeal was wrong to consider that there was a departure from the 'but for' test. One of the rival 'causes' (pancreatitis) was simply a preexisting vulnerability of the claimant.

Lord Toulson JSC, *Williams v Bermuda Hospitals Board*

> 47 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 as 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 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 eggshell skull.

Does this resolve the problem of *Bailey*? It is suggested that it does not. If the pancreatitis is seen as a 'pre-existing condition', the only potential cause in operation is the additional weakness caused by the defendants' negligence. Applying a traditional 'but for' test to this weakness while treating the pancreatitis as a 'vulnerability' does not resolve the problems noted above: it still needs to be asked whether a material, but unquantifiable, contribution to the causal process is sufficient to satisfy the causation requirement. See also the discussion by J. Stapleton and S. Steel, 'Causes and Contributions' (2016) 132 LQR 363, arguing that it is right to call this a cause; but wrong to say that it satisfies the orthodox 'but for' test.

Williams v Bermuda Hospitals Board [2016] UKPC 4

Here, 'material contribution' once again operated in a medical context. Further, it operated in a situation where the contributing causes were not simultaneous, but successive. The claimant went to the defendant's hospital suffering from acute appendicitis. There was a delay in his treatment, and although he had an appendectomy later that day, he suffered from complications causing injury to his heart and lungs. These
p. 446 complications were the ↵ result of sepsis, which had developed over approximately six hours. There had been a culpable delay of at least 140 minutes, during which the development of sepsis would have continued. Therefore, the negligence contributed to the sepsis and thus to the process which caused the final injury; but the contribution could not be quantified. It would appear that the Privy Council treated the injury in this case as *indivisible*, and not as varying according to the level of sepsis suffered.

> **Lord Toulson (giving the judgment of the Board), *Williams v Bermuda Hospitals Board***
>
> 41 In the present case the judge found that injury to the heart and lungs was caused by a single known agent, sepsis from the ruptured appendix. The sepsis developed incrementally over a period of approximately six hours, progressively causing myocardial ischaemia. (The greater the accumulation of sepsis, the greater the oxygen requirement.) The sepsis was not divided into separate components causing separate damage to the heart and lungs. Its development and 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.
>
> 42 On the trial judge's findings, that process continued for a minimum period of two hours 20 minutes longer than it should have done. In the judgment of the Board, it is right to infer on the balance of probabilities that the hospital board's negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs.

How far does *Williams* assist with understanding 'material contribution'? It does demonstrate that a material contribution to the process by which an indivisible injury is brought about is capable of being accepted as a cause. Unfortunately, it does not offer any help with the critical question of whether this is an application of the 'but for' test, or a departure from it. Stapleton and Steel have argued that this result can be reached only by 'employing a causal concept that is broader than but-for causation':

J. Stapleton and S. Steel, 'Causes and Contributions' (2016) 132 LQR 363

> Where, as it should, the law recognizes X is a cause of Y *simply* from the fact that X contributed to the process by which the indivisible injury, Y, occurred, it is accepting that factual causation can be established without the orthodox but-for test.

More recently, in *Davies v Frimley Health NHS Foundation Trust* [2021] PIQR P14 (a decision at first instance), HHJ Auerbach had to decide a similar case, in which a patient had died from meningitis after admission to hospital. The breach of duty was failure to start antibiotics by 10.40 on the day of admission. The judge felt that there was in fact no alternative to the 'but for' test in such a case, of a delay in treatment where there was indivisible damage. This was, however, a case where the causal link could be established on balance of probabilities, even if the experts giving evidence were reluctant to reach such a conclusion.

p. 447

Summary: Material Contribution

Is it possible to summarize the current position in relation to 'material contribution'? Plainly, *Fairchild* both adopted and built upon the 'material contribution' test in articulating its more specific 'material contribution to risk' principle. Since *Fairchild*, it has begun to be recognized that 'material contribution to damage' and 'but for causation' are two distinct approaches to showing a causal link. The first concentrates on causal 'contribution'; the second on the 'necessary' nature of the breach in the events that bring about damage. In *Sienkiewicz*, Lord Phillips took the view that the two approaches may be appropriate to different kinds of case, and that 'material contribution' is an appropriate criterion in relation to cumulative concurrent causes. This

implies that 'material contribution' is analytically preferable in such cases, and is not only applicable where there is insufficient evidence for the application of the 'but for' test. Further, it suggests that the relationship between different potential causes—and particularly the question of whether they operate cumulatively—is crucial to deciding which causal test to apply.

Lord Phillips went on to suggest that when the 'material contribution' relates to causation of a divisible disease, then the claimant will recover damages relating to the contribution that has been made. In these instances, however, it may well be argued that 'material contribution' is in fact simply another name for 'but for' causation.[38] On the other hand, Lord Phillips also said that in the case of an indivisible disease, the defendant may nevertheless make a material contribution to the causal process, and the claimant will then recover in full. While most commentators have not shared this analysis, Jane Stapleton has developed the theory that 'contribution' is indeed an appropriate test for factual causation, and that the 'but for' test is merely one manifestation of the search for contributing causes. It was observed at an earlier stage that there was, however, a sting in the tail; and it is time to consider that now. It entails rejecting the final suggestion of Lord Phillips referred to above, namely that a claimant who shows that the breach made a material contribution to causation of an indivisible injury will necessarily recover in full.

Causing Events and Making a Difference?

Jane Stapleton does not accept that all claimants who succeed in showing that the defendant's breach made a material contribution to the causal process which led to their injury should recover damages. As we noted earlier, this is because it remains to be asked, on her analysis, whether this causal process made any difference to the harm caused by the claimant. That in turn is because the law only seeks to return tort victims to the position they would have been in, had the tort not been committed. What this approach does is to separate the causal question—which relates to processes in the world—from the question of whether the tort nevertheless resulted in any loss to the claimant. Previously, these have always been considered as one and the same question: did the breach cause the damage, *not* did the breach cause an adverse event, from which damage did or did not flow compared to another hypothetical version of events? This second question demands the use of hypotheticals, which appeared to be left behind by the idea of a 'material contribution'. If this approach merely deflects all of the questions of 'but for' to a further stage of analysis, concerned with 'damage', then it has done nothing to assist claimants, nor perhaps to advance the law's attempt to do justice, but has merely protected a
p. 448 conceptual approach to the meaning of 'causing' something. ↵ We have seen that many judges have little or no interest in protecting causal notions, and would most likely reject this distinction.

Stapleton argues, however, that the entire 'but for' question as it is traditionally encountered is not simply reintroduced in its familiar form at this second stage. Rather, she proposes that the law has 'a choice' in how it addresses this additional stage. This stage is referred to as the 'no better off' principle of compensatory damages—notice that trouble is taken to ensure that the language of causation is avoided in naming this question.

J. Stapleton, 'Unnecessary Causes' (2013) LQR 39, 58–9

> ### VIII. The 'No Better Off' Principle of Compensatory Tort Damages: Choice of Benchmark
>
> At this point it might seem that the traditional but-for test has simply been re-introduced albeit at the stage when the legal analysis asks if the injury represented 'damage'. But this is not the case.
>
> The question of whether the injury represents 'damage' relative to what had been the victim's prospects 'absent tortious conduct' is ambiguous in cases in which: the mechanism by which an indivisible injury occurred involved a step requiring a threshold concentration of some element; there were multiple wrongful contributions of that element; and the threshold had been oversubscribed. Here tort law has a choice whether the 'no better off' principle mentioned earlier is that compensatory damages should not make a claimant better off relative to:
>
> (i) where he would have been but for the individual defendant's tortious contribution; or
>
> (ii) where he would have been but for all the tortious contributions.
>
> The choice of benchmark will be critical to the outcome of the many medical negligence and toxic tort claims where: but for the defendant's individual contribution, the threshold would still have been reached and the injury would still have occurred; but in the absence of all wrongful contributions it would not have been reached and the injury would not have occurred.

Stapleton clearly considers the second benchmark to be preferable in a range of circumstances. While the idea of a 'contributing cause' may well match common usage and also helps to rationalize the recent cases on material contribution, this additional stage is likely to be problematic. How is the law to select its 'benchmark' for recoverability of damages, given that success or failure in the claim would turn on this newly recognized additional stage? Would courts welcome, or reject the opportunity to consider *other* tortious causes which are not the acts or omissions of the parties before the court, and how would they assess these contributions? Would the results appear just, and on what basis? The attempt to divide factual causation questions from questions of compensatory damages, and to allocate 'but for' to the second of these not the first, is an interesting one, and it is suggested that the resulting explanation of 'material contribution' is enlightening. The difficulties relating to the second stage, however, may discourage courts from embracing it.

p. 449

7 Loss of a Chance

The conflict between a traditional 'all or nothing' approach, and an approach based on quantification of risk, arises again in relation to our final problem. Our question here is whether the tort of negligence could accommodate claims for a *lost chance of avoiding physical injury*? It already compensates in some circumstances for a lost chance of *financial gain*. So far, the answer in respect of personal injury has been 'no'.

In cases where the claimant is unable to establish the defendant's breach as a 'but for' cause of injury, it has sometimes been argued instead that the breach has diminished the claimant's chances of a better outcome. This argument treats a chance as itself a thing of value, so that loss of or perhaps diminution in such a chance should be regarded as sufficient damage to give rise to a claim in negligence. Claims for loss of chance are clearly accepted in certain cases of economic loss, and of lost chance of economic gain (see, for example, *Kitchen v Royal Air Force Association* [1958] 1 WLR 563; *Allied Maples v Simmons and Simmons* [1995] 4 All ER 907; *Normans Bay v Coudert* [2003] EWCA Civ 215; [2004] All ER 458). The decision in *Allied Maples* drew a distinction between hypothetical future acts of the claimant, which could not be used to argue for liability on a 'lost chance' basis, and hypothetical acts of third parties, which could give rise to such an analysis. Thus, there could be liability for the lost chance of negotiating a term in a contract, for example, where this would depend on the behaviour of a third party. The distinction in *Allied Maples* has since been affirmed by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5, where it was described (at [20]–[21]) as a 'sensible, fair, and practicable dividing line' (here the question turned on what the claimant would have done if properly advised, and it was correct to approach this 'on balance of probabilities'). In *Normans Bay*, members of the Court of Appeal expressed 'disquiet' about this apparent inconsistency. A possible principled (as opposed to sensible and fair) basis on which to distinguish the cases of recoverable lost chance, from those in which the traditional all or nothing approach will apply, has been outlined by Helen Reece in an article extracted below. But even if this is accepted, cases arise which can be used to test the resistance to 'loss of chance' claims in a medical context. An example is *Wright v Cambridge Medical Group*, considered at the end of this section.

Hotson v East Berkshire Area Health Authority [1987] AC 750

In *Hotson*, the plaintiff fell 12 feet out of a tree. He was taken to hospital within a few hours. Medical staff failed to notice that he had suffered an acute traumatic fracture of the left femoral epiphysis, and he was sent home. For five days he suffered severe pain. He was then taken back to the hospital, and this time the injury was correctly identified. He was treated accordingly. He suffered an avascular necrosis. This resulted from a failure of the blood supply and led to a deformity in the hip, at the head of the femur. This would almost certainly be aggravated by osteoarthritis in the future. The plaintiff sued the defendant health authority for the initial failure to diagnose the injury which led to the avascular necrosis.

The difficulty with the plaintiff's claim was that he could not establish on the balance of probabilities that, with prompt treatment, the avascular necrosis would not have developed. The trial judge (Simon Brown J) assessed the available evidence and concluded that it was more likely than not that, even with prompt treatment, the injury would still have developed. The likelihood that he would have sustained the same injury was assessed at 75 per cent. However, the trial judge allowed the plaintiff's claim, subject to a discount of 75
p. 450 per ↵ cent for the likelihood that the injury would still have been sustained but for the negligence. This amounted to a successful claim for loss of a 25 per cent chance of recovery. The Court of Appeal upheld this award. The health authority appealed to the House of Lords.

In the House of Lords, the traditional 'all or nothing' approach was restored. The reasoning of the House has been criticized for not dealing with the central issues, but the case has nevertheless become a 'fixed point' in the law, rather like *Wilsher*.

In the extract below, Lord Bridge leaves the issue of lost chance for another day.

Lord Bridge of Harwich, at 780

> I would observe at the outset that the damages referable to the plaintiff's pain during the five days by which treatment was delayed in consequence of failure to diagnose the injury correctly, although sufficient to establish the authority's liability for the tort of negligence, have no relevance to their liability in respect of the avascular necrosis. There was no causal connection between the plaintiff's physical pain and the development of the necrosis. If the injury had been painless, the plaintiff would have to establish the necessary causal link between the necrosis and the authority's breach of duty in order to succeed. It makes no difference that the five days' pain gave him a cause of action in respect of an unrelated element of damage.

At 782–3

> ... The plaintiff's claim was for damages for physical injury and consequential loss alleged to have been caused by the authority's breach of their duty of care. In some cases, perhaps particularly medical negligence cases, causation may be so shrouded in mystery that the court can only measure statistical chances. But that was not so here. On the evidence there was a clear conflict as to what had caused the avascular necrosis. The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he failed on the issue of causation and no question of quantification could arise. But the judge's findings of fact ... are unmistakably to the effect that on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the sole cause of the avascular necrosis.
>
> The upshot is that the appeal must be allowed on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences. Your Lordships were invited to approach the appeal more broadly and to decide whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a statistical chance which is less than even that, but for the defendant's breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure of damages for the lost chance.
>
> There is a superficially attractive analogy between the principle applied in such cases as *Chaplin v. Hicks* [1911] 2 K.B. 786 (award of damages for breach of contract assessed by reference to the lost chance of securing valuable employment if the contract had been ↵ performed) and *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 (damages for solicitors' negligence assessed by reference to the lost chance of prosecuting a successful civil action) and the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment. I

p. 451

> think there are formidable difficulties in the way of accepting the analogy. But I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy can ever be applied.
>
> . ...

In an influential article, Helen Reece argued that there is a key distinction between 'deterministic' cases, including *Hotson*, and 'quasi-indeterministic' cases, which are appropriately dealt with through a 'loss of chance' analysis. We will spend some time on this distinction because it might have provided the basis for distinguishing *Hotson* in the later case of *Gregg v Scott*, had there not been other complicating factors. In the closing part of the chapter, we will consider a rival account of the case based in 'material contribution' (continuing the discussion in the earlier section). Jane Stapleton's analysis attempts to revive the idea of discounted damages in such a case by taking issue with Lord Bridge's comments above,[39] treating the 'hypothetical' problem as relevant not to causation, but to questions of compensatory damages.

According to Reece, *deterministic* cases are appropriately dealt with on the usual all or nothing approach, where one assesses whether the damage itself was more probably than not caused by the defendant's breach. *Quasi-indeterministic* cases on the other hand are appropriately dealt with as loss of chance cases. Reece explains the meaning of 'determinism' and 'indeterminism' in this context as follows:

Helen Reece, 'Losses of Chances in the Law' (1996) 59 MLR 188, 194

> ... The intuitive notion of determinism ..., is that phenomena are deterministic when their past uniquely determines their future and that phenomena are indeterministic when they have a random component.
>
> ... An event will here be treated as indeterministic if and only if it could not have been predicted at any time in the past, it cannot be predicted in the present even given unlimited time, resources and evidence, and we cannot imagine how it would become possible in the future, even given the success of current research programmes. Such an event is indeterministic for all human purposes ... it is not humanly possible to predict the event. This type of event is referred to as a *quasi-indeterministic* event, ... to distinguish [it] from those processes which scientists believe to be truly indeterministic.

Why is this distinction of relevance in deciding whether to allow a claim for loss of chance? Because in the quasi-indeterministic case, it is not 'humanly possible' to answer the 'but for' question. This is not a question of lack of evidence; it is a question about the limits of knowability. Reece argues (at 204) that the reason for
p. 452 adopting a rule whereby the claimant must prove ↵ their case on the balance of probabilities is that the 'risk of non-persuasion' must fall on the person who wishes to disturb the status quo. But this does not apply to unknowable facts:

> ... the risk which it is reasonable to expect the plaintiff to bear is the risk of uncertainty in the evidence, not uncertainty in the world.

We should notice that despite the logical nature of the distinction outlined by Reece, this *consequence* is a matter of opinion. It returns us to the question of which risks, in terms of evidence, it is 'reasonable' to place on the claimant, or the defendant. For example, is it reasonable that the claimant should bear the risk of lack of evidence where the defendant's breach has removed the opportunity of obtaining that evidence? (An example is *Hotson* itself.)

Reece describes *Hotson* as a deterministic case, which could be appropriately dealt with on the balance of probabilities.

At 195–6

> … That *Hotson* was a deterministic case becomes clear when we look at the medical facts a little more closely. Avascular necrosis develops if and only if insufficient blood cells are left intact to keep the epiphysis alive. The trial judge found that it was likely (to a degree of 75%) that insufficient blood cells were left intact after the fall, so that necrosis would have been bound to develop; but that if, on the contrary, there were enough vessels left, then the delay would have made the onset of necrosis inevitable. …
>
> Therefore, there was a time in the past when the cause of the necrosis could have been determined. If the blood vessels had been examined after the fall, then it would have been humanly possible to decide whether or not the plaintiff would develop necrosis even if he were treated. …

If this is right, then Lord Mackay captured the essential feature of the evidence when he said:

Hotson v East Berkshire Area Health Authority
[1987] AC 750, at 915

> It is not, in my opinion, correct to say that on arrival at the hospital he had a 25 per cent chance of recovery. If insufficient blood cells were left intact by the fall, he had no prospect of avoiding complete avascular necrosis, whereas if sufficient blood vessels were left intact … if he had been given immediate treatment … he would not have suffered the avascular necrosis.

The *Hotson* case therefore concerned a simple lack of evidence, and was not appropriately dealt with in terms of 'loss of chance'.

Jane Stapleton's recent analysis of 'unnecessary causes', which make a contribution to events, but do not necessarily make a difference,[40] treats *Hotson* very differently from the ↵ accounts above (including the account of the House of Lords itself). Rather than treating *Hotson* as a 'binary' case, where the negligent delay either made a difference to the injury suffered or it did not, Stapleton explains *Hotson* as a 'threshold' case, in which both the fall from the tree, and the delay in diagnosis, contributed to a process of physical change which culminated in the injury. This approach renders the negligence a material cause of the avascular necrosis. The question of whether the defendant's negligence 'made a difference' is deferred to the

p. 453

assessment of damages. It is most likely of course that courts will not entertain any attempt to argue for proportionate damages where the *injury* is indivisible. The point is, however, that this makes a link between loss of chance cases, and material contribution cases, discussed here in separate sections.

In the following case, the House of Lords again declined to embrace 'loss of chance' reasoning in a case of medical misdiagnosis.

Gregg v Scott [2005] UKHL 2; [2005] 2 AC 176

The claimant consulted his doctor about a lump under his left arm. The doctor ought to have referred the claimant to a hospital for further investigation. Instead, he reassured the claimant that the lump was only a collection of fatty tissue. This was found by the trial judge to have been a breach of his duty of care. Had the claimant been referred for further investigation, it would have been found that a cancerous lymphoma was developing and he would have had treatment for his cancer at that stage. Because of the doctor's breach of duty, it was not until the claimant was admitted to hospital with acute chest pain some months later that the diagnosis was made and treatment commenced. Treatment was delayed by around nine months.

Defining the damage in this case is not entirely straightforward. But it appears that the appellant's claim was not for the pain and suffering associated with the spread of his cancer, nor for the need to undergo particular forms of treatment which might not have been necessary if the disease had been recognized promptly. The action was solely for the reduced chances of a successful recovery which resulted from the delay in treatment. As Lord Hope put it regretfully, all of the claimant's eggs were in one basket. Different interpretations of the statistical chances of recovery themselves were mentioned in the judgments. But it appears that the chance of making a full recovery (defined for these purposes as survival for 10 years) was diminished from around 42 per cent (at the time of the initial consultation), to around 25 per cent at the time of the trial. Survival was never a probability. (We should note, however, that at the time of the House of Lords' judgment, the claimant's prospects of recovery were increasing given his good response to treatment.)

The trial judge dismissed the claim, considering himself bound to this conclusion by the authority of *Hotson* (above). The Court of Appeal by a majority dismissed the appeal. In the House of Lords, a further appeal by Mr Gregg was dismissed by a majority, Lord Nicholls and Lord Hope dissenting.

Lord Nicholls of Birkenhead (dissenting)

[2] This is the type of case under consideration. A patient is suffering from cancer. His prospects are uncertain. He has a 45% chance of recovery. Unfortunately his doctor negligently misdiagnoses his condition as benign. So the necessary treatment is delayed for months. As
p. 454 a result the patient's prospects of recovery become nil or almost nil. Has the patient a claim for damages against the doctor? No, the House was told. The patient could recover damages if his initial prospects of recovery had been more than 50%. But because they were less than 50% he can recover nothing.

[3] This surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He lost something of importance and value. But, it is said, in one case the patient has a remedy, in the other he does not.

[4] This would make no sort of sense. It would mean that in the 45% case the doctor's duty would be hollow. The duty would be empty of content. For the reasons which follow I reject this suggested distinction. The common law does not compel courts to proceed in such an unreal fashion. I would hold that a patient has a right to a remedy as much where his prospects of recovery were less than 50–50 as where they exceeded 50–50. ...

Medical negligence

[20] ... I turn to the primary question raised by this appeal: how should the loss suffered by a patient in Mr Gregg's position be identified? The Defendant says 'loss' is confined to an outcome which is shown, on balance of probability, to be worse than it otherwise would have been. Mr Gregg must prove that, on balance of probability, his medical condition after the negligence was worse than it would have been in the absence of the negligence. Mr Gregg says his 'loss' includes proved diminution in the prospects of a favourable outcome. Dr Scott's negligence deprived him of a worthwhile chance that his medical condition would not have deteriorated as it did.

[21] Of primary relevance on this important issue is an evaluation of what, in practice, a patient suffering from a progressive illness loses when the treatment he needs is delayed because of a negligent diagnosis. ...

[24] Given this uncertainty of outcome, the appropriate characterisation of a patient's loss in this type of case must surely be that it comprises the loss of the chance of a favourable outcome, rather than the loss of the outcome itself. Justice so requires, because this matches medical reality. This recognises what in practice a patient had before the doctor's negligence occurred. It recognises what in practice the patient lost by reason of that negligence. The doctor's negligence diminished the patient's prospects of recovery. And this analysis of a patient's loss accords with the purpose of the legal duty of which the

> doctor was in breach. In short, the purpose of the duty is to promote the patient's prospects of recovery by exercising due skill and care in diagnosing and treating the patient's condition.

Comment

Lord Nicholls' primary argument is a good one. Given that in a case like this a patient will only ever have a 'prospect' of recovery, which can only be defined in terms of statistical chances, the whole purpose of a doctor's duty of care is to safeguard the patient's prospects. If loss of prospects is not recoverable, then the duty serves no purpose in respect of many medical conditions. The step proposed by Lord Nicholls can therefore be presented as a necessary one, designed to reflect the limitations of medical knowledge. But the other judgments expose complications associated with this solution.

p. 455 ↵ Lord Hoffmann considered the cases of *Hotson, Wilsher*, and *Fairchild*, before continuing:

[79] What these cases show is that, as Helen Reece points out in an illuminating article ('Losses of Chances in the Law' (1996) 59 MLR 188) the law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is. The blood-starved hip joint in *Hotson*, the blindness in *Wilsher*, the mesothelioma in *Fairchild*; each had its cause and it was for the plaintiff to prove that it was an act or omission for which the defendant was responsible. The narrow terms of the exception made to this principle in *Fairchild* only serves to emphasise the strength of the rule. The fact that proof is rendered difficult or impossible because no examination was made at the time, as in *Hotson*, or because medical science cannot provide the answer, as in *Wilsher*, makes no difference. There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof.

[80] Similarly in the present case, the progress of Mr Gregg's disease had a determinate cause. It may have been inherent in his genetic make-up at the time when he saw Mr Scott, as *Hotson's* fate was determined by what happened to his thigh when he fell out of the tree. Or it may, as Mance LJ suggests, have been affected by subsequent events and behaviour for which Dr Scott was not responsible. Medical science does not enable us to say. But the outcome was not random; it was governed by laws of causality and, in the absence of a special rule as in Fairchild, inability to establish that delay in diagnosis caused the reduction in expectation in life cannot be remedied by treating the outcome as having been somehow indeterminate.

... [82] One striking exception to the assumption that everything is determined by impersonal laws of causality is the actions of human beings. The law treats human beings as having free will and the ability to choose between different courses of action, however strong may be the reasons for them to choose one course rather than another. This may provide part of the explanation for why in some cases damages are awarded for the loss of a chance of gaining an advantage or avoiding a disadvantage which depends upon the independent action of another person: see *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602 and the cases there cited.

[83] But the true basis of these cases is a good deal more complex. The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it. So, for example, the law distinguishes between cases in which the outcome depends upon what the claimant himself (*McWilliams v Sir William Arrol & Co* [1962] 1 WLR 295) or someone for whom the defendant is responsible (*Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771) would have done, and cases in which it depends upon what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of the chance that the third party would have so acted. This apparently arbitrary distinction obviously rests on

grounds of policy. In addition, most of the cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can itself plausibly be characterised as an item of property, like a lottery ticket. It is, however, unnecessary to discuss these decisions because they obviously do not cover the present case. …

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Control mechanisms

[86] The Appellant suggests that the expansion of liability could be held in reasonable bounds by confining it to cases in which the claimant had suffered an injury. In this case, the spread of the cancer before the eventual diagnosis was something which would not have happened if it had been promptly diagnosed and amounted to an injury caused by the Defendant. It is true that this is not the injury for which the Claimant is suing. His claim is for loss of the prospect of survival for more than 10 years. And the judge's finding was that he had not established that the spread of the cancer was causally connected with the reduction in his expectation of life. But the Appellant submits that his injury can be used as what Professor Jane Stapleton called a 'hook' on which to hang a claim for damage which it did not actually cause: see (2003) 119 LQR 388, 423.

[87] An artificial limitation of this kind seems to me to be lacking in principle. It resembles the 'control mechanisms' which disfigure the law of liability for psychiatric injury. And once one treats an 'injury' as a condition for imposing liability for some other kind of damage, one is involved in definitional problems about what counts as an injury. Presumably the internal bleeding suffered by the boy Hotson was an injury which would have qualified him to sue for the loss of a chance of saving his hip joint. What about baby Wilsher? The doctor's negligence resulted in his having excessively oxygenated blood, which is potentially toxic: see [1987] QB 730, 764–766. Was this an injury? The boundaries of the concept would be a fertile source of litigation.

[88] Similar comments may be made about another proposed control mechanism, which is to confine the principle to cases in which inability to prove causation is a result of lack of medical knowledge of the causal mechanism (as in *Wilsher*) rather than lack of knowledge of the facts (as in *Hotson's* case). Again, the distinction is not based upon principle or even expediency. Proof of causation was just as difficult for Hotson as it was for Wilsher. It could be said that the need to prove causation was more unfair on Hotson, since the reason why he could not prove whether he had enough blood vessels after the fall was because the hospital had negligently failed to examine him. …

Comment

Lord Hoffmann is concerned to maintain the traditional 'all or nothing' approach. He rejects as 'arbitrary' and unprincipled attempts to define a small category of personal injury cases, including this one, in which 'loss of a chance' could be regarded as a loss appropriate for compensation. If no principled reason for distinguishing the cases can be found, he suggests, the introduction of claims for loss of chance will have such far-reaching implications that it ought not to be attempted by the common law, but left to Parliament. Lord Hoffmann does

not entirely accurately reflect the arguments of Helen Reece whose article he cites in support of the 'all or nothing' approach (at [79]). Reece's article as we have seen proposed that there was a difference between 'deterministic' and 'quasi-indeterministic' cases, which was broadly compatible with the pattern of the case law and occasionally (as in *Hotson*, per Lord Mackay) apparent in legal reasoning. Lord Hoffmann presents her arguments as suggesting that law *always* takes a 'deterministic' approach. The only exception he mentions is
p. 457 the case of hypothetical acts of third parties.[41] In *Allied Maples v Simmons and Simmons* ↵ [1995] 4 All ER 907, for example, the defendants were solicitors, whose breach had removed the opportunity of negotiating a more favourable term in a contract. But it appears from Reece's article that she would include within the 'quasi-indeterministic' category some cases which do not involve hypothetical human actions.

Although Lord Hope joined Lord Nicholls in dissent, his reasons were different. He considered that the claimant would have had a straightforward claim for the pain, suffering and other immediate consequences of the spread of the tumour, including the need for any extra treatment if such were needed as a consequence of the breach. These effects he regards as sufficient damage to be the subject of a claim. It seems difficult to argue against this view, and it appeared to be accepted by Baroness Hale in the majority. However, there is a conflict with the opinion of Lord Hoffmann. Lord Hoffmann included some difficult examples in his attempt to show that the immediate physical consequences of the breach should not be considered to give rise to a claim. For example, was the oxygenation of the blood in *Wilsher* itself an injury? But it is hard to dismiss the pain and suffering associated with the larger tumour in *Gregg* and the claimant's knowledge of his likely death. These are not invented forms of injury, and it is suggested that at least in his narrower point (this damage in itself could have formed the basis of a claim), Lord Hope is correct. There are clear parallels with *Rothwell* (later in this Section), but there the condition was painless, and not causative of any reduced life expectancy.

The remaining issue is whether the diminution in survival prospects can be included as a head of damage in such a claim. Lord Hope suggests that it may be so included, subject to a reduction to reflect the fact that recovery was never a probability. This would be to allow 'loss of chance' via assessment of damages, rather than through redefinition of the damage suffered. It is similar to an argument which was rejected in the Court of Appeal and criticized by Lord Hoffmann in this case, namely that the physical changes can be regarded as a 'hook' on which to hang a claim for loss of chance:

Jane Stapleton, 'Cause-in-Fact and Scope of Liability for Consequences' (2003) 119 LQR 388, 423

> … what is the minimum sufficient factor that can satisfy the orthodox form of past actionable damage in physical loss negligence claims? … If C can come within whatever this requirement is held to be, C may well be able to use that factor as the 'hook' on to which to hang a lost chance as consequential on the actionable injury which is then recoverable under orthodox rules.

This is because the assessment of damages, far from ignoring chances and probabilities, habitually adjusts awards to reflect such chances and probabilities. Lord Hope derived support for his proposition from certain cases where some account of future prospects is made in assessment of damages (at [119]). But we have

already seen that Lord Hoffmann distinguished these cases, suggesting that the estimated loss of prospects in such cases can be demonstrated on balance of probabilities to be the consequence of the defendant's breach (at [67]–[68]). This is precisely what remains to be proved in a case such as *Gregg v Scott*.

p. 458 **Baroness Hale of Richmond**

[223] Until now, the gist of the action for personal injuries has been damage to the person. My negligence probably caused the loss of your leg: I pay you the full value of the loss of the leg (say £100,000). My negligence probably did not cause the loss of your leg. I do not pay you anything. Compare the loss of a chance approach: my negligence probably caused a reduction in the chance of your keeping that leg: I pay you the value of the loss of your leg, discounted by the chance that it would have happened anyway. If the chance of saving the leg was very good, say 90%, the claimant still gets only 90% of his damages, say £90,000. But if the chance of saving the leg was comparatively poor, say 20%, the claimant still gets £20,000. So the claimant ends up with less than full compensation even though his chances of a more favourable outcome were good. And the defendant ends up paying substantial sums even though the outcome is one for which by definition he cannot be shown to be responsible.

[224] Almost any claim for loss of an outcome could be reformulated as a claim for loss of a chance of that outcome. The implications of retaining them both as alternatives would be substantial. That is, the claimant still has the prospect of 100% recovery if he can show that it is more likely than not that the doctor's negligence caused the adverse outcome. But if he cannot show that, he also has the prospect of lesser recovery for loss of a chance. If (for the reasons given earlier) it would in practice always be tempting to conclude that the doctor's negligence had affected his chances to some extent, the claimant would almost always get something. It would be a 'heads you lose everything, tails I win something' situation. But why should the Defendant not also be able to redefine the gist of the action if it suits him better?

[225] The Appellant in this case accepts that the proportionate recovery effect must cut both ways. If the claim is characterised as loss of a chance, those with a better than evens chance would still only get a proportion of the full value of their claim. But I do not think that he accepts that the same would apply in cases where the claim is characterised as loss of an outcome. In that case there is no basis for calculating the odds. If the two are alternatives available in every case, the defendant will almost always be liable for something. He will have lost the benefit of the 50% chance that causation cannot be proved. But if the two approaches cannot sensibly live together, the claimants who currently obtain full recovery on an adverse outcome basis might in future only achieve a proportionate recovery. This would surely be a case of two steps forward, three steps back for the great majority of straightforward personal injury cases. In either event, the expert evidence would have to be far more complex than it is at present. Negotiations and trials would be a great deal more difficult. Recovery would be much less predictable both for claimants and for defendants' liability insurers. There is no reason in principle why the change in approach should be limited to medical negligence. Whether or not the policy choice is between retaining the present definition of personal injury in outcome terms

> and redefining it in loss of opportunity terms, introducing the latter would cause far more problems in the general run of personal injury claims than the policy benefits are worth.
> ...

Concluding Remarks: *Gregg v Scott*

As Baroness Hale noted, *Gregg v Scott* is different from previous cases where 'loss of chance' has been argued in one very significant respect. At the time of the House of Lords' judgments, it was still unclear whether the claimant was going to be a survivor. Although he had suffered significant pain, harm, and distress (none of
p. 459 which formed the basis of his claim), ↵ he had not lost his chance of survival. That chance had been diminished, rather than lost. In *Hotson*, the damage had been suffered, but causation was unclear. In the successful lost chance cases, such as *Allied Maples* or *Chaplin v Hicks*,[42] it was clear that the claimant could not now be successful in negotiating a term in a contract, or in winning a beauty competition. Through the defendant's breach, the chance of success had gone. In *Gregg v Scott*, the chance is still in the future. It is a diminished chance case, rather than a lost chance case. This reason featured prominently in the majority judgments of Lord Phillips and Baroness Hale. It did not feature in the other majority judgment of Lord Hoffmann, who was more concerned to reiterate the traditional 'all or nothing' approach in general terms.

Issues concerning the nature of the required damage in a personal injury action arose in a very different form in an appeal heard soon afterwards by the House of Lords. This forms a part of the asbestos litigation, but is not concerned with mesothelioma.

Rothwell v Chemical and Insulating Company Limited [2007] UKHL 39; [2008] 1 AC 281

'Pleural plaques' are symptomless changes in the lungs, caused by exposure to asbestos. They are **not causally related** to the development of asbestos-related diseases such as lung cancer; but there is a **statistical** correlation between the development of the plaques, and the future development of such diseases. At first instance, the judge had held for the claimants. He argued that the plaques themselves did not constitute physical injury, but they were caused by the piercing of the lung by asbestos fibres. This *could* constitute injury; and the consequential losses (including the possibility of future disease) were recoverable. Indeed, employers and insurers had been paying compensation in respect of such plaques for the previous 20 years. The House of Lords, in agreement with the Court of Appeal, put an end to this practice. They concluded that there was no compensable physical harm in these cases.

Note: one of the claimants in this case also claimed to have suffered distinct damage in the form of 'anxiety neurosis'. This is a recognized psychiatric illness and is very different, in the eyes of the law, from pure anxiety. The parts of the judgment in this case relating to anxiety neurosis are extracted in Chapter 5, Section 1, 'Psychiatric damage'.

In our extracts from the House of Lords' judgment, members of the House make reference to the dissenting opinion, in the Court of Appeal, of Smith LJ. In this dissent, Smith LJ had argued quite convincingly that pleural plaques, though *usually* symptomless, were nevertheless a 'physical injury', and that when the other consequences of this injury were taken into account (particularly enhanced future risk) this injury could not be said to be trivial. That being so, they constituted actionable damage. This 'aggregation' argument was rejected by all members of the House of Lords. They argued that the crucial question is not whether the

plaques amount to an 'injury', but whether they amount to 'damage'. Other factors such as anxiety and enhanced risk can increase the damages that ought to be awarded if there is an actionable harm; but they cannot turn a change which is not material damage into material damage. The curious result is that the damage in these cases was unrecoverable because it was too trivial (*de minimis non curat lex*); yet at the same time, awards have been made for the same condition, including amounts for future risk and anxiety, of a clearly non-trivial amount. The line taken by the House of Lords is that the *actionable damage itself* needs to be substantial.

p. 460 **Lord Hoffmann, *Rothwell***

18 Smith LJ said that pleural plaques amounted to 'an injury'. She gave two reasons: first, in rare cases plaques might (on account of the position in which they developed) cause symptoms. In such a case the symptoms are not the injury. It is the plaque. That shows that the plaque is an injury and it must be an injury whether it causes symptoms or not. Similarly, the plaque is a lesion to the pleura. A lesion to the body, for example, a disfiguring scar, would be a compensatable injury. That shows that a lesion is an injury.

19 It seems to me, with respect, that Smith LJ asked herself the wrong question. One is not concerned with whether the plaque is in some sense 'injury' or (as she went on to decide) a 'disease'. The question is whether the claimant has suffered damage. That means: is he appreciably worse off on account of having plaques? The rare victim whose plaques are causing symptoms is worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings), the plaques have no effect. They have not caused damage.

20 Smith LJ also found support for the aggregation theory in section 32A of the Supreme Court Act 1981. … She said, at para 133:

> 'In my view, the wording of section 32A is consistent only with the proposition that a claimant has only one cause of action for all personal injury consequences of a wrongful act or omission. The wording of the section is not consistent with the notion that the same exposure to asbestos can and does give rise to separate torts in respect of each consequence. Because he has only one cause of action, as soon as the claimant knows that he has one personal injury consequence, he must sue for all such possible consequences. Under section 32A, he is able to defer the assessment of that part of his damages which relates to future risks, instead of having to accept them now, imperfectly assessed, as he was required to do at common law. Whether he chooses a provisional or final award is a matter for him.'

21 That seems to me undoubtedly correct. But she then went on to say:

> 'The important point is that, because he has only one cause of action, his damage must include the risks that other serious conditions might eventuate. Therefore, both the existing condition and the future risks must be brought into account when the judge is considering whether the damage is more than minimal.'

22 It is the last 'therefore' that seems to me, with respect, to precede a non sequitur. It is true that *if* he has a cause of action, his damage must include the risks that other serious conditions might eventuate. But that does not mean that such risks are taken into account in deciding whether he has a cause of action, that is to say, whether he has suffered (and not merely may suffer) more than minimal damage.

Given our discussion of *Barker v Corus* and *Gregg v Scott*, earlier in this section, it is notable that members of the House of Lords declined to treat 'risk' as actionable damage for the purpose of this case. It is clear that the move made in *Barker*, to calculate damages on the basis of the increased risk imposed by the defendants rather than on the basis of the damage suffered, was a particular response to the issues arising in the *Fairchild* 'enclave' of cases. It has not been allowed to radiate out beyond the 'material contribution' cases. (In fact for somewhat similar reasons *Barker* has now been reinterpreted to omit this element.)

p. 461 ↵ It is important to note the way that this decision was distinguished in the Supreme Court's later decision in *Dryden v Johnson Matthey Plc* [2018] UKSC 18. Here, the claimants had become sensitized to platinum salts, and this sensitization meant that they lost earnings, since they could no longer work in an environment in which they were exposed to this substance. The sensitization itself led to no symptoms, but it amounted to a physical change (production of an antibody on exposure). The claimants would not be ill unless exposed to platinum salts, in which case they would suffer an allergic reaction. This meant, however, that the physical change (sensitization) in itself had appreciable adverse consequences. Though these consequences were economic (lost earnings), the sensitization amounted to an actionable personal injury.

***Dryden v Johnson Matthey Plc* [2018] UKSC 18**
Lady Black JSC (giving the judgment of the Court)

> 47. I would distinguish this case from *Rothwell*. I set out earlier how the doctors saw the distinction between pleural plaques and sensitisation to platinum salts but it is, of course, ultimately a lawyer's question whether the two conditions are distinguishable. As I see it, it is material that the pleural plaques were nothing more than a marker of exposure to asbestos dust, being symptomless in themselves and not leading to or contributing to any condition which would produce symptoms, even if the sufferer were to be exposed to further asbestos dust. Similarly, the sensitisation of the claimants in this case marks that they have already been exposed to platinum salts, but unlike the plaques, it constitutes a change to their physiological make-up which means that further exposure now carries with it the risk of an allergic reaction, and for that reason they must change their everyday lives so as to avoid such exposure. Putting it another way, they have lost part of their capacity to work or, as the claimants put it in argument, they have suffered a loss of bodily function by virtue of the physiological change caused by the company's negligence.
>
> 48. As Lord Pearce said in *Cartledge* <https://uk.westlaw.com/Document/I82F93AC0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)> …, it is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. It is a question of fact that must be determined in the light of the legal principles applicable to personal injury actions, and this case has provided a useful opportunity to clarify some of those principles. The process has led me, for all the reasons I have set out, to differ from Jay J and the Court of Appeal and to conclude that the concept of actionable personal injury is sufficiently broad to include the damage suffered by these claimants, which is far from negligible.
>
> 49. In these circumstances, it is unnecessary to say anything further about the claimants' alternative argument that they should be able to recover for pure financial loss. I would allow the appeal on the claimants' first ground, having concluded that they do have a cause of action in negligence/statutory duty against the company.

To return to the decision in *Rothwell*, further litigation flowed from it. In Scotland, the effect of the case was reversed by legislation, providing that such plaques would constitute recoverable damage: Damages (Asbestos-related Conditions) (Scotland) Act 2009. This legislation was the subject of judicial review proceedings brought by a number of liability insurers, which once again required the attention of the Supreme Court. The application was based on a variety of grounds including inconsistency with the insurers' rights under the ECHR; the competence of the Scottish Parliament; and common law principles (an unreasonable, irrational, and arbitrary use of legislative authority). The argument that the principles of common law
p. 462 articulated ↵ in *Rothwell* were clear and simple, and in no way embodied judicial policy reasoning, played an important part in the insurers' challenge. Equally, the existence of an alternative possible approach as set out by Smith LJ in the Court of Appeal was important in leading the Outer House of the Court of Session to

decline an initial application which sought to prevent the legislation from coming into force at all: *Axa General Insurance and Others, re Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009* [2009] CSOH 57.

The legislation survived the challenge, the UK Supreme Court holding that the Scottish Parliament had legislated on the basis of a perception of social injustice, and its view could not be dismissed as unreasonable. Further, the means adopted were proportionate to the aim.

8 Conclusions

i. Negligence, as we saw in Chapter 1, is a tort requiring damage. This means that it is actionable only when a breach of duty causes damage. Further, as we noted in Section 1, that damage must not be too remote from the breach, and must fall within the scope of the duty. We explored the traditional categories of cause in fact and remoteness in Sections 2 and 3, noting that the 'remoteness' element has been interpreted in different ways, and that there are different views about whether it is a causal concept at all. On the Supreme Court's current approach, it would appear that there are multiple questions about legal responsibility, including *both* remoteness, and a separate idea of 'legal cause' which deals with intervening causes.

ii. In Section 4, we noted that 'scope of duty' analysis, which might have presented a non-causal interpretation of remoteness in some instances, has been identified as a separate test, indicating the presence of a range of questions relating to 'legal responsibility'. The significance of 'scope of duty' did not begin with the decision in *SAAMCO*, and its application has been broadened by recent decisions. However, separation of these tests makes it harder to find a satisfactory account of remoteness.

iii. Notwithstanding this lack of clarity in respect of the range of causal questions in the law, it is clear that causation, in all its forms, has been among the most contested and difficult aspects of the tort of negligence. Returning to 'cause in fact', cases involving multiple potential causes raise some of the most difficult questions in the entire law of tort, and these were considered in Sections 5–6 of the Chapter.

iv. In Section 6, we noted that courts sometimes recognize evidence of 'material contribution to damage' as sufficient evidence of a causal link. The nature of this 'material contribution' test, and its relationship to 'but-for' causation have, however, been exceptionally difficult to identify. As things stand, there is some evidence that a claimant who can show that the defendant's negligence made a 'material contribution' to the *process* by which injury was caused will have satisfied the applicable causal tests. In the case of a divisible injury, there are grounds to think that this is no more than an application of the 'but-for' test, and in principle the damages should be proportionate to reflect the defendant's contribution. In the case of an indivisible injury, however, the current state of the authorities suggests that liability will be for the full injury suffered. Further, this would appear to amount to a broader test than 'but-for', though courts have not stated this with clarity. It has been urged by Jane Stapleton that unnecessary contributing factors are indeed correctly called causes, and this is consistent with much of the case law. However, it has also been suggested by the same writer

p. 463 that damages might then be reduced to reflect the fact that injury may have been suffered in any event —a move which would appear to reintroduce the difficulties of 'but-for' causation, though leaving a greater element of choice.

v. A more innovative move was made by the decision in *Fairchild*, recognizing evidence of material contribution to the *risk* of injury as sufficient proof of a causal link in certain defined circumstances of scientific uncertainty. Within the *Fairchild* 'enclave', damages at common law are recognized as proportionate to the contribution to risk, though since the insurance cases of *Trigger* and *IEG v Zurich*, this is perceived as a matter of broad fairness, rather than of redefinition of injury in terms of 'risk'. The latter possibility would have caused enormous difficulties for insured employers and in the case of *Trigger*, would have invalidated the very insurance policies which have been the clear source of compensation underlying the development in *Fairchild* itself. Where mesothelioma is concerned, section 3 of the Compensation Act 2006 ensures that liability is not proportionate, but full, within the range of application of the statute. *Fairchild* has, however, been applied to lung cancer, and thus the *Fairchild* enclave may be capable of expansion. So far, however, the courts have not been inclined to extend the treatment of risk as injury to other areas, and in particular have not recognized an action for 'lost chances' in the medical or industrial injury contexts. The approach taken in *Trigger* and *Zurich* makes plain that the proportionate nature of recovery in the *Fairchild* enclave of common law, like the rest of that enclave, is perceived to be a just and practical response, rather than a general development of legal principle. Legal development, however, is often unpredictable, and this chapter underlines the surprises it may hold.

Further Reading

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Notes

[1] H. L. A. Hart and T. Honoré, *Causation in the Law* (2nd edn, Oxford University Press, 1985). In fact, Hart and Honoré defended a refined version of the ‘but for’ test known as the ‘NESS’ test (the condition must be a ‘necessary element in a sufficient set’). This refinement almost certainly goes beyond what will be required of a student of tort law, and is not encountered in the case law. There is a brief introduction to ‘NESS’ in Section 5 of this Chapter.

[2] Lord Hoffmann, ‘Causation’ (2005) 121 LQR 592.

[3] Footnotes omitted.

[4] It is for this reason, presumably, that the model does not refer to the question of whether a duty of care exists (Chapters 4 and 5)—an omission remarked upon by Lord Burrows in his separate judgments in the two cases.

[5] More extensive review of the problems that might follow will be found in N. McBride and S. Steel, ‘Suing for the Loss of a Right to Sue: Why *Wright* is Wrong’ (2012) 28 PN 27.

[6] Though the result was unanimous, the two judges who did not directly deal with the concurrent causes issue themselves (Lord Phillips and Lord Scott) expressed agreement with Lords Hoffmann and Rodger. They did not express agreement with Lord Brown, who was more sympathetic both to the claimant, and to the authority of *Baker v Willoughby*.

[7] In this case, the deceased committed suicide under the influence of depression, suffered in reaction to a workplace incident caused by the employer’s breach of duty. The employer was liable for the claimant’s death.

[8] Drawing on analysis by A. D. McNair, ‘This Polemis Business’ (1931) 4 CLJ 125.

[9] It could also be objected that in more recent cases, and particularly those couched in terms of 'scope of duty' (Section 4), the fact that a duty is relational and owed to specific parties—for example, because there is an assumption of responsibility—is the basis for a narrower rule of recoverability, rather than a more extensive one in the form of directness. But as already explained, 'scope of duty' or 'duty nexus' is now perceived as an additional step, beyond remoteness.

[10] Chapter 13.

[11] On standard of care and rescuers, see also the provisions of the Social Action, Responsibility and Heroism Act 2015, extracted in Chapter 3.

[12] See our discussion of recent decisions of the Supreme Court, below.

[13] *Gabriel v Little/Hughes-Holland v BPE* [2017] UKSC 21.

[14] In the previous decision in *Bhamra v Dubb*, [2010] EWCA Civ 13 'scope of duty' analysis was applied by the Court of Appeal in a case in which a wedding guest at a Sikh wedding relied on the expectation that there would be no egg in the dishes supplied. Although the reason for the duty not to supply foods containing egg was a religious one, and the harm suffered was an allergic reaction, the scope of the duty was thought to extend to other harm caused by the presence of egg because of the expectation that none would be present. This perhaps reflects the fact that the wedding guest was not to be expected to seek advice on specific risks in the same way as an investor, for example.

[15] This framework is the six stage approach outlined in Section 1 of this Chapter (*footnote added*).

[16] See particularly R. W. Wright, 'Causation in Tort Law' (1985) 73 Cal L Rev 1735.

[17] J. Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39, includes this and a number of other examples; see also J. Stapleton, 'An "Extended But-for" Test for the Causal Relation' (2015) 35 OJLS 697.

[18] See the discussion in Section 3.

[19] Lord Hoffmann, 'Causation', in R. Goldberg (ed.), *Perspectives on Causation* (Hart Publishing, 2011).

[20] The 'single fibre theory'—that one fibre can on its own cause the cancer—was not therefore essential to the outcome in *Fairchild*. Rather, it was essential that the disease was indivisible, and that medical science could not attach probabilities to the likelihood that the cancer was caused by any individual exposure. This is important now that the single fibre theory has been discredited. In *Durham v BAI (EL Trigger Litigation*) [2008] EWHC 1692 (QB), none of the experts who gave evidence accepted that theory.

[21] *Holtby v Brigham and Cowan* [2000] 3 All ER 423; *Thompson v Smith Shiprepairers* [1984] QB 405, respectively.

[22] As understanding of mesothelioma grows, it becomes harder to state with certainty what the role of a single fibre is. It seems that an accumulation of fibres may be required. That means that the product of a number of different exposures may interact. But this is not the same as individual defendants adding a particular proportion to the injury itself.

[23] In *Rahman v Arearose* [2001] QB 351, the Court of Appeal accepted that a psychiatric disorder was, on the facts, divisible damage. Though controversial, this is quite different. The Court of Appeal was persuaded on the basis of expert evidence that the various personality disorders from which the claimant suffered could be separated and attributed to different causes.

[24] Janet Smith, 'Causation—The Search for Principle' [2009] JPIL 101–13.

[25] ABI, *Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims* (2003); R. Merkin, 'Insurance Claims and *Fairchild*' (2004) 120 LQR 233–41.

[26] As pointed out by Jane Stapleton, to approach the case as involving a 'single exposure' was probably somewhat misleading—the more so in the case of *Willmore*. At least some of the 'background' or environmental exposure may itself be tortious: J. Stapleton, 'Factual Causation, Mesothelioma and Statistical Validity' (2012) LQR 221.

[27] We noted earlier that this may not entirely capture the facts of these cases, but only one tort is argued before the court and it could be that only one proposed tortfeasor is within the claimant's knowledge.

[28] On these insurance issues, readers may consult either the critique of the Court of Appeal's decision (duly reversed by the Supreme Court) by Merkin and Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329; or the more recent account, written after the Supreme Court decision, by the same authors: *Insurance and the Law of Obligations* (Oxford, 2013), chapter 13. On the decision in *IEG v Zurich* [2015] UKSC 33, see R. Merkin, 'Insurance and Reinsurance in the Fairchild Enclave' (2016) 32 LS 302.

[29] The expression was used by the first instance judge, who reached the conclusion that the various policies did respond to *Fairchild* liabilities (a conclusion restored by the Supreme Court).

[30] That view is criticized by Merkin and Steele, *Insurance and the Law of Obligations: Fairchild* is influenced by an intention to clear away the obstacles to compensation under the circumstances, and is not solely concerned with establishing 'liability' as a matter of principle. The House of Lords knew full well the claims were defended by insurers—not least because a very late offer to settle on the part of insurers (with a view to avoiding legal resolution of the issues) had led to the original appeal date being lost. Members of the House expressed 'regret' at this turn of events and the appeal was relisted. The decision itself was announced in advance of the reasons in recognition of the deteriorating condition of one of the claimants. The House could not have missed the insurance dimension, nor the significance of compensation.

[31] This is a reference to Judge Nicholas Wikeley, 'The Diffuse Mesothelioma Payment Scheme 2014' (2014) 21 JSSL 65 (*footnote added*).

[32] Hemsworth (Further Reading) suggests that there is 'more than a hint of reasoning backwards' in the Court of Appeal's decision.

[33] For an argument that *Fairchild* should not in fact be confined to a narrow enclave, because it resolves some problems whose occurrence is inevitable, see Merkin and Steele, 'Causation and Proportional Recovery', in Barker and Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018).

[34] See James Lee, 'Causation in Negligence: Another Fine Mess' (2008) 24 PN 194–8, cited with agreement by Foskett J in *B v Ministry of Defence* [2009] EWHC 1225 (QB), at [235].

[35] If the claimant had been forced to rely on *Fairchild* then she would have struggled to show this was a 'single agent' case.

[36] S. Green, 'Contributing to the Risk of Confusion? Causation in the Court of Appeal' (2009) 125 LQR 44–8; S. Bailey, 'What is a Material Contribution?' (2010) 30 LS 167.

[37] If, as suggested above, there is scope to interpret *Bonnington* as turning on the cumulative nature of the causes, this would make it closer to *Bailey*; but it would also take it further from *Holtby*. It would suggest that there would be no basis for apportioning damages in *Bonnington* after all.

[38] This is the general argument advanced by S. Bailey, 'What is a Material Contribution?' (2010) 30 LS 167.

[39] The remarks are described as 'untenable'.

[40] J. Stapleton, 'Unnecessary Causes', discussed in the previous section.

[41] See further the discussion of *Wright v Cambridge Medical Group*, in Section 3.3.

[42] Successful lost chance cases are considered below.