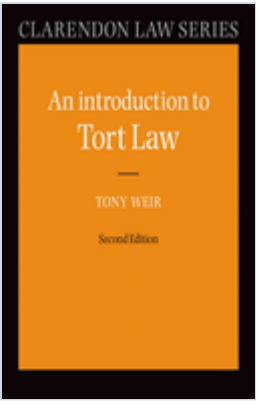

An Introduction to Tort Law (2nd edn)
Tony Weir

4. Causation

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter discusses the issue of causation. Damages are due to the victim only if the harm was due to the tortfeasor. The harm must be the effect of the defendant's misconduct and causation must be established. The principal question to ask in matters of causation is: Did the breach of duty *contribute* to the occurrence of the harm? At all costs one must avoid the easy supposition that a result can have only one cause, or that one must seek out the 'main' cause, relevant though this may be in claims under an insurance policy. The chapter also identifies three ways that the law lets a defendant off the hook even though the harm would not have occurred but for his negligence. These are the rules of remoteness, intervention, and purpose.

Keywords: tort law, negligence, causation, damages, liability, remoteness, intervention, purpose

Recent judicial pronouncements in this area of the law have been so dramatic and controversial that one is tempted to suppose that the changes have been deeply radical. Indeed, much of what was written in this chapter in 2002 has had to be revised, though it did not seem very wrong at the time. Nevertheless, it is likely that the basics remain unchanged, so we shall restate the geology and then report on the changes in the landscape.

Damages are (in principle) due to the victim only if the harm was due to the tortfeasor. The harm must be the effect of the defendant's misconduct. Causation must be established. Insurance companies certainly have to pay for losses which they haven't caused, but that is because they promised to pay if such losses occurred. Likewise, the social security office must pay the statutory invalidity benefit, though the state didn't invalidate the recipient, but that is because the statute so provides. But you cannot claim damages from a defendant in tort unless he is responsible for the loss in question, and he is not responsible unless he (or someone for whom he must answer) can be said to have been a cause of the loss. As we have seen, a defendant is not liable in negligence if his conduct was reasonable, or if he was under no duty of care, but even a flagrant breach of duty will not render him liable unless that breach played a part in the occurrence of the harm of which complaint is made. Thus an employer who was clearly in breach of his duty to make safety belts available to his employees was not liable for the death by falling of a steel erector who would certainly not have worn a belt had one been dangled in front of him[1] (the problem arising if he *might* have worn the belt but would *probably* have chosen not to is considered later).

The basic idea is very simple, and is said to be a matter of common sense, though it involves imagining a counterfactual course of events, one which never happened. Would the harm have been suffered just the same *if* the defendant had behaved properly? Did it make any difference to the outcome that he misconducted himself in the way he did? This is commonly called the 'but-for' test. In most cases which come before the courts this test is generally satisfied, simply because one doesn't sue a person wholly uninvolved in a situation. Even so, there are some clear cases of 'no cause'. One is not liable for failing to rescue a man already dead,[2] or not diagnosing an incurable,[3] or giving far too much penicillin to a child when such an overdose is wholly incapable of causing the meningitis from which he subsequently suffered.[4] Nor is one liable for not giving a warning to someone who would have ignored it, or making a misrepresentation to a person who didn't believe it. *Post hoc ergo propter hoc* is not simply a logical fallacy: the subsequent is not necessarily consequent.

In matters of causation, as in other matters, if one wants the right answer, one must ask the right question. It is not right to ask 'What was the cause of this harm?'. That question may be appropriate for doctors certifying the cause of death, but the lawyers' role is to see whether the defendant can be held responsible, an inquiry in which, admittedly, cause plays a great part. Nor is it right to ask 'Did the defendant cause the harm?' or even, more precisely, 'Did the defendant's breach of duty cause the harm?'. The correct question is 'Did the breach of duty *contribute* to the occurrence of the harm?' At all costs one must avoid the easy supposition that a result can have only one cause, or that one must seek out the 'main' cause, relevant though this may be in claims under an insurance policy (where the insurer promises to pay for a loss only if, or unless, it is caused by an event specified in the policy).

Contribution

That the correct question is in terms of 'contribution' emerged clearly in *Bonnington Castings v Wardlaw,* where a workman contracted a lung disease as a result of pollution in the air in the workplace.[5] For one of the two pollutants the defendant occupier was responsible, for the other he was not. There was enough of the latter to have caused the disease by itself, so it could not be said that 'but for' the pollutant for which the defendant

was responsible, the victim would not have contracted the disease. It was nevertheless held that the 'guilty air' probably made some not insubstantial contribution to the occurrence of the disease, and that was enough (a) to make the defendant liable, and (b) to make him liable for the entirety of the claimant's (indivisible) disability. The decision has been both extended as regards (a) and restricted as regards (b).

(a) The extension occurred 16 years later in *McGhee,* where the pursuer developed dermatitis (= skin disease) after cycling home unwashed after each of three days' work cleaning out warm brick kilns.[6] The defendant was not negligent in allowing the plaintiff to get caked with brick dust (kilns cannot be cleaned unless they are still warm), but admitted, curiously enough, that it was negligent in not providing washing facilities. Had such facilities been provided, the plaintiff would very probably have used them, so the question was not, as it was in the case of the steel erector, whether the plaintiff would probably have washed but whether washing would probably have inhibited the onset of the skin disease. On this the evidence was completely equivocal, as the House of Lords admitted, but it nevertheless awarded full damages. Lord Wilberforce suggested that if the defendant's breach of duty increased the risk of the occurrence of the harm in question, that was tantamount in law to contributing to its actual occurrence, as required by *Wardlaw*. This suggestion was held to be wrong in law by the House in a later case, *Wilsher,* where a very premature baby afflicted with several ailments developed a condition which might have been caused by any of those ailments or possibly by the hyperoxygenation, for which alone the defendants were responsible.[7] The House stated that *McGhee* had 'added nothing to the law', and that *Wardlaw's* case was gospel. Then in *Fairchild v Glenhaven Funeral Services*[8] the House unanimously reinstated *McGhee* and held in terms that even if it could not be shown (and especially if it was categorically impossible to show) that the defendant's misconduct had actually contributed to the occurrence of the harm, he could in certain circumstances (but not those of *Wilsher)* be held liable if his misconduct had made it more likely that the harm might occur. The case was one where the claimants had contracted a kind of lung cancer called mesothelioma which is perhaps due to the inhalation of a single asbestos fibre and certainly has a long period of latency before proving fatal. The claimants had all worked for several employers (not including Glenhaven Funeral Services: coffins are not made of asbestos), and while each of them had negligently exposed the claimants to asbestos fibres, the fatal fibre could not be attributed to any particular employer. The Court of Appeal had dismissed the claims, but the House held all the employers liable on the basis that in this case negligent exposure to risk of harm should be treated as equivalent to negligent contribution to its actual occurrence. Note that the House did not say that one can sue just for being put at risk—the Court of Appeal has subsequently held, correctly, that you cannot[9]—it said that *if* the harm does happen one *may* be liable just for making it more likely to occur.

That this decision constitutes a breach in the normal principles of causation is obvious and admitted: after all, each defendant could properly say that the harm could just as well have occurred if he had not been negligent at all, that his negligence was not a 'but for' cause of the harm and had not even been shown to have contributed to it. *Fairchild* has now been reconsidered in *Barker v Corus*.[9a]" The *applicability* of the *Fairchild* 'exception' has been clarified: not all the possible contributors to the risk need be tortfeasors, as they were in *Fairchild* itself. Accordingly, when the actual harm is due to physical agent X (asbestos fibre, brick dust, pollution in the air) anyone who negligently increases the risk of its happening is liable, but not if the harm might as well be due to agent Y or Z (as in *Wilsher)*.

(b) The *effect* of *Fairchild* has, however, been dramatically reduced. From now on, a defendant whose liability depends on his having contributed to the risk of harm (rather than ot the harm itself) is liable only to the extent of his own contribution, not for the whole of the harm. In technical terms, liability under *Fairchild* is not 'joint and several' but only ' several' The result is that solvent tortfeasors pay only for their own contribution to the risk, not for that of other tortfeasors or indeed of events which involve no tort at all, such as the claimant's own conduct (as held in *Barker).*

Outside *Fairchild* it is still the law—in principle—that if harm is ' indivisible' a defendant whose breach of duty actually contributed to it (rather than just the risk of it) is liable for the full amount of that harm, regardless of any contributions due to other persons or events. The courts have, however, sidestepped this rule by holding that despite all appearances the harm in question is not indivisible, thereby reducing the extent of the defendant's liability. Thus in *Holtby v Brigham and Cowan (Hull)* a case involving asbestosis, a cumulative and progressive industrial disease, we find Stuart-Smith LJ adding to his unobjectionable statement that the claimant was entitled to succeed 'if the defendant's conduct made a material contribution to his disability', the revolutionary rider ' but strictly speaking the defendant is liable only to the extent of that contribution.'[10] One can understand unease at rendering a subsequent employer liable for harm already inflicted by a predecessor and readiness to hold him liable only for the aggravation, but it is not the case that harm is divisible simply because it has separable causes. So to decide is not too hurtful for the claimant if all the contributors are solvent tort-feasors, but what if, as now under *Barker,* the other contributory causes invoked to reduce the defendant's liability are not torts at all? For example, the (indivisible) stress suffered by an employee is rarely due exlusively to conditions in the factory or the office: marital and parental problems may well have played a major part. Should only proportional damages be awarded against the careless (uncaring) employer?

In an unreported case cited in *Holtby,* the judge said 'Where there are causes concurrent in time, the likelihood is that a resulting injury will be indivisible; but where causes are sequential in time, it is not likely that an injury will be truly indivisible.' (The adverb 'truly' generally heralds a falsehood.) But it is not the harm they are dividing up, they are distinguishing the causes, measuring and comparing the contributions made, either in intensity or in duration, by the various possible defendants—as if the fact that one can distinguish causes means that the result can be 'truly' divided up. Many industrial afflictions (unlike mesothelioma) are indeed cumulative—the greater the exposure and the longer it lasts, the worse you get—be it deafness, or asbestosis or vibrating white finger, but the victim is complaining that he is now very ill or very deaf or very numb, and he is as ill, deaf or numb as he is, not partly ill or deaf or numb. In the case of death, for example, even if due to 'causes sequential in time' the courts would have some difficulty in dividing it up between those who contributed to it (to which it may be said that Death is Different, as indeed, in many respects, it is).

But in *Rahman v Arearose* this new rule was applied where the faults of the two defendants occurred very close in time.[11] The claimant was attacked and beaten up by thugs one night at the fast food joint near King's Cross of which he was the manager. One of his eyes was quite badly injured. He was taken to the defendant hospital, where the negligence of the eye surgeon made him blind in that eye. Owing to the combined effect of the attack (from which the defendant employer should have protected him) and the botched operation the claimant became a total psychological wreck. The court treated his condition as divisible and held each defendant liable for only part of his neurosis. While the hospital was admittedly not responsible for the attack, it should certainly have been held liable, along with the employer, for the claimant's present medical condition to which they had both contributed and which was manifestly indivisible: it is simply nonsense to say that the

employer made him half-mad and that the surgeon made him mad as to the other half. Furthermore, was it not the thugs who contributed most? But the court went further into error in holding that the employer was not liable for the deterioration in the claimant's condition due to the medical negligence; as has been subsequently and correctly held, an original tortfeasor is liable for any ordinarily negligent mishaps in the medical treatment he made necessary.[12]

The attempt to divide up a psychological condition is already producing ghastly problems now that a local authority may be held liable for harm suffered by children in care, whether by abuse, neglect, or mismanagement. Such claimants, generally a complete mess at the time of trial, are only taken into care if their home conditions are appalling. Psychiatrists are forever telling us that what happens early in life determines one's condition later, so it is virtually impossible for the courts to say to what extent the fault of the local authority made things worse, how the claimant would have turned out if the local authority had done its job. Thus in one case we read 'It was Mrs G's opinion that 80% of the causation of the difficulty in her adult life lay in her experiences in care. Dr A was at first of the view that her experiences in care were 20% to blame for her problems'.[13] Similar difficulties arise where the local authority is charged with educational malpractice, such as not diagnosing dyslexia. It is permissible to wonder whether the growing tendency to reduce the amount of recovery by making the defendant liable only to the extent of his contribution, even to an indivisible result, may not be due to unease at making him liable at all.

While it is clearly unjust to make a person pay for harm he hasn't caused, we have seen that 'cause', even in its traditional sense, is not the test. The question is, is it unjust to make a defendant pay for the whole of the harm to which he has by his fault contributed? Is it just to give the claimant only partial damages against him, leaving it up to the claimant to sue others for the balance? One must bear in mind, as regards the claimant (a) that his claim against those others may be time-barred, and (b) that he may well be penalized if he brings another action in respect of the 'same damage'; and as regards the defendant that if he is held liable for the full damage (a) he will be indemnified by the insurance policy he is required by law to have against any liability to his employees that the courts may care to throw at him, and (b) he may claim contribution from others who might have been held liable for the full damage, even if the victim's own claim against them is time-barred, and the quantum of recovery in a contribution claim by a tortfeasor is what is 'just and equitable' which is not at all the test for recovery by the victim. It is true that the right to claim contribution from a fellow tortfeasor is not worth much if he is untraceable or insolvent, and this problem has become more acute as tort liability has increasingly been imposed on defendants who failed to protect the claimant from attack by criminals; but the same is true of the victim's ability to claim damages, and as between the tortfeasor and the victim the risk of not being able to find the other contributors should surely be on the tortfeasor rather than the victim. In any case, even if it is thought that the court is right on the point of justice, it has opened up a can of worms, and one must hope that the House of Lords, in a case which raises the point clearly and is properly argued, will put the lid back on.

If, as *Wardlaw* rightly lays down, 'contribution' to the actual occurrence of the harm is enough, it is evident that there will have been other contributory factors apart from the defendant's conduct. If the other contributory factor is the fault of the claimant himself, then the Act of 1945 reduces the amount of the defendant's liability; this is perfectly just, since one cannot properly claim damages to the extent one's wounds are self-inflicted. Another contributory factor may be the extreme susceptibility of the claimant, who would not have suffered so much harm but for his predisposition. Here the law has long been that the

claimant recovers undiminished damages, even for psychiatric harm which normally stolid citizens would not have suffered.[14] What if the susceptibility was due, not to a congenital condition, but to a previous tortfeasor? Here one must apparently distinguish. The second tortfeasor doesn't have to pay for harm which the victim had already suffered, but his tort may well have aggravated the consequences of that harm. If the other contribution is a subsequent event (as it always is where one is liable for failing to protect the claimant from a danger one did not cause) it may be held to eclipse the causative effect of the original negligence, depending on *novus actus interveniens,* a doctrine shortly to be dealt with.

Harm Eclipsed?

The cases considered so far involved harm which still existed at the time of trial. What if the harm is already over, or soon will be? *Baker v Willoughby* fascinates not only students but barristers as well, to judge by its citation in court for propositions for which it is not an authority. The plaintiff was injured in his left leg by the negligence of a motorist, and it looked as if he would have a limp for the rest of his life. Not so, for some years later he was shot in that same leg by gangsters and it had to be amputated. For the amputation the motorist was of course not liable, for the gangster's attack was indubitably a *novus actus interveniens,* being both deliberate and unforeseeable. The plaintiff claimed damages from the motorist on the basis of lifelong disamenity, and the House of Lords, reversing the Court of Appeal, allowed his claim (but not for pain and suffering, which had ceased).[15] Part of the reasoning was that as the gangsters would be liable only for damaging a leg already damaged the plaintiff would be out of pocket if he couldn't sue the motorist for lifelong disability. The reason was unsound (as well as *obiter):* the gangsters would be liable for what their wrongdoing cost the victim, and that would include the loss of his claim against the motorist.[16] The substantive decision that the motorist was liable for harm which had ceased to exist was much doubted by the House in a later case where the plaintiff, who had suffered a 50% incapacity through an injury due to the defendant's tort, subsequently developed an unconnected disease which totally incapacitated him, as it would have done even if he had not already been partially incapacitated; it was held that the defendant was liable only up to the time the disease eclipsed the effects of the tort.[17]

Such cases are not at all common, and too much should not be made of the puzzle. Meanwhile it is a question whether a distinction is to be drawn depending on whether the subsequent event is a tort or a natural event (unhelpfully called a 'vicissitude' of life), but it is unclear why any such distinction should be made, for it is odd, especially for a judge, to hold that being torted is not one of the vicissitudes of life. And is it not a vicissitude that one has a thin skull or an egg-shell personality?

Probabilities

It has been seen that before the causation question can be answered it must emerge *exactly* wherein the defendant was at fault, for the question is whether the harm would have happened just the same if he had behaved properly. Classically all that need be shown is that it would *probably* have made a difference if the defendant had not been in breach of duty. Certainty is not required. The essential thing is to persuade the

judge that the harm would probably have been avoided if the defendant had acted properly: it does not matter whether he is easily persuaded, because it is obvious, or is persuaded only with difficulty, because the matter is far from clear. The tendency to state the matter in terms of percentages is to be avoided. 'More likely than not' is a matter of persuasion, not of proof. Statistics are often deployed. There is no reason why they should not be considered, but they cannot be conclusive. Unfortunately, they seem objective. Note this outburst from a normally sensible judge: '... it is unjust that there should be no liability for failure to treat a patient, simply because the chances of a successful cure by that treatment were less than 50%. Nor, by the same token, can it be just that, if the chances of a successful cure only marginally exceed 50%, the doctor... should be liable to the same extent as if the treatment could be guaranteed to cure. If this is the law, it is high time it was changed...'[18]

The idea that recovery should be proportional to the cogency of the proof of causation is utterly unacceptable, and it was rejected by the House of Lords on appeal. The case was one where a boy fell out of a tree (no one's fault, except perhaps his own) and hurt his hip rather badly. The hospital ignored his hip and X-rayed his knee. Five days of pain ensued, and on the boy's return to hospital they admitted their error but stated (correctly) that his condition was now incurable. At trial they claimed that the injury had always been incurable, so that their admitted misdiagnosis made no difference, but the judge held that there was a one-in-four chance that the boy would have avoided permanent disablement if the proper diagnosis had been made on the first visit, and that the hospital's negligence had certainly robbed him of this chance. The judge accordingly granted the plaintiff 25% of the damages he would have awarded if, but for the negligence, full recovery had been probable. The House of Lords reversed: the plaintiff must prove that it was more likely than not that proper diagnosis would have prevented the crippling effect of the injury, and he had clearly failed to do so, given that on the evidence it was three times more likely than not that the misdiagnosis had made no difference.[19]

This is quite right, but the decision has caused controversy, because in many cases a claimant is indeed allowed to recover for the loss of a mere chance of obtaining a benefit. The case principally cited is *Chaplin v Hicks* where the defendant wrongly prevented the plaintiff from proceeding to the next round of a beauty competition. The trial judge said that he couldn't possibly tell whether or not she would probably have won, so he awarded nothing. The Court of Appeal sent the case back to him with instructions to decide on the plaintiff's chance of success, and award damages in proportion to that chance, if at all substantial.[20] The defendant's fault in that case was a breach of contract, but the same principle applies in tort also: when a widow sued the person who negligently killed her husband, the trial judge dismissed her claim since she would more likely than not have been divorced for adultery, but the House of Lords said that the true question was whether there were any substantial chance that the matrimonial rift might be healed and her husband continue to support her.[21]

How do these cases relate to the decision in *Hotson?* The explanation is that where the claimant is suing in respect of personal injury or property damage, he must persuade the judge that that injury or damage was probably due to the defendant's tort, whereas in cases of financial harm it is enough to show that the claimant had a chance of gain which the defendant has probably caused him to lose. There is nothing irrational in this, unless one supposes it is sensible to speak of 'loss of a chance' without saying what the chance is of. Losing a chance of gain is a loss like the loss of the gain itself, alike in quality, just less in quantity: losing a chance of not losing a leg is not at all the same kind of thing as losing the leg.

This squares with another point. The judge in *Hotson* was certainly logical, for in a subsequent case where the still-birth of the plaintiff's baby was almost certainly due to the negligence of the defendant hospital he reduced the damages to take account of the faint possibility that the baby might have been born dead anyway.[22] This was sternly discountenanced by the House of Lords. In financial loss cases, by contrast, where a benefit which would probably have been gained but for the defendant's negligence or breach of contract (there is now not much difference where the defendant is a professional), the courts reduce the damages to take account of the possibility that the benefit might not actually have been achieved.[23]

The issue was reventilated in *Gregg v Scott* in 2005, the outburst cited above being echoed in the House of Lords by the main dissentient.[24] When the claimant went to the defendant doctor he already had cancer which would more likely than not kill him within 10 years, but he did have (according to the medical boffins) a 42% chance of recovery within that period. Since that chance had slumped to 25% a year later when the correct diagnosis was made, the defendant's negligent misdiagnosis had nearly halved the claimant's chances of living a bit longer. Although no damages can be awarded for the mere loss of time on earth, a claim does lie for the earnings one would have made during that period and for distress at contemplating the accelerated approach of death.

The claim was rejected by the trial judge, and by a majority in both the Court of Appeal and the House of Lords. It should now be clear that in medical negligence cases as in other claims for personal injury the claimant must show that the defendant's breach of duty probably contributed to the occurrence of the harm complained of, and that it is not enough to show that it merely deprived him of a chance of escaping such harm: the claimant must show that he *would* (probably), not just that he *might* (possibly), have been better off if the defendant had acted properly. As Lord Phillips observed 'A robust test which produces rough justice may be preferable to a test that on occasion will be difficult, if not impossible, to apply with confidence in practice.'

Of course even when there are dissents which clarify the point at issue, decisions are never quite as clear as one would wish. One reason why *Hotson* has been held (by those who dislike it) to be inconclusive on the question whether the loss of a chance of a better medical outcome is compensable is that the House affected to hold that the judge's finding that the injury was *probably* incurable meant that it was *certainly* incurable (so that there was no chance of recovery) though the judge had held that it was *possibly* curable (with a 25% chance of recovery). Given this, the judge in question was surely right, when *Gregg* came before him in the Court of Appeal, to hold that *Hotson* was indistinguishable. Likewise, certain peculiarities in the *Gregg* case suggest that it may not have put paid to adventurous claims: first, the doctors' statistics are all in terms of living a further 10 years, not, as lawyers think, of living a normal lifespan; secondly, the fact that the claimant was alive at the time of the hearing in the House, and in good enough health to attend it, is ample indication that the statistics in issue were not conclusive in his own case. Of course *Fairchild* was put in play by the eager attorneys, but the answer was given by Lord Phillips 'there is a danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed.'

Avoidance of Liability for Consequences

Although it is clear that one should not have to pay for harm if one's breach of duty did not contribute to it at all, it does not follow that one should have to pay for all its consequences if it did make such a contribution. The law has three ways of letting a defendant off the hook even though the harm would not have occurred but for his negligence. The three ways are not entirely distinct, but they may be called rules of remoteness, intervention, and purpose.

Remoteness

In 1921 the Court of Appeal was faced with a case in which the plaintiff's ship, which had been carrying petrol in open vats, was destroyed when a workman employed by stevedores retained by the charterer carelessly knocked a plank into the hold and thereby caused a disastrous and wholly unexpected explosion. The action by the shipowner against the charterer was of course, as the very title of the case indicates, based on their very detailed contract, and could not have succeeded in tort since the workman was not one of the charterer's employees. The charterer was held liable on the basis that a negligent defendant was answerable for the physical consequences which resulted *directly* from his negligent conduct even if they were quite unforeseeable.[25] Scholars in Oxford were scandalised that different tests should be applied to determine whether the conduct was negligent and for what consequences the negligent party was responsible: if foreseeability was the test of negligence, it should also be the test of remoteness of consequences, doubtless on the 'one size fits all' argument. Actually, as we have seen, foreseeability is not the *test* of negligence, but merely a factor to be taken into account in determining whether conduct is unreasonable or not, but this does not seem to have been appreciated by the critics, who were also, apparently, unaware that German lawyers, not greatly given to fatuity, draw a clear distinction between the link which must be established between the conduct and the initial harm and the link between the conduct and the ulterior harm for which claim is made. Be that as it may, the Privy Council 40 years later categorically and dogmatically disavowed the reason underlying the Court of Appeal's decision and held that it is only for the foreseeable consequences of his conduct that a negligent person can be held liable: it accordingly dismissed the claim of the owner of a wharf in Sydney burnt in a fire on the ground that the fire was unforeseeable, though it was unquestionably and immediately due to the oil which the defendant had negligently spilled into the har-bour.[26] English law is thus formally committed to the rule that 'negligent parties pay only for the foreseeable consequences of their negligence'. That leaves open the question of what 'foreseeable' indicates in this context. And we learn without much surprise that once a party has been held negligent in the light of the harm that might have been foreseen, the consequences have to be really quite exceptional ('Who would have thought it?') for him to escape liability for them.[27] Perhaps one could take some of the stress off the notion of 'foreseeability' by using the concept of 'normality', which is closely connected with it but seems slightly more objective; one would be liable for all but quite abnormal consequences of one's breach of duty.

It is the *type of harm,* not the precise *way* it occurs nor yet its *extent* which has to be foreseeable. There are not very many types of harm, one would think. As we have seen, purely economic harm is different from property damage, but it has been held that there is no difference between psychological injury and physical damage to

the person.[28] In the Sydney Harbour case pollution damage was foreseeable but fire damage was not. That was a case of damage to property. Two cases involving personal injury to adventurous youths have been more generous. In the first the pursuer came upon the allurement of an open manhole in an Edinburgh street one late winter afternoon. The manhole had a canvas tent over it and a paraffin lamp beside it, left unguarded when the defender's men went off for tea. The youth took the lamp into the hole but dropped it and there was an unexpected explosion in which he was burnt. The Court of Session held that since the explosion was unforeseeable, the pursuer could not recover for his burns, but the House of Lords reversed and held that since it was foreseeable that he might well be burnt and he had been burnt, it was immaterial that it happened in an unexpected way.[29] More recently, a boy was rendered paraplegic when the abandoned boat which he had jacked up fell on him while he was working underneath it in the romantic hope of rendering it seaworthy. The boat, which was rotten, was on the defendant's property and they admitted that they should have removed it, but they alleged that while it was foreseeable that a child clambering on it might put his foot through the rotten timber, it was not foreseeable that boys would do what these boys did, and that the accident was therefore of a quite different kind. The Court of Appeal agreed with this, but their decision was reversed in the House of Lords, and the Borough of Sutton (which had many abandoned cars on the property) was made to pay over half a million pounds, 25% contributory negligence having been taken into account.[30] It was emphasised in the House that it was a sterile activity to compare cases on this point when the rule was clear. But if the rule is clear, it is far from clear how it is to be applied. Suppose a youth tried to lift an abandoned car and suffered a hernia or, as has happened, threw matches into the petrol tank and got burnt?

The German distinction adverted to above actually has a role to play in English law. If I negligently cause actionable harm to a person and he suffers further harm in consequence, the question is not whether that further harm could be foreseen as a consequence of my conduct, but rather whether by harming him I increased the risk of that further harm occurring. Thus if I injure a person I remain responsible for the further harm done to him by a negligent doctor in treating him, since injured people need treatment and treatment involves a risk of iatrogenic exacerbation.[31] If, however, the doctor cuts off the wrong leg or does something really insane, my liability will terminate. It is only the risk of normal negligence, so to speak, which is enhanced: really gross negligence will count as a *novus actus interveniens*. But suppose my victim has to be carried away in an ambulance, and the ambulance is involved in a collision in which the patient suffers further harm. Here I shall probably not be liable, for ambulances are not more likely to be involved in accidents than other vehicles. Suppose that while my victim is lying in the highway unconscious he is run over by another vehicle. I shall be liable, but not if his wallet is taken by a thief or he is struck on the head by a falling tile, though the reasons are slightly different.

Novus Actus Interveniens

It often happens that an act of negligence on the part of X creates a danger which is triggered by the subsequent act of Y, or indeed of the victim himself, with resulting injury which would not have occurred but for the intervention. This was true, for instance, of the youth who tried to prop up the abandoned boat. Of course the harm also would not have happened but for the original act of negligence. So there is a problem of causation.

First, there is no difficulty at all in holding both X and Y liable for the consequences of their combined negligence. As noted already, a result may have several causes. Thus if X's careless driving causes a collision on the highway and Y, a following driver paying inadequate attention, runs into the melee and causes further harm, that harm may well be attributable to both X and Y.[32] It is, indeed, extremely common for more than one party to be liable, for much of the development in the law of tort over the past century has been to provide claimants with extra sources of compensation by imposing on more remote defendants a duty to anticipate or defuse the dangerous conduct of tortfeasors closer to the damage. Reference can be made to the section on liability for omissions (above, p. 54).

Although the defendant's misconduct need not be the sole cause of the eventual harm, nor even the main cause, it may be such a minor cause in comparison with another cause or causes that it can properly be denied any causal effect at all. This is particularly true where the subsequent conduct of another is so deplorable that it would not be right to hold the original tortfeasor liable for the ulterior harm. Consider the following mildly puzzling case.[33] One wet and foggy evening the Mini Minor which X was driving eastwards on the four-lane A45 (as it then was) coughed to a halt. X was held negligent in not pushing the now stationary car off the carriageway (but surely not very negligent, she being a young woman caught in an emergency). Y came tearing along in his articulated lorry at wicked speed and collided with the Mini Minor, injuring X's passenger. So fast was Y going that the collision forced him on to the opposite carriageway into the path of another vehicle calmly proceeding westwards, with fatal results. Y settled with all the victims and now claimed contribution from X on the ground that X also was liable to them. The Court of Appeal made X contribute 10% towards the sum paid to her passenger but nothing towards the sums paid to the other victims: Y's driving was so 'reckless' as to insulate X from liability to those on the other side of the road, although there would have been no accident but for her having left her Mini Minor on the roadway.

Another example is provided by *Knightley v Johns*?.[34] X turned his car upside down in the Queensway tunnel in Birmingham, blocking the right-hand lane just beyond the bend on the northbound carriageway. The police were summoned but went to the exit, forgetting the standing order that the entry to the tunnel must first be closed to prevent further traffic entering it. The inspector then told two of his men, including the plaintiff, to get on their bikes and ride back up the tunnel to close it; in so doing the plaintiff was struck and injured by a vehicle driven quite carefully by the unsuspecting Z. The trial judge held that this was all the fault of X, and held him solely liable. The Court of Appeal reversed, held the police inspector liable for failing to obey standing orders and endangering his men, and—this being the significant point—further held that this negligence was so extreme and unforeseeable that X should be held not liable for the injury to the plaintiff.

The explanation of the *novus actus* cases in terms of foreseeability is perhaps not entirely convincing. After all, wickedness and laziness are not less foreseeable than negligence and clumsiness, yet it is clear that deliberate acts of the intervener tend to insulate the prior tortfeasor more effectively than merely negligent ones, and positive acts more effectively than omissions. Perhaps it can be suggested that since it is clear that there must come a moment when the party originally responsible for a dangerous situation ceases to be liable for its ulterior effects one might ask whether the 'buck has passed' from the original tortfeasor to the inter-vener. This seems to happen in particular when the danger comes to the notice of a person who can and should defuse it and prevent the danger causing harm or more harm, as was the situation of the police inspector in *Knightley v Johns,* (where the plaintiff was his fellow-employee and not a stranger such as another motorist). This is possibly also the explanation of the decision in *McKew v Holland and Hannen and Cubitts*.[35] The pursuer

had suffered an injury to his left leg owing to the fault of his employer, and had been paid for it. Not long thereafter, when he was fully aware that his leg might 'go away' from under him, he was coming down some steep and worn stone stairs in a Glasgow tenement where there was no banister when his leg 'went'. In order to avoid falling, he jumped down on to the half-landing, and broke his right leg. His claim was dismissed, and though controversial (many commentators think he should have received damages reduced for his carelessness) the decision is surely right. The pursuer was now in control of the situation, he knew his gait and balance were impaired, and it was up to him to take account of the injury for which he had been paid. Considerations of foreseeability and reasonableness are not entirely apt in the circumstances. The question really is whether at the relevant time the intervener was in control and free to act, rather than still reacting to an emergency triggered by the defendant.

It is to be noted that these considerations apply only where the conduct alleged to insulate the defendant from liability for ulterior consequences actually *intervenes,* that is, *comes between* the defendant's conduct and the occurrence of the harm. Prior acts of negligence are not intervening acts, and cannot, on causal grounds, excuse subsequent negligence (though they may cause an emergency or crisis such that an unfortunate reaction by a person caught up in it is not to be regarded as negligent at all).

One must therefore distinguish the cases where, because the victim was especially sensitive or vulnerable, the defendant's conduct causes much more harm than could have been expected. Here one trots out the saying 'The tortfeasor takes the victim as he finds him' and holds the defendant liable. This is dubious policy where the claimant is physically susceptible: there is no good reason why the accident-prone should increase the liability of normal people, and it is really unacceptable in the case of the neurotic who has fits at the drop of a hat. Yet it was so held in *Page v Smith,* where a driver involved in a minor collision which did him no physical harm whatsoever took to his bed in shock and obtained damages on the basis that he would never be able to work again.[36] Should an employee really be able to claim damages when the position to which they sought promotion proves more stressful than they are able to cope with? It is, however, true that before the 'thin-skull' rule applies, with the effect of holding a defendant liable for unforeseeable consequences, it must be shown that the defendant was indeed negligent. The point can be seen as between neighbours: you need not curtail your activities because your neighbour is ultra-sensitive, but if you make so much noise that a normal person would be distressed, you will be liable if, being very sensitive, he suffers much more than could have been expected.

Purpose

In one case the plaintiff's sheep were being carried on the defendant's vessel and were washed overboard, a fate they would have avoided had the defendant penned them in as statute required. The court held that in imposing the duty to pen the beasts Parliament's purpose was to prevent contagion, not drowning. The claim was consequently lost: the harm was doubtless caused by the infringement but it was not the kind of harm which it was the purpose of the provision infringed to prevent.[37] One must not be too precise about the purpose, however: the provision that the roof in a coal mine must be kept secure was held to cover not only the obvious risk that a piece of it might fall on a miner but also the risk that an accident might be caused to a miner by a piece which had already fallen.[38] On the continent, where all basic law is legislative, it is a

widespread principle that in order to be compensable the consequence of negligence must be such as it was the purpose of the rule infringed to avoid. For example, in a German case, when the noise of a vehicular collision on a country road caused pigs on a nearby farm to panic and kill each other the farmer could not invoke the Traffic Act, which was held not to have such consequences in mind.

Common lawyers can apply this teleological approach to statutory duties quite nicely, as we have seen, but they have much more difficulty with duties which arise at common law, since we do not think of such duties as having been laid down by someone with some inferable purpose in mind for future cases. A useful substitute is to speak in terms of the 'scope' of the duty. That is what Lord Hoffmann did in a case where the plaintiff lender would not have lent money at all but for the erroneously high valuation which the defendant had negligently placed on the property which was to act as security for the loan. The borrower failed to repay, and the security was doubly inadequate because the property market had collapsed. The lender was not allowed to recover his full loss, but only the amount by which the defendant had overstated the value of the property. His Lordship said that the plaintiff 'must show … a duty in respect of the kind of loss which he has suffered' and that 'Normally the law limits liability to those consequences which are attributable to that which made the act wrongful'.[39] His Lordship gives an interesting example. A doctor consulted by a patient who proposes, if he gets a clean bill of health, to go on a climbing expedition negligently certifies the knee as fit when it is not. The patient is injured on the mountainside, say in an avalanche or because of his colleague's failure to belay properly. Although he would not have been on the mountain at all 'but for' the doctor's negligence, the doctor will not be liable. Likewise it is negligent for a parent to give an adolescent a gun, but this is because he may shoot someone with it; the parent will not be liable if the boy clumsily drops the gun on a friend's foot.

At this point it is necessary to deal with the third of the trilogy of contentious decisions in the matter of causation rendered by the House of Lords in the past few years. In *Chester v Afshar* the very experienced defendant surgeon advised the claimant patient to undergo an operation on her spine but omitted to inform her, as it was his duty to do, that there was a small risk (less than 2%) that she might end up worse than before. Had he so informed her, she would probably have taken a second opinion and had the operation later. Unwarned, she had the operation right away and it went wrong without any operational fault on the part of the defendant surgeon.[40]

Was she entitled to damages? The Court of Appeal had held that she was. Indeed the case seems perfectly clear: her injury was due to the surgeon's operating on her when he should not have done so, and the harm would probably not have been suffered had he given the warning, since the chance of its occurring in a later operation (though identical) was virtually negligible. Wherein is the problem?

The minority in the House, who would have reversed the decision for the claimant, were of the opinion that one is not liable for harm unless one's negligence increases the risk of that harm occurring. This was asserted to be 'conventional' causation law. It is far from clear that this is so. It is almost as if the dissentients were inferring from *Fairchild* that if you are liable for increasing the risk of harm without actually causing it, you cannot be liable for the harm you cause unless you increased the risk of it. But tort is about harm rather than risk.

The alarming aspect of the case, however, is that even the majority, who favoured the claim, seem to have believed that their decision deviated from standard causation lore and was justified only in order to give effect to the doctor's duty to warn. Yet is this extract from the speech of Lord Hope not consistent with 'conventional' causation lore?: 'It can be said that Miss Chester would not have suffered her injury "but for" Mr Afshar's failure to warn her of the risks, as she would have declined to be operated on by him on 21 November 1994.... If she had been given the warning she would have avoided the risk, and the chances of her being injured in that way if she had had the operation later would have been very small—between 1 and 2% What more can be required?

The claimant's injury was certainly bad luck, but it was not a coincidence: the harm was within the scope of the duty, unless by scope we mean purpose. The purpose behind the duty to warn is doubtless to enable the patient to make up her mind, but it is surely not necessary to ignore consequences of a breach just because it was not the purpose of the duty to prevent them.

Note, however, that the purpose analysis may have the effect of rendering the defendant liable when otherwise he would not be. In a case already mentioned, the police were held liable for not closing the flap on the door of the cell of a remand prisoner who used the opening to tie his shirt to and strangle himself: the very purpose of keeping the flap closed was to prevent the prisoner from using it to kill himself.[41] Likewise a painter was held liable for theft from premises he had undertaken to keep locked, precisely because the purpose of locking the door was to prevent theft, which otherwise would have rated as a *novus actus*. This was 'the very thing' the obligation was designed to prevent.[42]

Notes

1 *McWilliams v Sir William Arrol* [1962] 1 All ER 623.

2 *The Ogopogo* [1971] 2 Lloyd's Rep 410.

3 *Barnett v Kensington and Chelsea Hospital* [1968] 1 All ER 1068.

4 *Kay v Ayrshire and Arran Health Board* [1987] 2 All ER 417.

5 [1956] 1 All ER 615.

6 *McGhee v National Coal Board* [1972] 3 All ER 1008.

7 *Wilsher v Essex AHA* [1988] 1 All ER 871.

8 [2002] UKHL 22.

9 *Rothwell v Chemical and Insulating Co* [2006] EWCA Civ 27.

9a [2006] UKHL 20.

10 [2000] 3 All ER 421.

11 [2001] QB 351.

12 *Webb v Barclays Bank* [2001] EWCA Civ 1144.

13 *C v Flintshire CC* [2001] EWCA Civ 302.

14 *Page v Smith* [1995] 2 All ER 736.

15 [1969] 3 All ER 1528.

16 *Hassall v Secretary of State* [1996] 3 All ER 909.

17 *Jobling v ASDA* [1981] 2 All ER 752.

18 *Hotson v East Berkshire Area Health Authority* [1987] 1 All ER 210 at 215.

19 *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909.

20 [1911] 2 KB 786.

21 *Davies v Taylor* [1972] 3 All ER 836.

22 *Bagley v North Hertfordshire Health Authority* (1986) 136 NLJ 1014.

23 *Blue Circle v Ministry of Defence* [1998] 3 All ER 385.

24 [2005] UKHL 2.

25 *In Re an Arbitration between Polemis and Furness Withy Co* [1921] 3 KB 560.

26 *The Wagon Mound (No i)* [1961] 1 All ER 404.

27 *The Wagon Mound (No 2)* [1966] 2 All ER 709.

28 *Page v Smith* [1995] 2 All ER 736.

29 *Hughes v Lord Advocate* [1963] 1 All ER 705.

30 *Jolley v Sutton LBC* [2000] 3 All ER 409.

31 *Webb v Barclays Bank* [2001] EWCA Civ 1141, paras 52-56.

32 *Rouse v Squires* [1973] 2 All ER 903.

33 *Wright v Lodge* [1993] 4 All ER 299.

34 [1982] 1 All ER 851.

35 [1969] 3 All ER 1621.

36 [1995] 2 All ER 736.

37 *Gorris v Scott* (1874) LR 9 Exch 125.

38 *Grant v National Coal Board* [1956] 1 All ER 682.

39 *SAAMCO v York Montague* [1996] 3 All ER 365, 370 at 371.

40 [2004] UKHL 41.

41 *Reeves v Commissioner of Police* [1999] 3 All ER 897.

42 *Stansbie v Troman* [1948] 1 All ER 599.

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