

CAUSATION IN PERSONAL INJURY CLAIMS

Introduction

1. The usual blueprint for any action for personal injury is a breach of duty causing actionable damage. Sometimes, the focus of the enquiry is in respect of the alleged breach of duty: was the driver negligent, or was the employer in breach of statutory duty or did the doctor negligently misdiagnose the patient's condition? Equally, the focus is sometimes on the question of damage: is the victim malingering, or what care does the Claimant require or how long is the Claimant expected to live? But in this talk, I shall be focusing on the small but vital word "causing". Before any action for personal injury can succeed, the Claimant must show that the damage he alleges he has suffered was caused by the breach of duty of which the Defendant is alleged to be in breach.
2. Often, causation is not an issue but is obvious. If a person is involved in a road traffic accident, and sustains a serious head injury, there can be no doubt that the two are causally connected. However, sometimes the question of causation raises extremely difficult issues, for example if there are concurrent tortfeasors or successive acts of negligence. In this talk, I aim to (attempt to) explain the law of causation as I understand it presently to be, and to identify the questions which liability insurers should ask themselves when faced with a personal injury claim, through a number of worked examples which we can go through together after I have tried to explain the principles. The outline of the talk is therefore as follows:

Brief Introduction to Causation
General Principles

The “But-for” Test
Intervening Acts
The Scope of the Duty
Fairchild
Chester
Gregg

Brief Introduction to Causation

3. Problems of causation are not a modern phenomenon – they have exercised the minds of lawyers for time immemorial. This is well illustrated by the following passage from the speech of Lord Rodger in *Fairchild*:

“The texts show that, in a certain form, problems with unidentifiable wrongdoers had begun to exercise the minds of Roman jurists not later than the first century BC. Julian 86 digesta contains a substantial extract from one of the most important works on Roman law, written in the second century AD, the high classical period of Roman law. In the principium Julian is discussing chapter 1 of the lex Aquilia, which gives the owner of a slave the right to claim damages if someone wrongfully “kills” the slave. Julian considers whether someone “kills” a slave for these purposes if he mortally wounds him and later someone else attacks the slave who dies more quickly as a result. Julian takes the view, which was probably not shared by all the jurists, that both persons who attacked the slave should be liable for “killing” him.”

So here you get a classic causation issue, namely the issue of joint tortfeasors (to which I shall return), being discussed in the second century

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AD. Problems of causation continued to trouble jurists in the intervening period, those problems often involving questions of philosophy. The philosophy of law is known as “jurisprudence” and a significant development in terms of causation in English Law occurred when the then Professor of Jurisprudence at Oxford University, Herbert Hart, turned his mind to causation in the 1950’s, and wrote, together with Professor Tony Honore, the seminal book: Causation in the Law. Over the previous 50-100 years, the courts in various commonwealth jurisdictions had developed rules of causation which governed the circumstances in which the courts would hold that one person was liable for damages suffered by another in consequence of breach of duty, and the circumstances in which they would not. The reason why the book was seminal was because it attempted to formulate a coherent explanation of the concept of causation as it had been developed by the courts, and to explain the philosophy behind those rules. An important part of Hart & Honore’s argument was to emphasise that the concept of causation is used by the law for attributing responsibility and that such attribution of responsibility, for example on the grounds of fraud or negligence, is often based on moral notions, not only as to the kind of conduct which should make one liable to pay compensation but also moral notions about the extent of the harm for which the person who has been guilty of such conduct should be responsible. That enabled them to identify general principles by which the court approaches questions of causation particularly in actions for negligence.

4. It is fair to say that there has hardly been an important case on causation since Hart and Honore’s book was published which has not drawn on the learning contained in it and relied on the authors’ scholarship. For anyone seriously interested in the law of causation and the philosophy which underlies the law, it is compulsory reading.

General Principles

5. So, what are the general principles, as articulated by Hart & Honore? First, there is what is known as the “but-for” test: the Claimant must establish that, but for the negligent act or omission, the damage would not have occurred. Thus, we do not treat a person as by his act or omission having caused something which would have happened anyway. Secondly, there is the concept of “novus actus interveniens” (a new intervening act) whereby there must have been no other intentional human act or subsequent unnatural occurrence without which the harm would not have occurred. So if somebody starts a fire but it would have gone out and was about to go out when somebody else deliberately came and poured petrol on it, we say the second person is the one who caused the damage even though it wouldn't have happened but for the first person having started it. Finally, there is a third factor which involves asking the following question: what is the scope of the duty of which the Defendant is in breach, and does that explain or restrict the damage for which the Defendant is liable? This is similar to, but not the same as the concept of remoteness. Let me give you an example which Lord Hoffmann used in the SAAMCO case. A mountaineer goes to the doctor and says “I'm a bit worried about my knee, do you think I should go climbing tomorrow” and the doctor says “no your knee is fine”. In fact that advice is negligent because his knee isn't any good at all. The mountaineer goes climbing when he would not otherwise have gone had he been competently advised, and he is injured, not as a result of his knee giving way, but because of a rockfall which would have injured the mountaineer even if his knee had been perfect. Now what is the doctor liable for? Is he liable for the consequences of not having given the right advice? If he had given the right advice the man wouldn't have gone mountaineering and as it

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happens, having gone mountaineering, he suffers some injury that has nothing to do with his knee and is not an injury which would have happened if he'd stayed at home. So do you say he ought to be liable for the consequences, whatever they were, of his having given the wrong advice or do you say well, no, it's confined to the consequences of his having gone with a dodgy knee? It was the view of the HL in SAAMCO that it was the latter. Whilst it is clear that the "but-for" test of causation was satisfied, this simply had the effect of putting the Claimant in the wrong place at the wrong time, and this is not usually regarded as sufficient in terms of the standard criteria. Thus, as Lord Bridge said in *Caparo v. Dickman*:

"It is never sufficient to ask simply whether A owed B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless".

And in *Environment Agency v. Empress Car Co (Abertillery) Ltd* Lord Hoffmann stated:

"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 ... one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule".

6. In relation to the third factor, though, it must be recognised that the law, acting through the courts, has a choice in relation to whether or not to impose liability. That choice can, in some cases be a difficult one. For example, the law could choose to make the doctor liable for all the

consequences of his advice having been wrong, even though not, in traditional terms, strictly within the scope of the duty which has been breached. If, for whatever moral reasons, the court thinks that the Defendant ought to be made liable, then it may do so as an extension to the usual principles. That is what happened in *Chester v Afshar*. It then becomes a matter of debate whether the particular circumstances justified the extension of the usual rules or not. The HL did not make such an extension in SAAMCO (although invited to do so) because they did not think it would be right to do so by reference to the scope of the duty of which the Defendant was in breach.

7. Let me now look at the standard criteria in a little more detail, and I start with the “but-for” test.

The “but-for test”

8. Generally, law students are taught that, for a Defendant to be liable, it is necessary for the “but-for” test of causation to be satisfied, but it is not sufficient. There are therefore 2 parts to the test: (1) Necessary and (2) not sufficient. Taking the first part first, it is necessary because, generally, people are not held liable for damage or other consequences which would have happened in any event. Sometimes, this is also referred to as “factual causation”. There is an important corollary to this. Sometimes, it is very difficult to know whether the damage would have happened in any event. Thus, you may have a situation where there is an outcome which could have been caused by one of three possible events, two of which were non-negligent and the third of which was negligent. Suppose they are equally likely. There is therefore a one-third chance that the outcome was caused by the negligence, but a two-thirds probability that it was caused by one of the other events. The law has consistently held that the

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burden of proving causation lies on the Claimant so that, in the example I have given, the Claimant would fail because he is unable to prove, on the balance of probabilities that, but for the negligence, he would not have sustained the damage in question. Attempts have been made to suggest that, in such situations, the burden of proof should be reversed and, where a Defendant has been negligent in a way which could have caused the damage sustained, the Defendant should have the burden of proving that his negligence did not cause the damage. However, the House of Lords rejected that argument in *Wilsher v. Essex Area Health Authority*¹, applying *Bonnington Castings Ltd v. Wardlaw*² and the universal general rule in English law is that it is for the Claimant to prove causation. Compare Australia where Gaudron J said (in *Chappel v Hart*) that

“breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach”

This is a morally justifiable stance which the law could take. The courts could say: where a Defendant is in breach of duty, and the Claimant suffers harm of the kind which that duty is intended to prevent, then the Defendant must take his chances. However, the general rule in England, subject to the exception to which I am coming, is that the burden of proof remains on the Claimant.

9. Let me turn to the second part, which is “not sufficient”: whilst it is necessary, if he is to succeed, for the Claimant to prove “but-for” causation, it is not sufficient. This is because the negligent conduct may

¹ [1988] AC 1074

² [1956] AC 613

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simply have the effect of putting the Claimant in the wrong place at the wrong time, but nevertheless the law rightly regards the damage sustained as coincidental. An example illustrates this point. A car, being driven along a road, is crushed by a falling tree, injuring the driver and his passenger. At the relevant time the car was being driven appropriately, at a safe speed. However, it so happens that, earlier on in the journey, the driver had been driving negligently fast. Now, but for that negligence, the car would not have been in the particular position in the journey that it was, and would not have been hit by the falling tree. And so, it can be seen that the “but-for” test is satisfied. But in reality, the negligence is a coincidence. It is as coincidental as if, before setting off, the driver’s wife had negligently spilt coffee on the driver causing him to be delayed 5 minutes whilst he changed his clothes. Again, the “but-for” test is satisfied, but no-one would sanely suggest that the wife should be liable for the injuries to the driver or the passenger from the falling tree. Thus, we can see clearly that whilst it is necessary to satisfy the “but-for” test in order to succeed, it is not sufficient by itself. This is where the scope and purpose of the rule comes in. The scope and purpose of the rule that you should not drive your car too fast is that you may thereby lose control of the car and have an accident, or be driving too fast to avoid an obstruction or a pedestrian and so on. The purpose and scope of the duty is not to prevent you being at a particular point in your journey later where a tree is going to collapse. That is why the collapsing tree and the damage resulting from it are regarded as coincidental. However, Claimants often fail to see this truth, particularly in cases of clinical negligence, but also generally in personal injury actions. They look no further than factual causation and the “but-for” test. Liability insurers, though, should always be aware of the issue and consider whether there could be an argument that the damage, or part of the damage, is not within the scope of the duty. It is also necessary to look at the different allegations of negligence that

are pleaded. The usual format of a pleading is to set out the breaches of duty together, and then set out, globally, the damage sustained. This may have the effect of obscuring the fact that not all the breaches of duty alleged may support all the damage alleged, and in order to succeed in recovering a particular part of the loss, the Claimant may have to establish a particular breach. You may be able to focus in on that allegation and refute it, thereby neutralising a significant part of the claim.

Intervening Acts

10. The second general principle of causation is that there must have been no other intentional human act or subsequent unnatural occurrence without which the harm would not have occurred, often known as “novus actus interveniens” or simply “novus actus”. There is little that I want to say about this. Generally, the intervening act must constitute an event of such impact that it obliterates the wrongdoing of the Defendant. The court asks the question: did the intervening event “isolate” or “insulate” or “eclipse” the Defendant’s conduct so that it was merely the occasion of the harm rather than the cause of it? Where what is being considered is the conduct of a third party, it is generally thought that 4 issues need to be addressed:

- (i) Was the intervening act such as to render the original wrongdoing merely a part of the history of the events?
- (ii) Was the third party’s conduct deliberate? Generally, negligent conduct will not suffice to constitute a novus actus, although grossly negligent conduct may do.
- (iii) Was the intervention foreseeable?
- (iv) Is the third party’s conduct wholly independent of the Defendant?

The Scope of the Duty

11. Suppose, then, that you have a breach of duty which satisfies the “but-for” test and there is no intervening act. Is it possible to identify a factor which then makes the conduct causative of the damage in legal terms so that the gap between the breach of duty and the damage is regarded as bridged and legal liability imposed? At this stage, I want to introduce the concept of risk, and in particular the situation where the Defendant’s negligence has caused an increase in the risk of the outcome occurring which has in fact occurred. It became established in a series of cases involving the first and second world wars that where, in addition to satisfying the “but-for” test, the Claimant could show that the Defendant’s breach of duty had increased the risk of the adverse outcome which had in fact occurred, then this was sufficient and elevated the situation from coincidence to causation.
12. First there was the American case of *The Malcolm Baxter (1927)*. The *Malcolm Baxter*, chartered to sail to Bordeaux, was unseaworthy on sailing as a result of which she had to deviate in order to effect repairs at Havana, and whilst those repairs were being effected the United States Government levied an embargo which prevented any sailing vessel from clearing for a voyage to Bordeaux, or for any port within the war zone. It was argued that it was the delay caused by her unseaworthiness which brought the vessel within the excepted peril. This argument was rejected on the ground that the delay was the occasion and not the cause of the operation of the embargo. It was, so the court held, no more its cause than delay which caused goods to be brought within the path of a flood would be the cause of their destruction. This was followed by, and is to

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contrasted with, *Monarch Steamship Co. v Karlshamns Oljefabriker* (1949) where a ship was chartered to transport soya beans. In June 1939, Karlshamn in Sweden was nominated by the charterers as the sole port of discharge but, owing to delay caused by the vessel's unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany in September, when the British Admiralty prohibited her from proceeding to Karlshamn and ordered the cargo to be discharged at Glasgow which she reached on October 21. Expense was incurred in forwarding the soya beans, in neutral ships chartered for the purpose, to Karlshamn where no soya beans were then obtainable. However, the House of Lords, whilst recognising that *The Malcolm Baxter* was correctly decided, distinguished that case and held that the owners of the ship were liable because the outbreak of war could reasonably have been anticipated in the light of the international situation at the time. They contrasted the fact that, in *The Malcolm Baxter*, there was no finding, nor was it suggested, that at the time when the contract of affreightment was entered into or when the vessel broke ground, the embargo could reasonably have been foreseen, with the finding of the judge at first instance in the present case that the shipowners should reasonably have foreseen the likelihood of the imposition of an embargo. In forming this opinion he relied upon the insertion of the war clause in the charterparty, coupled with the evidence of a Mr. George Sheriff, who stated that, at the date of the charter, the international situation was considerably overclouded and the possibility of war was in the minds of his company. In other words, in the *Monarch* case, war was more likely to break out with every day that passed, with the result that any delay on the ground of unseaworthiness increased the risk that the charter would be affected by the imposition of an embargo. It was this increase in risk, and the fact that the damage was consequently reasonably foreseeable, which enabled the House of Lords to distinguish *The Malcolm Baxter*.

13. If an increase in risk is, indeed, a legitimate touchstone for distinguishing an event which merely provides the occasion for damage and an event which is in law causative of the damage, then it can be seen to apply in the example of the falling tree. Thus, the fact that the driver had been speeding earlier did not make it any more likely that the car would be crushed by the tree than if he had been driving too slowly – that risk was the same at whatever speed he drove. As long as the car had to pass by the tree, it was subjected to the risk of being crushed by it. Consider, though, the risk of having a collision or of running over a pedestrian: the risk of those happening is greater if a car is driven negligently fast, and that is why, where that happens and damage is sustained, the driver is liable. How does it work in the example of the mountaineer? It could be argued that the negligent advice does increase the risk because, if the mountaineer does not go mountaineering, there is no risk at all. The answer to this is to compare the risk if the doctor had been right. Thus, suppose there had been nothing wrong with the knee, the doctor's advice had been correct and the man had gone mountaineering. In those circumstances, the risk to him of the injury which befell him would have been exactly the same. This illustrates that the fact that the advice is wrong has had no effect on the risk. It might be different if the scope of the duty extended to advice whether to go mountaineering rather than merely on the state of the knee.

14. The conclusion is that, as a matter of general principle, causation will be established in legal terms if the Claimant can prove:

- (i) The damage claimed would not have occurred but for the breach of duty;
- (ii) The damage claimed is within the scope of the duty breached, and

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this will generally be the case where the effect of the breach of duty is to increase the risk of such damage occurring.

As so, to the exceptions.

Fairchild

15. In *Fairchild*, the issue for the House of Lords was whether, where there are joint tortfeasors, an increase in risk alone is sufficient even where the Claimants could not prove that the “but-for” test was satisfied, which is, as we have previously observed, usually a pre-requisite to liability. The background to the decision in *Fairchild* was the earlier decision of the House of Lords in *McGhee* where it had been decided that special rules apply to cases where there is, or may be, more than one contributory cause of the Claimant's injury. In general, it will be sufficient in such cases for the Claimant to show that the wrongdoing in question made a material contribution to the injury. Take a bottle filled with acid. Damage is caused if the bottle overflows. Anyone who has made a material contribution to the contents of the bottle, in breach of duty, is liable for the damage caused when it overflows, even if the Claimant cannot prove that, but for the Defendant's contribution, the bottle would not have overflowed. There is obviously no problem if the Defendant's contribution is the last one. Then, as the Claimant will not already have suffered the injury, it will follow that the “but-for” test is satisfied. But even in respect of earlier or contemporaneous contributions, each negligent contributor will be liable if his contribution was a material one (ie not minimal).
16. In *McGhee* itself, the issue was whether the Defendant's breach of duty in failing to provide a worker with shower facilities before he cycled home

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covered in brick dust was a material contribution to his contraction of dermatitis. The Claimant's counsel argued that it was sufficient for him to prove that the Defendant's breach of duty increased the risk of dermatitis. This was rejected by the Lord Ordinary, at first instance, who said:

"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 reduced the risk. Pursuers' counsel maintained that a material increase in the risk of contracting the 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."

Whilst this is undoubtedly correct, what the House of Lords held was that, in certain cases, it may be possible for the Claimant to prove that the Defendant's breach of duty made a material contribution to his injury by showing that it increased the risk of injury, whereby the court should draw an inference that there was material contribution. Thus, see per Lord Rodger in *Fairchild*, referring to *McGhee*:

"What Lord Reid does, rather, is to accept that the pursuer must prove that the defender's conduct materially contributed to the onset of his illness but also, like Viscount Simonds and Lord Cohen in *Nicholson*, he considers what it is that the pursuer must prove in order to establish that material contribution. Taking the "broader

view of causation", he holds that, in these particular circumstances, there is no substantial difference between saying that what the defenders did materially increase the risk of injury to the pursuer and saying that it made a material contribution to his injury."

Thus, McGhee is not taken to suggest that the Claimant is absolved from proving that there was a material contribution to the damage occurring where there are concurrent potential causes. It is rather looking at the question of evidence, and how a Claimant can prove material contribution. What they are saying is that, in certain circumstances, where a Claimant can prove that the breach of duty increased the risk of the adverse outcome, the court will draw an inference that the breach of duty made a material contribution. McGhee is, though, an exception to the need for the Claimant to prove that the "but-for" test is satisfied, confined to the situation where there are concurrent contributory causes. It can be seen that where the court draws the line of legal liability is a matter of legal policy. Thus, the court could, in such cases, if it so wished, confine liability to the greatest contributor – the person who puts the most acid in the bottle. An alternative would be to confine liability to the last contributor, ie the person who causes the bottle to overflow. The difficulty with this is that it may be difficult or impossible to prove who the last contributor is. The court has therefore decided that, in these difficult cases, it is only fair to make liable all those whose contribution was material, ie more than merely minimal.

17. Fairchild was a case where the Claimants had contracted mesothelioma, an invariably fatal form of lung cancer, as a result of exposure to asbestos at some time in the past. The problem which arose was that, in these cases, there had been exposure to asbestos in different employments, but the Claimant could not prove which one was the fatal one causing the

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mesothelioma. The medical evidence showed that mesothelioma could be contracted as a result of exposure to a single asbestos fibre, so it was not a case of cumulative exposure – it was not like the acid in the bottle. Thus, the Claimants were in fact unable to satisfy the “but-for” test: in relation to any particular Defendant, they could not show that, but for that Defendant’s breach of duty, the mesothelioma would not have been contracted. All the Claimants could prove that each employment had increased the risk that they would contract mesothelioma. In the Court of Appeal, it was held that the inability to satisfy the “but-for” test was fatal to the Claimants’ case, and the result was that they failed. However, the House of Lords held that, in certain limited cases, they were prepared to make an exception to the necessity of satisfying the “but-for” test and to hold that it was sufficient to prove an increase in risk.

18. The problem that arose, and which faced the House of Lords, is illustrated by the example of the Claimant who is injured when 2 huntsmen both negligently fire their guns in his direction at the same time, but he cannot prove whose pellet hit him. In those circumstances, the Claimant is unable to prove on the balance of probability that, but for the negligent act of Huntsman A, he would not have been injured, nor can he prove the same in relation to Huntsman B. So the courts are left with a quandary: should the law be that he recovers against neither, or that he recovers against both (leaving them to sort out the apportionment between them)? These seem to be the only options. If he recovers against neither, is this unfair or is it simply an example of a basically fair rule operating at the limits of fairness? Is it more unfair on the Claimant not to recover or on the Huntsmen to be liable when, in each case, the Claimant has been unable to prove that his shot was the cause of the injury? Of course, in the case of each huntsman, he increased the risk of injury to the Claimant by negligently discharging his gun in the Claimant’s direction.

19. The solution of the House of Lords was to say that they would relax the need to prove “but-for” causation where the following conditions are satisfied:

(i) It is impossible for the Claimant to prove exactly how his injury was caused.

(ii) The Defendant's wrongdoing has materially increased the risk that the Claimant will suffer injury (creating a material risk of injury to a class of persons is insufficient).

(iii) The Defendant's conduct must have been capable of causing the Claimant's injury.

(iv) The Claimant's injury was caused by the eventuation of the kind of risk created by the Defendant's wrongdoing. By contrast, the principle does not apply where the Claimant has merely proved that his injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the Defendant's wrongful act or omission.

(v) The Claimant must show that his injury was caused by an agency that operated in the same, or substantially the same, way as was involved in the Defendant's wrongdoing.

(vi) The principle continues to apply and is not excluded where the other possible source of the Claimant's injury is a similar wrongful act or omission of another person, or where it is a similar, but lawful, act or omission of the same Defendant.

It can be seen that this is a very limited exception and is unlikely to arise very often.

20. As a result of McGhee and Fairchild, the law can therefore be stated as follows:

(vii) In general, in order for a Claimant to succeed, it is necessary for him to establish that, but for the breach of duty in question, he would not have sustained the injury complained of. Although fulfilment of the "but-for" test of causation is necessary, it will not always be sufficient.

(viii) However, special rules apply to cases where there is, or may be, more than one contributory cause of the Claimant's injury. In general, it will be sufficient for the Claimant to show that the wrongdoing in question made a material contribution to the injury.

(ix) In certain circumstances, as a matter of law, it will be sufficient for the Claimant to prove that the wrongdoing in question materially increased the risk of the injury occurring in order to prove that the wrongdoing made a material contribution or caused the injury. Those circumstances are as follows (following Lord Rodger's basic analysis):

(a) The Claimant has suffered an injury but it is impossible for him to prove exactly how his injury was caused: the highest he can put it is as in (d) below.

(b) The Defendant's wrongdoing has materially increased the risk that the Claimant will suffer injury: but creating a material risk of injury to a class of persons is insufficient.

(c) The Defendant's conduct must have been capable of causing the Claimant's injury.

(d) The Claimant's injury was caused by the eventuation of the kind of risk created by the Defendant's wrongdoing. It is not enough that the Claimant's injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the Defendant's wrongful act or omission.

(e) The Claimant must show that his injury was caused by an agency that operated in the same, or substantially the same, way as was involved in the Defendant's wrongdoing.

(f) The principle continues to apply and is not excluded where the other possible source of the Claimant's injury is a similar wrongful act or omission of another person, or where it is a similar, but lawful, act or omission of the same Defendant.

Chester

21. Chester was a case of negligent failure to warn of the risks of an operation: the Claimant should have been warned of a small but recognised risk, in the order of 1-2%, that, if she had the operation, she could contract a condition known as cauda equina syndrome without any negligence on the part of the surgeon in carrying out the operation. She had the operation and the risk eventuated. The evidence showed that, properly warned, the Claimant would not have had the operation when she did, but that she would have had it (or at least an operation involving the same risk) on some later occasion. Because the risk was so small, and

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was random (ie not a risk which would always materialise in her), she was able to satisfy the “but-for” test. However, it was argued for the Defendant that she should fail because she was unable to prove that the Defendant’s breach caused the risk to be any greater. To put it another way, the scope of the duty to warn of the risk of surgery is confined to the question whether or not to have the surgery at all, not when to have surgery. Thus, once it was shown that the Claimant would have consented to surgery on some later occasion, the damage occurring in that operation was not caused by the negligence because it was not within the scope of the duty. The House of Lords accepted these arguments in principle. However, by a majority of 3-2, they held that, even though the Claimant should fail on normal causation principles, they would make an exception to those principles in respect of this particular breach and allow her to succeed on the basis of “but-for” causation alone, even though, in traditional terms, the injury was coincidental.

22. Again, as in Fairchild, this exception to the usual rules (here, not an exception to the “but-for” test but to the third general principle, that the damage must be within the scope of the duty by reason of the risk of the damage being increased by the breach) was expressed to be a limited one, intended to be a specific protection of the right of autonomy which a person should enjoy over his or her body. The majority judges emphasised that they were influenced by the fact that the damage sustained was damage from the very risk against which the Claimant should have been warned. Two points should be noted. First, the majority judges did not suggest that the Claimant should not still have to satisfy the “but-for” test. Thus a Claimant will fail unless she can prove that she would not have had the operation when she had it, and that, if she had had it on a later occasion, on the balance of probabilities the risk would not have eventuated. Secondly, the Claimant will only succeed if

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the damage sustained is the very damage against which she should have been warned. Otherwise, the House of Lords accepted that the Defendant's arguments were generally right, and in that sense the case is authority in support of the general principles expounded in paragraphs 5 and 6 above.

23. Attempts have since been made to extend the Chester exception and make it more widely applicable, and these have failed. See, for example, *White v Davidson* (18 November 2004) where Arden LJ said:

“There are no such policy considerations in the present case. If there were, then it would be difficult to distinguish this case from any other case of professional negligence on the part of a lawyer or accountant. None of the long-established authorities on causation was overruled by the House of Lords in *Chester v Afshar*. For these reasons, it would not, in my judgment, be right for this court to apply *Chester v Afshar* in preference to those traditional principles already summarised by Ward LJ. The basic rule remains that a tortfeasor is not liable for harm when his wrongful conduct did not cause that harm.”

Gregg

24. Finally, the third case in which the issue of causation has recently been considered by the House of Lords is *Gregg v Scott*. Again, this can be considered relatively briefly as it does not disturb in any way the principles of causation as I have expounded them. Dr Scott was Mr Gregg's GP, and he negligently failed to diagnose cancer with the result that there was a delay in treatment. The effect of this delay was to reduce Mr Gregg's chances of 10 year survival from 42% to 25%. Either way, though, it was

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thought that, on the balance of probabilities, the Claimant was not going to survive 10 years. He claimed that he was entitled to damages representing his reduced chance of surviving 10 years and this claim was rejected by the House of Lords. It was held that, at least in cases of clinical negligence, there is no valid claim for a lost chance and this was not a head of loss in its own right. A Claimant is, of course, entitled to claim damages if he can prove that, as a result of another's negligence, his expectation of life has been reduced and he has a valid claim arising out of such reduced life expectation. But the burden of proving the causal connection between the negligence and the reduced life expectation remains on the Claimant but the standard of proof remains the balance of probabilities. If the damage claimed is, as in Gregg's case, non-survival beyond 10 years, then if he cannot prove that, but for the negligence, he would, on the balance of probabilities, have survived beyond 10 years, then he fails. Here, the Claimant could not do so because, even without the negligence, his chance of surviving 10 years was only 42%, so, on the balance of probabilities, he was going to die within 10 years anyway. It was held that a Claimant cannot get around such causation difficulties by making his head of claim, instead of death within 10 years (or non-survival beyond 10 years) the loss of the chance of survival beyond 10 years.

25. I would wish to make 2 comments about Gregg's case. First, the case was bedevilled by the way in which it was put, namely loss of the chance of survival beyond 10 years. 10 year survival may be a useful prognostic tool in medical terms, but it seems to me to be nonsensical in legal terms. The sensible way to have put the case would have been (i) to prove what the Claimant's expectation of life would have been if the treatment had been instituted earlier, when it should have been, (ii) to prove what his expectation of life in fact was, and (iii) to claim damages for the difference. Secondly, there seems to be a dichotomy between the ability to claim

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damages for loss of a chance in cases of solicitors' negligence, for example for loss of the chance of successfully pursuing lost litigation, and the ability to claim damages for loss of a chance of a better outcome in medical cases. In a recent lecture, Lord Hoffmann recognised this dichotomy and accepted that, at some stage, the two lines of authority may have to be reviewed and reconciled by the House of Lords. Perhaps the most appropriate vehicle would be a claim against a solicitor for the lost chance of pursuing a claim in clinical negligence against a hospital for the lost chance of a better outcome!