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# 'Breach of Duty Causing Harm?'

## Recent Encounters between Negligence and Risk

Jenny Steele\*

### Introduction—Visions of Negligence and Current Challenges

Through analysis of three important recent cases,<sup>1</sup> this lecture explores fundamental questions about the essential criteria of the tort of negligence, and most particularly the role of 'damage'. It argues that certain current problems can be best understood by accepting that the tort of negligence is typically concerned with allocation of the risk of accidental damage. This core concern of the tort of negligence is best reflected in an integrated approach to the various components of the tort, including both duty and damage.

The criterion of damage is essential to the tort of negligence. Damage has even been called the 'gist' of the tort.<sup>2</sup> In the absence of damage, 'negligence' is not actionable. Breach of duty without damage (like carelessness without breach of duty) does not 'assume the legal quality of negligence' at all, according to Lord Macmillan in *Donoghue v Stevenson* ([1932] AC 562, 618–9):

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness where there is a duty to take care and where failure in that duty has

\* My thanks are due to Nick Wikeley, Jon Montgomery, Kit Barker, Rob Merkin, and Telford for input of various sorts. They may not agree with all of the views expressed.

<sup>1</sup> *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134; *Barker v Corus* [2006] UKHL 20, [2006] 2 WLR 1027; *In re Pleural Plaques* (also reported under the name *Rothwell v Chemical and Insulating Company Limited*) [2006] EWCA Civ 27, (2006) 4 All ER 1161.

<sup>2</sup> See J Stapleton, 'The Gist of Negligence: Part 2' (1988) 104 *Law Quarterly Review*, 389; also by the same author, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388–425. Other torts requiring damage include misfeasance in a public office (*Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395, *Karagozlu v Commissioner of Police for the Metropolis* [2006] EWCA Civ 1691), and the 'economic torts' (with the exception of inducing breach of contract). It is by no means clear

caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails consequences in [the] law of negligence.

The dividing line between torts of damage and torts that are actionable 'per se' (without proof of damage) is likely to grow in significance given the influence of the Human Rights Act 1998. For example, there is pressure to provide remedies through tort law—not just through actions under the Human Rights Act itself—where interests associated with or akin to 'Convention rights' have not been respected.<sup>3</sup> The relationship between these interests, and recognized forms of 'damage' and protected interests in the law of tort, is not straightforward. Such developments remind us that the tort of negligence is in no sense representative of the law of tort in general. Negligence is concerned with carelessly inflicted loss or damage, where this is caused through breach of a duty of care. Other torts exist which respond to quite different states of affairs. For example, there are torts that turn not on carelessly inflicted harm but on unlawfulness (of physical contact or restraint, for example) whether this leads to actual damage or not; on *intentionally* caused harm; on abuse of power or process; or on actions inconsistent with proprietary rights.<sup>4</sup> In addressing the relationship between the law of tort, and remedies for invasions of Convention rights, increasing attention is likely to be focused on these variations. For example, the tort of 'malicious procurement of a search warrant' is apt to protect interests which are within the Convention right stated in Article 8 ECHR, but it does so only on proof of 'malice'. In *Keegan v Home Office* [2003] EWCA Civ 936, the Court of Appeal declined to modify the requirement of 'malice' in this tort, where rights under Article 8 were engaged.<sup>5</sup>

Experience of damages awards under the Human Rights Act is also likely to focus attention on the contrasting nature of *compensatory* damages in the law of tort. Damages for violations of Convention rights are

that 'damage' ought to be defined in the same way in all torts, since it may play a different role in each.

<sup>3</sup> This issue was closely analysed by the House of Lords in *Watkins v Home Office* (above), with the conclusion that interference with a 'constitutional right' (itself a contested term) is not sufficient to fulfil the requirement of damage for the purposes of misfeasance in a public office. Neither can it justify waiving the damage requirement.

<sup>4</sup> Examples in each category are trespass to the person; the action in *Wilkinson v Downton* and the economic torts; misfeasance in a public office, malicious prosecution, malicious procurement of a search warrant; trespass to land and goods (respectively).

<sup>5</sup> In *Keegan v UK* (2006), the European Court of Human Rights determined that Article 8 was violated and that the failure to provide a domestic remedy in this case constituted a violation of Article 13. The facts of *Keegan v Home Office* arose before commencement of the Human Rights Act 1998. There would now potentially be a remedy under that Act.

more limited than tort damages both in terms of quantum and in terms of availability. All things considered, greater familiarity with actions designed to vindicate rights is likely to work against the previously popular idea that 'tort' should be rationalized under a single set of principles—modelled, no doubt, on negligence.<sup>6</sup> It will enhance awareness of tort functions outside the 'welfare function' which has been closely associated with negligence.

In summary, the law of tort has a variety of concerns and tort should not be conflated with negligence. This is becoming clearer in the Human Rights Act era. But our key point is that negligence in particular is concerned chiefly with accidental damage, and its distinctive character can be best understood in the light of this.

### The components of a negligence action

It can be said to be 'trite law' that liability in negligence has a series of requirements, all of them equally necessary. The following statement serves as an example:

It is trite that there are five requirements for the tort of negligence: (1) the existence in law of a duty of care; (2) breach of that duty; (3) damage; (4) a causal connection between the defendant's careless conduct and the damage; and (5) the particular kind of damage not being too remote...<sup>7</sup>

Admittedly, with the final requirement, it is impossible to maintain any convincing pretence of simplicity. There is no agreement on the best way of expressing this 'remoteness' component (let alone what it means). Some suggest we should ask whether the damage is 'within the scope of the duty' (see in particular Lord Hoffmann's judgment in *South Australia Asset Management Company v York Montagu* [1997] AC 191 ('SAAMCO')). This is an updated version of the 'risk principle' adopted in *The Wagon Mound*,<sup>8</sup> which was then regarded as turning on reasonable foreseeability.<sup>9</sup> In the *Wagon Mound*, the Privy Council held that a defendant in breach of a duty of care is liable only for those consequences which are a foreseeable consequence of the breach of duty. 'Foreseeability' at that time appeared to be the main element in justifying the existence of a duty of care, and the

<sup>6</sup> See B Rudden, 'Tortiles' (1991–2) 6/7 *Tulane Civil Law Forum* 105, listing around 70 known torts and proposing that the variations (being the product of historical accident) ought to be rationalized, or perhaps removed.

<sup>7</sup> Ward LJ, *Corr v IBC* [2006] EWCA Civ 331, [2006] 3 WLR 395, at [8].

<sup>8</sup> *Overseas Tankship v Morts Dock Engineering Co (The Wagon Mound)* [1961] 3 KB 560.

<sup>9</sup> See also M Stauch, 'Risk and Remoteness of Damage in Negligence' (2001) 64 *Modern Law Review* 191–214, who explicitly links 'scope of duty' analysis with an updated risk principle.

extent of recoverable damage was deliberately defined by reference to the 'risk' which justified the imposition of the duty. In more recent years, it has become obvious that a wider range of factors is relevant in determining whether a duty exists, and these factors are marshalled in terms of the *Caparo* 'three stage test'. In an 'advice' case, for example, the *purpose* for which advice is known to be required (and may reasonably be relied upon) is relevant to the question of whether the duty arises, given the use made of the statement by the claimant. Not surprisingly, these reasons for imposing the duty are also relevant to the question of which damage is recoverable. While the duty is (in terms of its content) a *duty to take care*, the risk thereby shifted to defendants in the event of breach is restricted. It is restricted for the same reasons that a foreseeability approach was adopted in *The Wagon Mound*: the extent of recoverable damage should reflect the risk against which the defendant ought to have protected the claimant; which is also the risk that can fairly be allocated to the defendant in the event of breach.

Others argue that analysis in terms of the 'scope of the duty' is nonsensical or circular. Instead, it must be asked whether the damage is within 'the scope of liability for consequences',<sup>10</sup> an idea which separates questions about the definition of recoverable damage (and liability) from ideas about the definition of duty. Like the 'risk principle' and 'scope of duty analysis', this 'scope of liability' approach also seeks to determine the 'remoteness' issue without reference to *causal* language. But it does not take an integrated approach to the criteria. We will return to this alternative approach in the discussion below.

It is notable that 'damage' is a distinct requirement in its own right. The criterion of damage has been the least emphasized of the requirements of negligence, becoming rather submerged in the requirements that damage must be '*caused by*' the breach, and that it must be not too 'remote'.<sup>11</sup> In two of the cases explored here (*Barker v Corus*, and *In re Pleural Plaques*), the nature of recoverable damage—in the latter case, material or sufficient damage specifically—was of central importance. In *Chester v Afshar*, the judgments proceeded for the most part on the basis that the nature of the damage was obvious (after all, the claimant had suffered severe

<sup>10</sup> J Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences', above at n 2.

<sup>11</sup> This point was made, and an important move made to redress the balance, by Jane Stapleton, in 'The Gist of Negligence: Part 2', above at n 2. More recently, the emergence of *novel* forms of damage in the tort of negligence have been considered by C Witting, 'Physical Damage in Negligence' (2002) 61(1) *Cambridge Law Journal* 189–208, and D Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *Modern Law Review* 59–88. See the discussion of *Chester v Afshar*, below.

personal injury). Lord Hoffmann addressed the possibility that the damage ‘caused by’ the breach of duty was not in fact the physical injury, but his analysis of the link between breach of duty and eventual damage was incomplete. Had a very slightly different analysis been adopted, the nature of the protected interest and of recoverable damage, rather than the criteria for showing factual causation, might have been recognized as the real questions to arise from the case.

### Breach of duty, or accidental damage?

Why did we begin by drawing attention to the full set of criteria for an action in negligence, particularly given that we stated them to be a matter of ‘trite law’? Two very different interpretations of the tort of negligence are at large, giving different weight to different halves of the ‘trite’ negligence formula: breach of duty on the one hand; and causation of (‘not too remote’) material damage on the other. One of these approaches takes damage very seriously; the other concentrates far more on the breach of duty, and at best treats damage as a separate criterion. In some variations it does not treat damage as a *criterion* of the action in negligence at all, maintaining that compensation for damage is just one potential response to a breach of the duty to take care.<sup>12</sup>

#### *Taking damage very seriously*

The first of these two broad approaches takes damage very seriously as an integral aspect of the tort. This approach observes that at least since *Donoghue v Stevenson*, the tort of negligence has been moulded by the fact that *it is the chief tort of accidental loss or damage*. Indeed, this argument can be developed further, because the concern with accidental damage explains some of the reasons for the very dominance of negligence in modern tort law.

<sup>12</sup> N J McBride, ‘Duties of Care—Do They Really Exist?’ (2004) 24 (3) *Oxford Journal of Legal Studies* 417–441. McBride declares himself to be an ‘idealist’ about duties of care. He argues that they are ‘real’ in that they actually impose obligations to be careful (not just to compensate injured parties in the event of breach). Notably, the ‘idealist’ lawyer in his article, when advising a client company that it *must* comply with the duty to take care (there, a duty to recall a defective product), declines to offer any comment to the client on the liabilities that are likely to follow if the duty is breached, nor does the lawyer advise the client that these consequences will only follow if harm is caused. This is related to McBride’s promotion of non-compensatory damages and of injunctions against continuing negligence. Notably, the example is a case of deciding *whether* to abide by a duty to take care (reflecting on whether or not to take a particular step in order to protect consumers): it is not the usual case of ‘inadvertent’ negligence (n 17 and accompanying text, below).

Negligence has come to be at the centre of tort lawyers' consciousness partly because there is a lot of accidental damage around. Such damage is a social problem and tort liability, primarily through the tort of negligence, is one component in our current response to this problem. Tony Weir has suggested that many jurists think of negligence as the 'paradigm tort', 'for no better reason than that a great many people are mangled on the highway'.<sup>13</sup> This apparently throw-away remark is offered to a serious purpose: Weir was in the process of contrasting the tort of negligence with the actions in trespass, which do not depend on carelessness but primarily on unlawfulness. He expressly pointed out that preoccupation with *negligence* typically means preoccupation with issues of *safety*, which are not at the core of the trespass torts. 'If a defendant can say that he acted reasonably, a negligence lawyer will let him off, without bothering to distinguish the reasonable but erroneous belief that the projected behaviour was *authorised* from the reasonable but erroneous belief that it was *safe*.'<sup>14</sup>

A further practical reason why concern with 'accidental' damage puts negligence at the core of modern tort law is that such damage will be covered by the typical liability insurance policy, while more deliberate acts (such as fraud or wilful violence) will generally be excluded.<sup>15</sup> So a claimant who seeks compensation (as many do) will typically be well advised to express his or her claim in terms of negligence, unless the defendant has deep enough pockets to cover an uninsured liability.

This first view of negligence is often expressed in terms of allocation of *risks*. For the most part, negligence deals with losses that were a foreseeable result of the defendant's negligence but which were not desired by the defendant in any sense.<sup>16</sup> This view depends, to some extent, on

<sup>13</sup> T Weir, *A Casebook on Tort* (10th edn) (London: Sweet and Maxwell, 2004), at 322–3.

<sup>14</sup> *ibid.*

<sup>15</sup> On the other hand, *vicarious* liability for violent or indecent assaults, for example, may be interpreted as within the employer's insurance policy. In *Hawley v Luminar* [2006] EWCA Civ 18, (2006) IRLR 817, it was held that a violent assault committed by a nightclub bouncer was 'accidental' for the purposes of the employer's insurance policy—it was accidental in respect of the *employer*, who was the assured party, even though in other respects (for the purposes of limitation and contribution for example), the employer 'stands in the shoes of' the perpetrator. In *KR v Royal Sun Alliance* [2006] EWCA Civ 1454, insurance policies which excluded cover for deliberate acts by 'the assured', were held to exclude liability for acts of sexual abuse by managers and directors. The policies were interpreted, however, as not excluding liability for acts of sexual abuse by ordinary employees, as opposed to managers and directors. Such ordinary employees were not the 'assured'.

<sup>16</sup> It seems obvious that a duty to take care *could* be breached through deliberate behaviour. For example, deliberate bad driving is a breach of the duty of care owed to other road users at least as much as inadvertent bad driving. But it must be said that trespass cases such as *Letang v Cooper* [1965] 1 QB 232 and (particularly) *Stubbings v Webb* [1993] AC 498 are a barrier to this obvious conclusion. It is expected that the latter case will be closely

recognition that carelessness itself is a generally foreseeable event. Equally, that 'negligence' (carelessness) cannot be entirely eradicated while retaining mutually beneficial activities in which it is an unavoidable attendant hazard.<sup>17</sup>

From the point of view of this first approach, the criterion of damage is obviously vital. Until *Barker v Corus*, it appeared that at least in personal injury cases 'allocation of risk' meant that, if the criteria of the tort were fulfilled, the defendant was liable to *compensate the claimant for the actual damage that was suffered*—provided that was 'within the relevant risk'. As we will see, *Barker v Corus* seems to adopt the different possibility that the damage that is *caused by the breach* may be less than *the damage that is suffered by the claimant*. In retrospect, there are other cases that make a similar move, including *SAAMCO*, for example. Arguably, *Barker* simply applies the logic of *SAAMCO* in that it defines the relevant risk as something less than the damage suffered. But *Barker* is a personal injury case concerning fatal disease, and application of the logic of *SAAMCO* to such a case is a novel development. It is true that certain injuries and diseases have previously been interpreted as 'divisible' into parts caused and parts not caused by a particular defendant,<sup>18</sup> but this is an entirely different matter. Equally, the first two cases examined here (*Chester* and *Barker*) show very clearly that 'scope of duty' analysis is never *purely* an exercise in logic.

On this first view of negligence, the measure of damages is compensatory for the simple reason that this is what it means to allocate a risk. If damage within the risk occurs, that damage is borne by the defendant. If it does not occur, there is no tort (and no legal consequence through the law of tort). This much was stated by Lord Macmillan in *Donoghue v Stevenson*, as noted above. Recent cases take a more nuanced and purposive approach to duty, and therefore a more nuanced view of the relevant risk.

### Risk spreading

We cannot leave this model of negligence as it stands. Before moving to a second approach to negligence, we should note that a 'risk allocation model' of negligence tends to lead to other thoughts about risks. It is clear

examined by the House of Lords when it hears the appeal from *A v Hoare* [2006] EWCA Civ 395, (2006) 1 WLR 2320.

<sup>17</sup> Or to quote Tony Weir again, '*Errare Humanum Est*': see T Weir, '*Errare Humanum Est*', in P Birks (ed), *The Frontiers of Liability* (Oxford: Oxford University Press, 1994). BA Hepple, 'Negligence: The Search for Coherence' [1997] *CLP* 69–94, captures this idea in terms of the rise of 'inadvertent negligence'.

<sup>18</sup> *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405; *Holtby v Brigham and Cowan* [2000] 3 All ER 421; *Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242.



that risks, once allocated, do not always stay put. Risk *allocation* is typically the precursor to risk *spreading*. People pass risks on, mostly through insurance, though also through the pricing of goods and services. Risk spreading is not only permitted, nor even merely encouraged, but in certain key contexts is actually required, through compulsory liability insurance.<sup>19</sup>

For many reform-minded tort lawyers, the step to risk spreading through liability insurance (particularly but not only where that is compulsory) marks a step from personal responsibility to social responsibility.<sup>20</sup> This step changes the whole subject.<sup>21</sup> There are challenges now to this view that liability insurance signifies social responsibility. The more important of these challenges tend to reflect broader social change and have been most clearly understood from within the 'social responsibility' view itself.<sup>22</sup> The broader change of scene of which this forms part can be explained in terms of discourse about risk more generally. 'Risk spreading' (which is collective and mutual) has turned out to be a precursor to something much less collective and mutual. This next stage has been described by Baker and Simon in terms of 'embrace of risk'. Embrace of risk incorporates ideas about personal responsibility for risk planning and risk avoidance, and about the limited capacity of insurance to resolve problems of damage and loss.<sup>23</sup> It is important to notice that these developments are emanations of the risk distribution model, and are not simple returns to an old-fashioned idea of individualism. They proceed from consideration of *societal responses to risk*, and consider the implications of this for personal responsibility (for risk avoidance and risk planning, rather than the consequences of individual action), solidarity or selectiveness, and social justice.<sup>24</sup>

The risk allocation view—with or without the additional interest in risk distribution—could be called the dominant one.<sup>25</sup> But there is a second perspective which does not accept the risk allocation view even of

<sup>19</sup> In particular Road Traffic Act 1988, section 143; Employers' Liability (Compulsory Insurance) Act 1969. The practical impact of compulsory insurance on tort is assessed by R Lewis, 'How Important Are Insurers in Compensating Claims for Personal Injury in the UK?' (2006) 31 *The Geneva Papers* 323–339.

<sup>20</sup> Hepple, n 17 above.

<sup>21</sup> It also, quite commonly, leads to recommendations for wholesale reform of personal injury law.

<sup>22</sup> Hepple, n 17 above, and P Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable', in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996).

<sup>23</sup> T Baker and J Simon, *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago: University of Chicago Press, 2002), Introduction.

<sup>24</sup> J Steele, *Risks and Legal Theory* (Oxford: Hart Publishing, 2004).

<sup>25</sup> McBride suggests that nearly all English textbook writers on tort adopt this view. See N J McBride, 'Duties of Care—Do They Really Exist?' (2004) 24(3) *Oxford Journal of Legal Studies*, 417–41.

negligence law, and not even in respect of its core cases of accidental damage. This view is gaining currency.

*A more normative approach to negligence duties*

The second perspective favours the ‘breach of duty’ aspect. From this second perspective, the integrated approach, adopting a risk allocation model, does not take sufficiently seriously the role of duties in *requiring or prohibiting certain behaviour*. On one version, the risk allocation model is accused of treating negligence duties as *only* being about allocation of losses.<sup>26</sup> It may as well say that no primary duties to take care exist at all—the only duty is a duty to compensate, if ‘fault’ causes damage. Because the risk allocation approach (above) treats negligence on a continuum with other ways of allocating or spreading risk, it may not even treat negligence as a part of the law of wrongs at all.<sup>27</sup>

This second approach emphasizes the normative nature of tort duties. Negligence is part of a continuum not with other risk allocation mechanisms but with other civil wrongs. On some versions, this approach is equivocal about the damage requirement. It treats negligence chiefly in terms of right and wrong behaviour, rather than accidental harm. The damage requirement can be an impediment to taking duty seriously enough, and (one aspect of this) it tends to restrict the suitable remedies. As we saw, the risk allocation model holds that the measure of damages will (*prima facie*) be compensatory—if the risk eventuates, the party in breach will pay for the consequences. If the function of negligence is, instead, primarily to determine what parties are *obliged* to do (simply, *to take care*), then the remedies may well be more flexible. Punishment and deterrence may loom large.

The late Peter Birks, for example, criticized contemporary tort scholarship (and tort law) for its exclusive preoccupation with the ‘welfare’ function of tort.<sup>28</sup> Part of his criticism related to the limitation of tort remedies to ‘mere’ compensatory damages. As he argued, ‘the welfare-oriented system of civil liability’ failed ‘to meet the victim’s need for satisfaction where there really has been outrageous and malicious behaviour’. He bemoaned the fact that the House of Lords had ‘confined the civil law,

<sup>26</sup> See McBride, *ibid*.

<sup>27</sup> So, McBride and Bagshaw treat the action in *Rylands v Fletcher* (like liability under the Consumer Protection Act 1987) as an ‘alternative source of compensation’, *outside* the law of tort. See N J Bride and R Bagshaw, *Tort Law* (2nd edn) (London: Longman, 2005), Ch 44.

<sup>28</sup> P Birks, ‘Editor’s Preface’, *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon, 1996).

anomalies aside, to the compensatory function'.<sup>29</sup> In fact from the point of view of a study of accidental damage, *full* compensatory damages are inclined to look rather excessive.<sup>30</sup> But Professor Birks also wanted the 'normative' element of tort law as a whole to be more widely accepted. Civil wrongs, he argued, should be seen on a continuum with criminal law as a source of duties and obligations:

The law relating to civil wrongs has two aspects. One, encapsulated in the notion of compensation for loss, aligns it with social security. The other, more powerfully normative, emphasizes its exhortatory and retributive function. From the latter standpoint the law of wrongs, civil and criminal, forms a single social project, for deterring disapproved behaviour and avenging its victims.<sup>31</sup>

One difficulty with applying this approach to negligence in particular is that 'inadvertent negligence' (the usual kind) is common, entirely human, and impossible to eradicate fully from a wide range of desired activities. That is indeed one of the reasons why not all failures to take care assume the 'legal quality' of negligence (in Lord Macmillan's expression), even if they result in foreseeable damage. In effect, courts ask whether there are grounds for placing the risk of negligently caused harm with the defendant. They adopt a risk allocation approach. The decision whether to allocate the risk depends on many factors, which are channelled into the 'duty of care' enquiry. The nature of the risk whose allocation to the defendant is thought to be justified in this way cannot be expected to be wholly irrelevant when determining the range of compensable damage.

<sup>29</sup> *Rookes v Barnard* [1964] AC 1129. Although more recently the House of Lords in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 removed the 'cause of action' limitation for exemplary damages, it did not do so out of great enthusiasm for exemplary damages and Lord Scott in particular was tempted to abolish them altogether. On the other hand Lord Hutton thought they were of particular use for civil liberties torts, and this reinforces our earlier argument that such cases may restore to prominence a less welfare-oriented function for some aspects of tort law.

<sup>30</sup> See P Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable', in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996). As we have noted, tort damages may also appear high when compared with damages under the Human Rights Act 1998. See the Law Commission's recent discussion of monetary remedies in claims against public bodies: Law Commission, *Remedies Against Public Bodies: A Scoping Report* (London: Law Commission, 2006).

<sup>31</sup> See Birks, above at n 28, vi. It seems important to note in passing that this is also a controversial statement of the purposes of criminal law. Indeed, the risk-based approach to tort law (or, more properly, the tort of negligence) has been a significant influence on developing a theory of 'actuarial justice' in respect of *criminal* law: see most recently M Feeley, 'Origins of Actuarial Justice', in S Armstrong and L McAra (eds), *Perspectives on Punishment: The Origins of Control* (Oxford: Oxford University Press, 2006).

### An integrated approach

This last point underlines the value of an integrated approach to the essential criteria of negligence. This approach treats the various criteria—breach of duty, and causation of actionable damage within the risk (or scope of duty)—as closely related. Duty is important to this model, but not in a way that would satisfy the more purely ‘normative’ approach. It holds that the nature of the duty of care itself can only be understood with some reference to the *consequences* of breach—both in terms of damage to the claimant, and in terms of liability for that damage. Indeed the likely consequences are a key consideration in deciding whether a duty is imposed. The integrated approach is a risk allocation approach, and it is exemplified by key cases such as *Donoghue* and *Caparo*, as well as *SAAMCO* and *The Wagon Mound*.

The main judicial proponent of a strongly integrated approach to duty and damage has been Lord Hoffmann.<sup>32</sup> In particular, Lord Hoffmann has developed an approach in which the range of recoverable losses is determined partly by the purpose and scope of the duty of care in a particular case. This gives us special reasons for focusing upon the dissenting judgment of Lord Hoffmann in *Chester v Afshar*, as well as his opinions in *Fairchild* and (in the majority) in *Barker v Corus*. ‘Scope of duty analysis’ has been criticized as both subtle, and subjectively evaluative.<sup>33</sup> This is not necessarily a decisive argument against it, but it will be important to identify the evaluative elements at work, especially where they are obscured by apparent exercises in logic. This is especially important in relation to *Barker v Corus*, where the criticism (that scope of duty analysis hides evaluative judgments) hits home hard. More fundamentally, the approach has also been criticized as ‘circular’.<sup>34</sup> This is an argument against integration of negligence criteria. I hope to illustrate that although scope of duty analysis is evaluative, and cannot answer all questions that might be referred to as ‘remoteness’ questions, nevertheless some (very important) issues and problems can be illuminated through analysis of the scope and purpose of the duty imposed on the defendant. These are not merely circular or nonsensical ideas. Our approach therefore is to suggest that ‘scope of duty’ or ‘scope of risk’ analysis is both potentially useful (in clarifying the nature of the problems faced), and potentially dangerous (if allowed to hide the evaluative nature of solutions adopted, behind a façade of apparent logic).

Lord Hoffmann has recently expressed acceptance that the language of ‘scope of duty’ is misleading and should change.<sup>35</sup> Perhaps as a

<sup>32</sup> See in particular his exercise in ‘scope of duty analysis’ in *SAAMCO*.

<sup>33</sup> See J Stapleton, ‘Cause-in-Fact and the Scope of Liability for Consequences’, n 2 above.

<sup>34</sup> *ibid.*

<sup>35</sup> L Hoffmann, ‘Causation’ (2005) 121 *Law Quarterly Review* 592–603.

consequence, the expression 'scope of duty' does not appear in his judgments in the cases considered here, although other judges have adopted it.<sup>36</sup> But it will be suggested that interpretation of the purpose of the duty is one of the determining factors in the judgments explored and partly defines the nature of the damage that is thought to be recoverable. Whether or not the expression 'scope of duty' is used, this is an integrated approach and unpacking this can help to illuminate some of the puzzles encountered in these cases.

Central to this integrated approach is that the duty of care is to be understood as a duty to avoid some particular consequence (or damage to some particular interest). It is not simply a duty *to take care*, but to take care *not to expose the claimant to certain risks*. This approach is evidently risk-based. As we have said, it updates the 'risk principle' of *The Wagon Mound*. The main rival to this view is, as we have seen, the idea that *a duty of care simply requires the person under the duty to be careful*. Consequences are dealt with by an entirely separate set of rules relating to remedies. This is hard to reconcile with the words of Lord Macmillan in *Donoghue v Stevenson* quoted towards the start of this lecture, and with significant intervening cases. Although the latter interpretation of negligence duties is chiefly associated with an approach to negligence which downplays its role in dealing with accidental damage, it is worth noting that Jane Stapleton's very influential writings seem to take a hybrid form from this point of view. Damage, according to Stapleton, is the 'gist' of the tort of negligence.<sup>37</sup> But at the same time, the only meaningful interpretation of the 'scope' of a duty of care is that it obliges the party subject to the duty to be appropriately careful.<sup>38</sup>

In summary, the argument over an integrated approach to the criteria of the tort of negligence tends to reflect debate about the very purpose and function of the tort as outlined above. The integrated approach is a risk allocation approach. The normative approach to duties by contrast requires separation of the criteria, and this is bound up with rejection of the idea that negligence is concerned with allocation of risk. Separation of the criteria has also been urged on the different grounds that integration hides evaluative judgments (which it certainly may) and is merely circular (which we will suggest it is not).

<sup>36</sup> The expression occurs in the opinion of Lord Walker in *Chester v Afshar*, and Lord Hope in the same case uses the analogous expression 'scope of the risk'. Both Ward LJ and Wilson LJ used the expression 'scope of duty' in *Corr v IBC* [2006] 3 WLR 395, although they did not find it useful for disposing of that case. It seems to be putting it too strongly to call the expression 'discredited', as does Stapleton: see J Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 (Jul) *Law Quarterly Review* 426–448.

<sup>37</sup> J Stapleton, 'The Gist of Negligence: Part 2', above at n 2.

<sup>38</sup> J Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences', above at n 2.

## The Case Law in Brief—The Role of Risk

All of the cases discussed here have some connection with risk; but we will have to decide what that connection is. We should also note that the cases involve not only negligence but also claims for breach of statutory duty. The issues in connection with this action are substantially similar to those that arise in respect of the negligence action. If anything, the integration claim is all the stronger (or more obvious) in connection with the action in tort for breach of statutory duty. The duty in question clearly ‘exists’ whether it is actionable in tort or not, in the sense that the relevant statute ‘obliges’ the defendant to act in a particular way. For example, penalties may attach to breach of the duty, or there may be scope for judicial review. But a remedy is available in tort only if it is thought that appropriate Parliamentary intent is present. At the very least, it must be thought that Parliament intended the duty to be *for the benefit of* the claimant, in the sense of protecting the claimant from the type of harm that actually came about (*Groves v Wimborne* [1898] 2 QB 402). The definition of the type of harm, as well as the relevant class of claimants, is essential to the decision that the breach is actionable at common law (see also *Gorris v Scott* 1874 LR 9 Exch 125).

As part of her argument against an integrated approach, Jane Stapleton has sought to make a sharp distinction between statutory duties, and negligence duties, in this respect. She argues that it makes sense to discuss statutory duties as having the avoidance of a particular ‘mischief’ as their purpose, but that to suggest there is a specific ‘purpose’ to a tort duty (beyond imposing a duty to be careful) ‘is no more than a crude bootstraps argument’.<sup>39</sup> We have already proposed that this is not the case, since negligence duties are defined partly in terms of the consequences of breach. The explicit terms in which courts decide whether a duty of care is owed also make it quite unconvincing to maintain that duties of care in negligence can never be said to have a specific ‘purpose’ which can be gleaned from the relevant case law.

### *Chester v Afshar*

*Chester* concerned a failure to advise of risks. I prefer to say ‘advise’ rather than ‘warn’ because warnings aim to make people safe, or enable them to

<sup>39</sup> J Stapleton, ‘Occam’s Razor Reveals An Orthodox Basis for *Chester v Afshar*’, at n 36 above, at 434.

choose safety. On the particular facts of *Chester v Afshar*, the failure to advise did not make the claimant less safe. This lay behind what was perceived to be the 'causal problem' (which was however not entirely clearly identified). The case can help us to understand a great deal about the relationship between the action in negligence, risks, and damage. It also illustrates the benefits and the limitations of scope of duty analysis.

### *Barker v Corus*

*Barker v Corus* concerned several claims in respect of fatal cancers sustained, almost certainly, as a result of occupational exposures to asbestos dust. The only connection with the disease that could be shown against any given employer on balance of probabilities was that their breach of duty had increased the risk of contracting the disease. On the face of it, the majority in *Barker* held the defendants liable for an increase in the risk of injury, rather than for the injury itself. The increased risk was the relevant 'damage' which was caused by the breach of duty (even if it was not the damage suffered by the claimant), and compensation was to be assessed accordingly. We question below whether this can be taken entirely literally. But the degree of consistency between Lord Hoffmann's dissenting judgment in *Chester*, and his leading majority judgment in *Barker*, is interesting. In *Chester* the failure to advise did not increase the risk of injury and Lord Hoffmann argued (in dissent) that the breach had not caused the injury. In *Barker* the defendant had increased the risk and Lord Hoffmann (together with Lords Scott and Walker) thought this increase itself could, within the ambit of the *Fairchild* exception and subject to other provisos, stand in as damage. Is this a departure from the 'risk principle' (updated by scope of duty analysis), or an application of it?

In respect of mesothelioma, the actual effect of *Barker* was very quickly reversed by section 3 of the Compensation Act 2006. We will explore the reasons of justice and fairness behind this reversal; and also explore the potential for *Barker* to retain an influence in the law's development.

### *In re Pleural Plaques*

At this time of writing the final case has not yet arrived in the House of Lords.<sup>40</sup> It concerns another series of claims concerning occupational

<sup>40</sup> The appeal is expected to be heard in June 2007.

exposure to asbestos dust, but the injury sustained by the claimants is quite different. By a majority, the Court of Appeal rejected the idea that exposure to risk was damage sufficient for an action in negligence (in this case, the risk was of future disease). It also rejected a claim that such a risk amounted to damage when combined with physical changes which were themselves too 'trivial' to be actionable. And the Court of Appeal further rejected a claim that these two counted as damage when combined with anxiety brought on by awareness of the physical changes, which acted as a marker of exposure to risk. None of these three forms of 'damage' being actionable individually, neither were they actionable in combination.<sup>41</sup> Though the treatment of risk as not damage is apparently at odds with the *Barker* approach, the cases are of course narrowly distinguishable. At a more principled level though it may be hard to explain why risk creation counts as damage in one context but not in another.

Perhaps this is why all of the majority's reasons from start to finish were expressed not in terms of principle but of 'policy'.<sup>42</sup> Was this an extreme effort to avoid setting out dangerous statements of principle which might affect other areas, such as claims for loss of chance in cases of medical misdiagnosis? If so, the case underlines the extent to which causal 'principles' are becoming much more fragmented and variable as between different types of case, with the result that it is difficult to draw distinctions in a particularly convincing way. The Court of Appeal was treading an uncertain line between *Barker*, where the gist of the action was increase in risk because this was all that could be proved, and the medical negligence cases of *Hotson v E Berkshire AHA* [1987] AC 750 and *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, where loss of a chance of recovery could not amount to actionable damage, even though proof of any more than this was impossible for similar reasons. We will need to ask how convincing the policy reasoning was in this case, and whether any additional unspoken factors influenced the majority.

<sup>41</sup> Hence the graphic expression, borrowed from counsel and used in the title of an article by Dominic de Saullès, 'nought plus nought plus nought equals nought': see D De Saullès, 'Nought Plus Nought Plus Nought Equals Nought: Rhetoric and the Asbestos Wars' (2006) 4 *Journal of Personal Injury Law* 301–36.

<sup>42</sup> A different strategy to a similar end was adopted by Smith LJ in dissent: on this analysis, the question of 'material damage' is primarily a question of fact, rather than legal principle.



## The Case Law in More Detail: Duty, Damage, or Causation?

### *Chester v Afshar*

Miss Chester had been suffering from chronic back pain for many years, and this had been 'conservatively' treated through a series of injections. Her doctor finally advised that she should consider surgery, and mentioned Mr Afshar. Miss Chester had a general fear of surgery. She consulted Mr Afshar, who (it seems) did not mention to her the small (1–2%) risk of major complications which was inherent in the surgery proposed. These complications were realized, and Miss Chester was left with serious impairments of bodily movement to an extent that was yet to be finally determined. The case was treated, in effect, as one where the surgeon had failed to advise a patient of the risks inherent in unavoidable surgery. We need to consider what is meant by this.

### *Inherent risks*

The risks were inherent in the sense that no amount of care would avoid them, if the surgery was carried out. We can assume that there is no more careful and experienced surgeon than Mr Afshar, and that there was no lack of care in the conduct of the surgery. The risks cannot be lower than they were when the operation was conducted. The realization of the risk was, in this specific sense, a matter of mere chance.

### *Unavoidable surgery*

The idea that the surgery was unavoidable is more contested. Jane Stapleton has argued that surgery is never unavoidable. We are always entitled to refuse surgery, if we wish to do so—even if this will result in death—provided we are 'competent'. *Therefore*, she does not accept that in such a case, the risk is not increased by the failure to advise:

Since warned patients may choose never to have the operation, they *can* affect the rate of the risk eventuating. . . . In medical failure to warn cases, then, the deleterious outcome of breaches are not coincidental outcomes, as had been the case in the case of lightning striking the ambulance, because here *breaches of the obligation to warn patients will tend to increase the incidence of the medical risk occurring*.<sup>43</sup>

<sup>43</sup> J Stapleton, 'Occam's Razor Reveals An Orthodox Basis for *Chester v Afshar*', at n 36 above, at 443.

But the surgery in this case was not treated by the majority judges as ‘unavoidable’ in any *general* sense, and the House of Lords did not consider itself to be addressing general questions of what would *tend to be* the case. Rather, it was accepted after assessment of the evidence that this particular claimant would, if fully advised of the risks, have delayed surgery. But it was also treated as established that Miss Chester would eventually have relented and undergone the same procedure, facing the same (inherent) risk. It is not simply that the surgeon decided that the surgery was inevitable. It was found in this *particular* case, as a matter of fact, that the particular claimant would eventually have undergone the same surgery, facing the same risks. It is for this reason that the House of Lords proceeded on the basis (denied by Jane Stapleton) that the failure to advise *did not increase the risk of the adverse outcome*. The failure to advise did not make the claimant any less safe, because her final decision would have been to undergo the surgery, which could not have been made any safer.

Between them, these elements of the factual context (the risk was inherent; and the surgery would on the facts have been undergone anyway) were taken to mean that the failure to advise did not enhance the risk faced by the claimant. This factor is all-important. It is the simple reason why an ‘orthodox’ interpretation of *Chester* (as Stapleton describes it) is not possible. If the risk *had* been increased by the failure to warn, then the injury suffered would indeed fall within the risk against which the warning should have protected. Factual causation would be present since the ‘but for’ test is satisfied (an issue explored below); and the injury would also fall within the ‘risk’ that should have been avoided, or reduced, by giving a warning. This is in fact a far simpler route to an ‘orthodox’ solution than Stapleton’s own, because she rejects the worth of the idea that the damage is ‘within the risk’.

Importantly, Stapleton concedes—from her ‘general’ vantage point—that if the ‘overall incidence of outcomes’ was not affected by the breach (which is to say, if risk was not increased by the failure to warn or advise of the risks), then no such ‘orthodox’ interpretation would be possible. Further, she concedes that in such a case a remedy would require recognition that what is protected is the claimant’s *autonomy*, not her *physical safety*. In fact, the duty to warn (advise) would be imposed ‘to protect an interest not previously protected by the tort of negligence in England’ (Stapleton (2006), at 442).<sup>44</sup> That is indeed the interpretation explored below. But it seems that in making this point Stapleton slips some way towards an ‘integrated’ approach, since she thereby concedes that duties

<sup>44</sup> Stapleton, *ibid*, 442.

are to some extent purposive—the duty here would exist ‘to protect’ a particular interest. Indeed, the tort duty would be defined partly in terms of the interests which it exists to protect.<sup>45</sup>

The House of Lords took it to be uncontroversial that the failure to advise was a *breach of duty*. It has been widely noted that this element of the case is hard to reconcile with *Sidaway v Bethlem Royal Hospital* ([1985] AC 871).<sup>46</sup> It is momentous because it appears to recognize a duty to obtain genuinely informed consent which has not previously been fully recognized in English law—and to do so through the tort of negligence (rather than in trespass to the person, where consent is well established to be an important element). An attempt could be made to reconcile the case with *Sidaway* by explaining that the claimant here is in the special category of patients who are inquisitive: *Sidaway* suggested that in such a case, questions must be answered truthfully. But the House of Lords did not attempt to do this. Alternatively, it can be argued that the inconsistency between the cases was the product of a mere concession. The defendant did not argue that there was no duty to advise of the risk. He argued instead that he *had* advised of the risk. But the majority judges made clear that they were not merely accepting a concession. They strongly endorsed the importance of the duty to advise in these circumstances.

### The central role of duty in *Chester*

Referring with approval not only to Ronald Dworkin’s analysis of patient autonomy,<sup>47</sup> but also to Michael Jones’ analysis ‘Informed Consent and Other Fairy Stories’,<sup>48</sup> the majority embraced the existence of an important duty to give information which will allow the patient to make an informed choice. This duty is still enforced through liability even if (as here) the final choice as to whether to undergo the surgery is unlikely to have been any different. The overriding goal is to prevent the doctor from making a choice which should lie with the patient. It may be pointed out that this is not a pointless or unreal exercise, since a patient may have very

<sup>45</sup> This is the approach to negligence duties which is rejected as a ‘crude bootstraps argument’ by Stapleton when she contrasts the action in negligence with breach of statutory duty.

<sup>46</sup> The risk was very similar in terms of its size and gravity to the one in issue in *Sidaway*, where there was held to be no duty to inform.

<sup>47</sup> R Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (London: Harper Collins, 1993): see the analysis of Lord Steyn’s judgment, below.

<sup>48</sup> M Jones, ‘Informed Consent and Other Fairy Stories’ (1999) 7 *Medical Law Review*, 103; see the judgment of Lord Hope.

different views from the doctor concerning the stage at which her current situation becomes intolerable, or at which she is sufficiently reconciled with the risk to undergo surgery.

But it is with the recognition of the duty as *protecting the patient's autonomy or right to choose* that the problems start. What follows may be complex, but a shorthand version of the reasons may be offered from the start. Negligence is primarily a tort concerned with safety. The breach of duty in this case violated the right to choose, rather than making the claimant any less safe.

The *scope of the duty* or *the nature of the duty* was discussed to some extent by all the majority judges. This in itself suggests that the nature of the duty to take care was not regarded as exhausted—as both McBride and Stapleton would propose—by saying that the defendant under the duty is obliged to take care. At the very least, such duties aim at protecting a particular interest or set of interests. In dissent, Lord Hoffmann adopted a particular analysis of the duty in this case, as a ‘duty to warn’. On this analysis, he thought there *was* a causal problem. We will suggest that he was probably right about this, although there is some uncertainty how to categorize that problem. To escape this difficulty, Lord Hoffmann also considered an alternative, which is that the protected interest was not *safety*, but *autonomy*.<sup>49</sup> But he thought damages for the consequential injury (paralysis) were not available on this analysis. He did not fully explain why not, and it seems that this conclusion turns on assumptions about what is ‘within the risk’ addressed by the duty understood in this way. Notably, the relationship between the protected interest, and the recoverable damage, is not straightforward if this path is taken. So the case illustrates both the value of scope of duty analysis (it is not merely circular); *and* its limitations. The final stage (should there be liability for all the consequences?) is evaluative. It is evaluative in the same way that the decision whether to impose a duty of care is evaluative. It concerns the definition of the risks that are appropriately allocated to defendants.

### The nature of the duty: Lord Steyn's approach

Lords Hoffmann and Steyn (in the minority and the majority, respectively) each saw that there were two different potential formulations of the

<sup>49</sup> It will be recalled that this is the analysis that Jane Stapleton proposes *would be correct if we ‘pretend’* (or in our case, accept) that the risk is not increased by the failure to advise.

duty. Lord Steyn emphasized the 'autonomy' version rather than the 'safety' version:

[18] ... A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.

Lord Steyn then quoted a passage from Dworkin's *Life's Dominion*, which begins:

The most [plausible] account emphasises the autonomy rather than the welfare of the choosing agent ...

Lord Steyn chose to take the 'autonomy' path. But he took that path *within* the tort of negligence, where (as Stapleton notes) protection of *autonomy*, as opposed to welfare, is not traditional.<sup>50</sup> Lord Steyn's judgment is compelling in terms of its identification of the purpose of the duty concerned, but rather less compelling in terms of its treatment of causation questions. He conceded that the case 'cannot neatly be accommodated within conventional causation principles' ([22]), but did not specify why not; and he drew a very loose analogy with the case of *Fairchild v Glenhaven* ([2003] 1 AC 32) which, as we will see, involved an entirely different problem. His conclusion was that the claimant had not given 'informed consent', *and therefore*:

[24] ... Her right of autonomy and dignity ought to be vindicated by a narrow and modest departure from traditional causation principles.

He did not identify what that departure was; nor did he indicate why vindication of a right to autonomy justifies compensatory damages assessed in terms of consequential personal injury. So in a sense there is little that can be gleaned from Lord Steyn's reasoning, other than the dominance of the right to autonomy and dignity. This right was sufficiently important to justify departure in some unspecified way from an unspecified causation principle.<sup>51</sup>

<sup>50</sup> See *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 where (by a majority) the House of Lords awarded a 'conventional sum' of £15,000 in respect of what might be termed 'autonomy damage', in the form of negligent interference with the claimant's right to self-determination. Lord Steyn (in the minority) did not accept the validity of this award. Lord Hope joined Lord Steyn in dissent: this aspect of *Chester* is discussed by S Bailey, 'Three Puzzles About Tort Causation', paper delivered to the Torts Subject Section, Society of Legal Scholars Conference, University of Keele, September 2006.

<sup>51</sup> Lord Steyn referred with approval to the analysis of T Honoré, 'Medical Non-Disclosure, Causation and Risk: *Chappel v Hari*' (1999) 7 *Torts Law Journal* 1–8. As

### The nature of the duty: Lord Hoffmann's dissent

Lord Hoffmann, by contrast, primarily emphasized the welfare or risk avoidance version of the duty, which would more typically be associated with the tort of negligence.

[28] . . . the purpose of a duty to warn someone against the risk involved in what he proposes to do, or allow to be done to him, is to give him the opportunity to avoid or reduce that risk. If he would have been unable or unwilling to take that opportunity and the risk eventuates, the failure to warn has not caused the damage. It would have happened anyway.

Without the last sentence, Lord Hoffmann would have correctly stated the problem that arises if the duty is a duty to *warn*. Unfortunately, the final sentence is incorrect, as demonstrated by Jane Stapleton.<sup>52</sup> But it is also an unnecessary addition.

On the facts of this particular case, it is *not* true that the damage would have happened anyway. The occurrence of the damage was a remote risk which would have attached to the surgery conducted on any given occasion. Had the claimant delayed surgery, then with hindsight (which is how we apply the 'but for' test), the damage *would not* have occurred anyway. What Lord Hoffmann could equally effectively have said is that 'the risk would have been the same anyway'. This would have been correct, and it would have made his point equally effectively. The point of the duty is to avoid the risk (or allow the risk to be avoided). The duty was breached; but on the facts the risk would not have been avoided if the 'warning' had been given.

This is precisely why Tony Honoré thought that a similar breach of duty in a similar case in Australia *had not caused* the injury—though he saw perfectly clearly that the 'but for' test was satisfied.<sup>53</sup> (A distinction between the two cases is that in *Chappel v Hart*, it is possible that the patient could, if aware of the risk, have chosen a slightly more experienced surgeon, and thus perhaps might have reduced the risk to some minor degree). It is a hallmark of the Hart and Honoré approach to causation that the 'but for' test is not seen as a sufficient test by which to identify 'causes'. It only identifies 'conditions precedent', and not all of these

explained below, Honoré identifies the causal problem with the fact that the risk of harm was not increased.

<sup>52</sup> See J Stapleton, 'Occam's Razor Reveals An Orthodox Basis for *Chester v Afshar*', above at n 36.

<sup>53</sup> See Honoré, above at n 51, commenting on *Chappel v Hart* 195 CLR 232.

deserve the name 'cause'.<sup>54</sup> This case could be taken to suggest that Hart and Honoré had a point in this respect. The 'but for' test is satisfied, but in such an unsatisfying way that the mind tends to reject the conclusion that this is the case.<sup>55</sup> Given that the 'but for' test *is* satisfied, it seems intuitively that something from the idea of a 'cause' is still missing. The question is whether that 'something' flows from general ideas inherent in the language of 'causation'; or from the nature and purpose of the duty that was breached. Is it a linguistic or a legal 'something'?

According to Honoré, a failure to warn that does not increase risk is simply not a cause of the damage that follows. Saying otherwise is not a 'modest adjustment' to causal principles. It is setting aside causation from the breach as a requirement. This is very important because it illustrates that a solution which appears to have been favoured by Lord Walker and (possibly) by Lord Hope is not available if one accepts Honoré's argument (as, it appears, they did). One cannot evade the absence of *factual* causation—and Honoré proposes that it *is* absent—by stepping sideways into *legal* causation.<sup>56</sup> Legal analysis—whether in the form of analysis of the scope of the duty or the scope of the risk, or not—has never been intended to make up for absence of factual causation. It is therefore not enough to say that the damage is 'within the risk' (a non-causal idea) if it does not satisfy applicable causal tests. On the other hand, Honoré's solution was to say that there should be *strict liability* (as opposed to liability in negligence), not for the consequences of the breach of the duty to warn, but for the consequences of the *surgery*, which had been carried out without informed consent. This tends to suggest that the problem—that risk had not been increased—is not entirely about the idea conveyed by the word 'cause' (it is not entirely a linguistic 'something' that is missing), since the role of risk is determined partly by the legal question that is asked. If the tortious conduct is defined as 'surgery without informed

<sup>54</sup> H L A Hart and T Honoré, *Causation in the Law* (2nd edn) (Oxford: Oxford University Press, 1985).

<sup>55</sup> See also the judgment of Lord Bingham, falling into the same trap.

<sup>56</sup> Lord Walker said (at para [94]) that: '[b]are "but for" causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn'. The nature of Lord Hope's approach is less obvious. He suggested that beyond the 'but for' test, questions about causation 'tend to be issues of legal policy in disguise. They are better answered by asking whether, all things considered, the defendant should be held liable for the harm which ensued or, on another view, whether the harm was foreseeable as within the risk, or was within the scope of the rule violated by the defendant' (at para [85]). In the final analysis: 'justice requires that Miss Chester be afforded the remedy which she seeks, as the injury which she suffered at the hands of Mr Afshar was within the scope of the very risk which he should have warned her about...' ([88]).

consent', rather than 'careless failure to obtain consent', Honoré would appear to agree that there is no causation problem.

We can clarify this further through attention to Lord Hoffmann's alternative formulation of the duty in this case. Lord Hoffmann also considered the thinking that should apply if the duty is not a welfare duty (to allow the claimant to avoid the risks), but (rather as Lord Steyn decided, influenced in part by Honoré) to ensure that the patient's *autonomy* is respected. On this interpretation, the purpose of the duty is to ensure that it is genuinely the claimant who makes the decision. Here, Lord Hoffmann seems to have *assumed* (at paras [32]–[34]) that the only damage which falls 'within the scope' of such a duty is the violation of autonomy itself and feelings associated with that violation—not its further consequences. This of course makes a very significant difference to the harm in respect of which damages are recoverable.

[32] ... On ordinary principles of tort law the defendant is not liable. The remaining question is whether a special rule of liability should be created by which doctors who fail to warn patients of risks should be insurers against those risks.

[33] The argument for such a rule is that it vindicates the patient's right to choose for herself. Even though the failure to warn did not cause the patient any damage, it was an affront to her personality and this leaves her feeling aggrieved.

[34] I can see that there might be a case for a modest *solatium* in such cases. But the risks which may eventuate will vary greatly in severity and I think there would be great difficulty in fixing a suitable figure. In any case, the cost of litigation over such cases would make the law of torts an unsuitable vehicle for distributing the modest compensation which might be payable.

Lord Hoffmann here divides the autonomy damage from the personal injury itself.<sup>57</sup> He reasons that the breach of duty did not cause the personal injury, but it that did violate the right to choose. He appears prepared to accept that the vindication of rights may be possible through negligence law,<sup>58</sup> but he treats that possibility as a very different matter from protecting welfare. Lord Hoffmann assumes that damages for this element of what the doctor has done—the element that was wrong, which was not exposure to risk—would be modest.

If there is 'damage' to the 'autonomy interest', why is it assumed that recoverable damage does not extend to *consequential personal injury*? As

<sup>57</sup> See S Bailey, 'Three Puzzles About Tort Causation', Paper delivered to the Torts Subject Section, Society of Legal Scholars Conference, University of Keele, 2006.

<sup>58</sup> Notably, Lord Steyn in the majority also used the language of 'vindication'—but thought a vindication of the autonomy right required an award of damages in respect of the *physical injury*.



we saw by reference to Honoré's solution, there is no difficulty in proving that the personal injury is caused by the breach of autonomy duty, since protection from risk plays no part in the duty. The breach of *this* duty (to respect autonomy) leads to the surgery on a given day. That surgery, on that day, should not have taken place because it was conducted without consent. It leads to personal injury. Because the question of causation is now whether the *surgery* led to the harm—not whether the breach led to a greater exposure to risk—it seems obvious that the test of factual causation is satisfied. The law is asking a different causal question. Only 'duty analysis' justifies the restriction of damages to 'autonomy damage'. It is by no means clear that the consequences covered by the duty should be so limited. They are not so limited in the trespass torts, it seems, where it is accepted that consequential physical injuries are recoverable.<sup>59</sup>

Lord Hoffmann's dissent can be used to focus our minds on the real problems in this case, in a way that is not achieved by the majority judgments. First, what are the protected interests in negligence, and how far from safety and welfare can they comfortably go? Second, what is the right measure of damages for breach of an autonomy duty, where that breach leads to consequential harm? Can it really be said that the injury suffered here was 'outside' the scope of the duty, *just* because it was an autonomy duty? If so, then the appropriate measure of damages in the trespass torts has almost certainly been totally misunderstood. It has generally been assumed that all *direct consequences* of a trespass will be compensated.<sup>60</sup> In fact, trespass torts might better capture the 'gist' of this case—not exposure to risk, but failure to respect the right to decide which risks to undergo (and when). Lord Hoffmann's analysis was original whether seen in terms of *negligence* or of *trespass*. 'Scope of duty' analysis is successful in explaining the problems in this case. But it is not successful at providing a knock-down argument as to its solution. There is no such argument to be provided.

### Conclusion: *Chester v Afshar*

*Chester v Afshar* draws our attention to the connection between negligence and 'safety', and thus also risk. The whole range of criteria applicable to an action in negligence can be seen to make most sense through analysis in

<sup>59</sup> There may however be the different problem, noted by Lord Hoffmann, that the surgery is innocently carried out by a person who was *not* the one who carelessly failed to advise. The 'wrong person' may be liable. This is, in fact, a recognized hazard of trespass to the person. See the discussion in *Chatterton v Gerson* [1980] 3 WLR 1003, 1012–13.

<sup>60</sup> Here, the damage was *foreseeable* (though unlikely), and there is no need to depend on a directness test.

respect of risks of harm. Certainly *Chester* shows the importance of duty. But it also shows the importance of the relationship between duty and damage. For this reason, one might question whether the abandonment of the language of ‘scope of duty’ is really so desirable. On the other hand, we can agree that such analysis cannot provide a fully logical (and non-evaluative) path to the answers on recoverable damage. That is important to bear in mind in connection with *Barker v Corus*, where Lord Hoffmann can be said to have delivered the lead—and very surprising—judgment, which purported to be an exercise in logic and fairness.<sup>61</sup>

### *Barker v Corus*

*Barker v Corus* shows the connection between duty, causation, and damage in an entirely different way. Though generally perceived to be a case about proving the causal link between breach and damage, the solution adopted by Lord Hoffmann for the majority displays a ground-breaking redefinition of actionable damage. Less obviously, this in turn may be linked to an integrated approach to duty and damage.

*Chester* was a case where the breach did not increase a risk. By contrast, *Barker*, like *Fairchild v Glenhaven* before it, is a case where all that *can* be established on balance of probabilities is that the defendant’s breach of duty *did* increase the risk and, importantly, that the claimant (or, in the case of the Fatal Accidents Act claims, the deceased) did contract the disease to which this risk relates. Since the disease (a fatal cancer not enhanced in its severity by cumulative exposures) is indivisible, is it enough to show that the risk of contracting the cancer is increased by the defendant’s breach?

*Barker* purported to extend the logic of an earlier case, *Fairchild v Glenhaven* [2003] 1 AC 32. But describing what *Fairchild* decided is more fraught with difficulty after *Barker*. As we have said, *Barker v Corus* was swiftly reversed as to its effect by legislation, so far as mesothelioma is concerned (Compensation Act 2006, s 3), following intense political pressure. But even so the law now has to work around the majority’s interpretation not just of *Fairchild* itself but also of *McGhee v National Coal Board* ((1973) 1 WLR 1), on which *Fairchild* was based in turn. It also

<sup>61</sup> Both Lord Walker and Lord Scott expressed agreement with Lord Hoffmann’s reasons, even though they added some reasons of their own. Baroness Hale reached the same conclusion on other grounds. The judgment was surprising both in relation to its originality in the context of personal injury or disease, and in the fact that it was not based on counsel’s argument, adopting a solution which counsel expressly *did not* propose.

adds a new ‘isolated’ example of recovery for risk, rather than damage, to the common law,<sup>62</sup> whether or not there are any other diseases (outside section 3) to which the interpretation will continue to apply in practice.

### The background: *Fairchild v Glenhaven*

In *Fairchild v Glenhaven*, a number of claimants (or in some cases their deceased husbands) had contracted mesothelioma. Mesothelioma is a fatal cancer with a very long latency period. The only known cause of mesothelioma is exposure to asbestos dust. On the interpretation of its aetiology accepted in this litigation, it is undeniably an ‘indivisible’ disease, since it may be caused by exposure to a small number of asbestos fibres and perhaps even by a single fibre. Once the fateful exposure has occurred—and there is no way of identifying on which occasion this has happened<sup>63</sup>—no further exposure will worsen or aggravate the disease. All that can be said is that each exposure adds to the *risk* that the disease will be contracted.

In *Fairchild*, the House of Lords concluded unanimously, but for a variety of different reasons, that it would be sufficient in these particular circumstances to show that exposure on the part of any given defendant had materially contributed to the risk of contracting the disease. This was the only thing the claimants *could* show. It was sufficient to deal with the appeal. The subsequent case of *Barker* was more testing, and a detailed analysis of *Fairchild* was needed to dispose of it.

### Why *Barker* was more challenging

One reason why *Barker v Corus* was a more testing case was that not all of the relevant exposures to asbestos dust were in breach of duty. Indeed in one of the appeals, the claimant had also been exposed to asbestos dust during a period of self-employment, and during this period he had shown no greater regard for his own safety than had employers during

<sup>62</sup> Lord Hoffmann said that recovery for risk was not unsupported by authority in the law of negligence. He mentioned the well-known example of recovery for lost chance of financial gain. In addition, when assessing damages for the lost chance of future income (in personal injury or dependency claims, for example), assessment of damages to represent the lost *chance* of future income is also entirely familiar: *Davies v Taylor* [1974] AC 207; *Brown v Ministry of Defence* [2006] EWCA Civ 546. *Barker*, despite its reversal, will assist those seeking to interpret these as examples of a more general principle.

<sup>63</sup> See C Miller, ‘Causation in Personal Injury: Legal or Epidemiological Common Sense?’ (2006) 26(4) *Legal Studies* 544–69.

other periods. At first instance, applying *Fairchild*, Moses J saw this as a reason for reducing damages on grounds of contributory negligence. He did not consider that it otherwise affected the claim.

A second testing issue raised in *Barker*, and not addressed in *Fairchild*, was the amount of damages recoverable. Should each defendant be liable in full for the fatal cancer itself, subject to contribution proceedings against other tortfeasors? Since the cancer is clearly ‘indivisible damage’ (as, still more obviously, is the death of a husband for the purposes of the Fatal Accidents Act 1976), joint and several liability would be the usual solution. In the courts below, this was the solution adopted. Each defendant was liable in full, subject to reduction in damages for contributory negligence. A liable party was of course free, as a matter of law, to bring contribution proceedings against any other tortfeasor who had (in the language of the contribution legislation) caused ‘the same damage’.<sup>64</sup>

On both issues—the impact of the non-tortious exposures, and the question of quantum—the exact basis of the decision in *Fairchild* became crucial.

### The decision in *Fairchild*: two interpretations

In *Fairchild*, Lords Bingham and Rodger said that *proof* that the defendant had made a material contribution to the risk of the disease was sufficient in such a case to count as *proof* of causation. This rested on an interpretation and application of the decision in *McGhee v National Coal Board*. Lords Hoffmann and Nicholls in *Fairchild* expressed the matter differently. Lord Hoffmann said that the ordinary rules of causation were being varied for reasons of justice and fairness. It may be wondered how this is compatible with his dissent in *Chester*. There, he said that it made no logical sense to call the breach a ‘cause’ of the damage. How can causation be a matter of *logic* in *Chester* but a matter of justice and fairness in *Fairchild*?

The answer again lies in the role of duty in connection with causation of damage. We have already seen that Lord Hoffmann treated the relevant duty in *Chester* as (primarily) a duty to warn. The goal of a duty to warn is to allow the risk to be avoided. It was on this basis that it was illogical to treat the breach as causing the injury. The *risk* would not have been avoided (though as it happens the *damage* would) if the doctor had given appropriate notice of the risk. In *Fairchild* too, the duty was expressed by Lord Hoffmann in terms of risk: it was a duty *to protect employees from the risk of asbestos-related disease*. This duty would be ‘emptied of content’ if

<sup>64</sup> Civil Liability (Contribution) Act 1978, s 1(1).

there was no liability because of evidential problems. Those evidential problems would always arise in any case of mesothelioma where there was more than one employer.

Lord Hoffmann was using an integrated approach to duty and causation of damage in *Fairchild*, just as he had previously done in *Chester*, and would subsequently do in *Barker*:

[54] If I may repeat what I have said on another occasion, one is never simply liable, one is always liable *for* something—to make compensation for damage, the nature and extent of which is delimited by the law . . .

Importantly, Lord Hoffmann also made clear that this is illustrated by the familiar process through which the existence of a duty of care is addressed in novel cases:

[55] In the law of negligence, in particular, it has long been recognised that the imposition of a duty of care in respect of particular conduct depends on whether it is fair, just and reasonable to impose it. Over vast areas of conduct one can generalise about the circumstances in which it will be considered just and reasonable to impose a duty of care . . . But there are still circumstances where Lord Atkin's generalisation cannot be fairly applied and in which it is necessary to return to the underlying principle and inquire whether it would be just and reasonable to impose liability and what its nature and extent should be: see *Caparo v Dickman* [1990] 2 AC 605.

It is notable that Lord Hoffmann describes this process (in the final sentence) in terms of whether 'to impose liability' (rather than 'to impose a duty'). The very existence of a duty of care is determined partly by considering whether it is fair to impose *liability*—and if so, what its nature and extent should be. This illustrates that being under a duty to take care does *not* mean *only* that one should take care. It says something about the consequences should there be breach—and the decision whether such a duty exists (and what it is) is determined partly by reference to these consequences. It is compatible with the judgment of Lord Macmillan in *Donoghue v Stevenson*, which we quoted at the start.

With hindsight, Lord Hoffmann's interpretation of the duty in *Fairchild* also appears significant. He argued (at para [61]) that 'we are dealing with a duty specifically intended to protect employees against being unnecessarily exposed to the risk of (amongst other things) a particular disease'. Further, 'the policy of common law and statute' was 'to protect employees against the risk of contracting asbestos-related diseases' (para [63]). The duty is a duty to protect against risk. Later, in *Barker*, this interpretation of the duty was implicated in the novel step that was taken. The risk was interpreted as the relevant damage.

### *McGhee*: what did it mean (in *Fairchild*)?

To understand *Fairchild* more fully, we have to take one further step back in time. As we have said, the House of Lords decided *Fairchild* partly in reliance on *McGhee v National Coal Board* (1973) 1 WLR 1. But members of the House did not express their views about *McGhee* in identical terms in *Fairchild*. Later, in *Barker*, Lord Hoffmann argued that the true meaning of *McGhee* can be gleaned from the much later case of *Fairchild: McGhee* is an application of *Fairchild* ‘avant la lettre’ (para [13]). This clearly hints at the fact that *McGhee* has been reinterpreted. But this reinterpretation was not effected by the unanimous House of Lords in *Fairchild*, as Lord Hoffmann argues. It was effected later by a *majority* of the House in *Barker* itself.

Let us look particularly at the formulations of *McGhee* adopted by Lords Bingham and Rodger on the one hand; Lords Hoffmann and Nicholls on the other, in *Fairchild v Glenhaven*.

### *Fairchild* on *McGhee*: Lords Bingham and Rodger

Lord Hoffmann argued in *Barker* that Lord Rodger had been alone, in *Fairchild*, in his interpretation of *McGhee*. But this is not the case—Lord Bingham’s interpretation was very similar to lord Rodger’s. Since Lord Hutton took a wholly different approach to *McGhee*,<sup>65</sup> the House in *Fairchild* was evenly split between what, in *Barker*, became the ‘Rodger’ (dissenting) and the ‘Hoffmann’ (majority) view of *McGhee*.

In *Fairchild*, Lord Bingham identified the proposition in *McGhee* as follows:

in the circumstances no distinction was to be drawn between making a material contribution to causing the disease and materially increasing the risk of the pursuer contracting it.<sup>66</sup>

The necessary causal connection sought in *McGhee* was material contribution to damage. That is the ‘normal’ requirement in cases derived from *Bonnington Castings v Wardlaw* ([1956] AC 613). On Lord Bingham’s analysis, this test remains the same in *Fairchild*. Did the breach of duty materially contribute to the damage? If it did, the defendant has ‘caused’ the damage. Thus, each defendant whose breach has materially contributed to

<sup>65</sup> Lord Hutton argued that liability in *McGhee* was founded on drawing a factual inference ‘in a common sense way’, not on a principle of law (*Fairchild v Glenhaven* at para [97]).

<sup>66</sup> Lord Bingham, *ibid*, at para [21].

the damage will have caused ‘the same damage’ (within the terms of s 1(1) Civil Liability (Contribution) Act 1978), and contribution proceedings between parties in breach will be possible.

In this case, however, all that can be *shown* is that the defendant’s breach materially increased the risk. The crucial step taken by both Lord Bingham, and Lord Rodger, is to interpret *McGhee* as saying that *as a matter of law*, and *in the circumstances*, no distinction between material increase in risk, and material contribution to damage, is to be drawn. Materially increasing risk in *these* circumstances is the same as materially contributing to the disease. As Lord Bingham put it at para [35]: ‘the ordinary approach to proof of causation is varied . . .’. The required causal *connection* remains the same. What is varied is the approach to *proof* of this causal connection.

Lord Rodger’s approach in *Fairchild* was very similar to Lord Bingham’s and it is consistent with the language used in *McGhee* itself—thus undermining Lord Hoffmann’s claim that it is *Fairchild*, rather than *Barker*, which adopted a new interpretation of *McGhee*.

Writing extra-judicially about the *Fairchild* decision, Lord Hope has explained Lord Rodger’s interpretation of *McGhee* as follows.<sup>67</sup> Lord Hope was junior counsel for the Coal Board in *McGhee* itself. He recognizes that decision as being correctly encapsulated by Lords Rodger and Bingham (and not by Lords Hoffmann and Nicholls) in *Fairchild*. It is the test for *proof* of causation, *not* the relevant causal connection, which is being redefined.

As Lord Rodger explained, what Lord Reid has done [in *McGhee*] is to accept that the pursuer must prove that the defender’s conduct materially contributed to the onset of the condition and then to hold, as a matter of law, that proof that the defender’s conduct materially increased the risk was sufficient for this onus to be discharged. You will not find the same interpretation in the speeches of Lord Nicholls of Birkenhead or Lord Hoffmann. . . . I respectfully agree with Lord Bingham and Lord Rodger that a new principle of law was decided in *McGhee*. . . the test for proof of causation is satisfied by showing a material increase in the risk of injury.

### ***Fairchild* on *McGhee*: Lords Hoffmann and Nicholls**

Lord Hoffmann in *Fairchild* took a different approach. Like Lord Bingham, he thought it inappropriate to adopt a ‘fiction’. But he regarded the solution above (treating a material increase in risk *as if* it made a material contribution to the disease) as just such a fiction. So the new proposition of law that Lord Hoffmann derived from *McGhee* was different from the one

<sup>67</sup> See Lord Hope, ‘James McGhee—A Second Mrs Donoghue?’ (2003) 62(3) *Cambridge Law Journal* 587–604, 599.

derived by Lords Bingham and Rodger. It skips the ‘material contribution’ aspect altogether:

the House [in *McGhee*] treated a material increase in risk as sufficient in the circumstances to satisfy the causal requirements for liability.

It is the *causal requirement itself* which has been altered. In *Fairchild*, Lord Hoffmann described this as fair and just because (quoting Lord Wilberforce) the *creator of the risk*—as between creator and employee—should bear the consequences of the impossibility of proof. Later, in *Barker*, Lord Hoffmann clearly thought he had done enough by way of favouring the claimant. The different risk, of *insolvency* or of untraceable defendants, should be borne by the employee.

Lord Nicholls too by-passed ‘material contribution’ and explained that a lesser causal connection was being required. In *McGhee*, he argued, the House had decided that ‘a less stringent causal connection was sufficient’ (*Fairchild v Glenhaven*, at para [44]). The court was not inferring that the usual ‘material contribution’ test is satisfied. Rather, ‘*the court is applying a different and less stringent test*’ (*Fairchild v Glenhaven*, at para [45]).

### ***Barker* itself**

In *Barker*, the House unanimously affirmed its commitment to *McGhee* as the basis of *Fairchild*. The *Fairchild* exception was *not* dependent on all the exposures being tortious. *McGhee* was a case where the cause might have been *not* tortious. Therefore, the presence of non-tortious exposures would not defeat *Fairchild*. But in respect of apportionment, the majority of the House of Lords fashioned an argument of its own (not put to it by counsel for the defendant employers and their insurers) which reinterpreted the meaning of both *McGhee* and *Fairchild*.

It could be established, as a matter of evidence, *only* that the employer had caused an increase in the *risk* of harm. Lord Hoffmann—with whom Lords Scott and Walker agreed as to the reasoning (and Baroness Hale in the result on other grounds)—held that the damages recoverable only extended to exactly that: the increased risk of harm, caused by the defendant. Instead of shifting the risk of damage by making a negligent party pay for that damage, if the risk eventuates, the recoverable harm is only the risk itself. A revolutionary step in the definition of the duty and of the recoverable damage has been taken, in response to the difficulties of proof. This step could not be taken without an integrated approach to duty, causation, and recoverable damage; but it is not in any sense *compelled* by the integrated approach.



It should be made clear that this solution is not the same as proportionate liability for damage.<sup>68</sup> It is, strictly, full liability for the damage caused by the defendant's breach of duty. But that damage is now said to be something other (and less) than the fatal disease itself. Recoverable damage within the breach is now said to be the increase in risk to which the claimant was subjected. Duty and damage are as important as causal criteria in this solution.

### Lord Hoffmann's solution in *Barker*: three stages in the reasoning

How did Lord Hoffmann in particular reason to this novel solution? We can isolate three stages in the reasoning.

The first stage is the interpretation of *McGhee*, as unconnected to 'material contribution to damage'. As discussed above, *McGhee* is interpreted as adopting (where it applies) a wholly new approach, by which *increase in risk* is sufficient causal connection. We have already said that this interpretation of *McGhee* cannot be clearly derived from *Fairchild*, where there was an even division of opinion. This contested step is crucial to the apparent logic of the *Barker* decision. If increase in risk is the causal connection, then liability may be for increase in risk. If on the other hand the causal connection is material contribution to the injury suffered, and evidence of increase in risk is merely treated as sufficient to prove this connection, then it makes no sense at all to say that the injury caused is an increase in risk. The injury 'caused' (once we have applied the relaxed test) would most surely be the disease (or death) itself.

If the first stage of the reasoning adopted a debatable interpretation of precedent (*McGhee*), the second appealed to logic, in the form of 'consistency of approach'. Now that the '*basis of liability*' is said to be the creation of risk of disease (stage 1), it is said to be consistent to hold that the *damage* which the defendant should be regarded as having caused is the creation of this risk:

[35] Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or

<sup>68</sup> Porat and Stein argued (before *Barker*) that the House of Lords in a *Fairchild*-type case should adopt proportionate liability, applying the solution in *Holtby* and *Allen* (above n 17): see A Porat and A Stein, 'Indeterminate Causation and Apportionment of Damages: An Essay on *Holtby*, *Allen*, and *Fairchild*' (2003) 23(4) *Oxford Journal of Legal Studies* 667–702. The House of Lords realized that a more radical departure from orthodox analysis was required to effect the same result, given the indivisible nature of the injury.

chance. If that is the right way to characterise the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for the chances of an event happening, in the way that a person who buys a whole book of tickets in a raffle has a separate and larger chance of winning the prize than a person who has bought a single ticket.

'Chances are infinitely divisible', unlike fatal cancer. This approach is designed to avoid the conclusion that all those who have (as a matter of law) 'caused' the damage are jointly and severally liable for the disease. In this way, the majority attempted to leap free of liability 'in solidum' for an indivisible disease.

On an important point of detail, this approach certainly will not work for claims brought under the Fatal Accidents Act 1976. That statute requires that *death* must be *caused by* the 'wrongful act, neglect or default' which forms the basis of the claim (section 1(1)). No claim can be brought under this Act where the defendant has merely caused the 'risk' of death. As such, if the solution of the majority is taken literally, it means that the form of damage caused by the defendant is (for dependents) not one that can be the basis of a claim. This does not seem to have been intended.

In fact, it is very difficult to take the solution (whereby the 'damage' is now exposure to risk) entirely at face value. It is expressed as being bound by two arbitrary limitations. First, it applies only where the disease in question (the risk of which has been increased by the defendant) *has actually been suffered*. It has no application to a case where the disease may or may not be suffered in the future. No reason is given for this qualification. As a matter of principle, it is then very difficult to maintain that the rule aligns the quantum of damage with 'the basis of liability'. If the approach is justified only where the claimant has actually suffered the disease, it would seem to be disease, rather than creation of risk, that is the key concern after all and which is thus 'the basis' of liability. 'Risk' is only a step on the way. The second arbitrary limitation is the 'single agent' rule which, it has been convincingly argued, has no basis in principle and is simply applied to keep *Fairchild* and *Barker* within narrow limits.<sup>69</sup> This brings us to the third stage in the reasoning.

<sup>69</sup> See C Miller, 'Causation in Personal Injury: Legal or Epidemiological Common Sense?' (2006) 26(4) *Legal Studies* 544–69. The 'single agent' rule maintains that *Fairchild* (and *McGhee*) applies only where it is established that the injury was caused by one particular agent (asbestos or coal dust, in these cases), even if it is not known whether the exposure which caused the injury was tortious. This distinguishes *Wilsher v Essex Area Health Authority* [1988] 1 AC 1974.

The third stage concerns fairness. This was indeed expressed by Lord Hoffmann to be the prime consideration: ‘the important question is whether such a characterisation would be fair . . .’ (at para [40]).

What then amounts to fairness in this case? The fairness argument in *Fairchild* was simple, and it echoed some comments of Lord Wilberforce in *McGhee* itself. The consequence of impossibility of proof should not be laid at the door of the claimant, but should rest with the defendant.<sup>70</sup> But in *McGhee*, there was only one party in breach. In *Fairchild* and *Barker* there are several parties in breach. This factor makes a difference in terms of fairness only where the contribution legislation is ineffective. The main reason why it might be substantially ineffective, in this context, is the risk of insolvency. A subsidiary reason is the difficulty of tracing relevant parties. Apart from these factors, a liable party (after seeking contribution) would be no more exposed to risk beyond the damage it actually caused than it was in *McGhee*. As such, the true rationale for *Barker* in terms of fairness seems to be settled by the arguments in para [46]. If a particular solvent defendant is held liable for the full amount suffered by the claimant:

... he will in effect be the guarantor of the liability of those who are not traceable or solvent and, as time passes, the number of these will grow larger . . .

The arguments of ‘fairness’ operating against the claimants in this case are not about the relationship between the two parties at all. They are based on past and future claims experience and engage the practical ineffectiveness, in the context of this particular industrial disease, of the contribution legislation. Here, the question is, should these other ‘risks’ (the risks of insolvency and of untraceable parties, not of disease) lie on the claimant, or on the parties in breach?

The problems created for claimants by the decision in *Barker* were problems of under-compensation created by insolvency and of untraceable defendants. The burden of finding each and every employer and insurer now lay with the claimants. Theirs was the burden of proving employment and (where relevant) insurance in respect of all periods of exposure, and the burden of the substantial risk of insolvency. It would be both rare and very expensive for *any* particular claimant to achieve full

<sup>70</sup> Porat and Stein, above at n 68, adopt a proportionate version of Lord Wilberforce’s argument. They argue that the problem is evidential: causation cannot be *proven*. The burden of this evidential uncertainty—which can be assessed proportionately in terms of the *likelihood* that the defendant caused the claimant’s injury—should lie on the defendant, who breached the duty.

compensation (whether for their own fatal disease or the death of a relevant party), whatever the merits of their case.<sup>71</sup>

### Conclusions: *Barker v Corus*

I have suggested that the argument about the ‘basis of liability’ under *Fairchild* and *McGhee* was unconvincing. In addition, the approach to ‘increased risk’ as damage was not compelled by ‘duty analysis’ or ‘risk analysis’, but actually amounted to a radical departure from the normal practice of risk analysis and allocation. The decision must therefore be evaluated in the end in terms of its fairness. Is the burden on claimants (certain under-compensation) really outweighed, in terms of pure ‘fairness’, by the problem for solvent defendants (excessive liability)? Getting the liability sum ‘right’ by reference to a share of the risk created will inevitably mean getting the compensation sum ‘wrong’. Lord Rodger’s argument—that this fairness argument is novel and hard to justify on the basis of the data to hand—is compelling. *Barker* does not hold a balance between claimants and defendants as it purports to do but dramatically switches the priority from compensation for personal injury (the traditional concern of a damage-based approach to the law of negligence), to concern with overall liability levels and their distribution among a shrinking number of defendants. Does this case show the influence on the judicial imagination of ill-defined threats such as compensation culture or insurance crisis?<sup>72</sup>

There is reason to agree with Baroness Hale (in the majority) and Lord Rodger (in dissent) that *Barker* must be judged above all as a policy decision. Parliament obviously took a different view of the policy position. Notably, section 3 of the Compensation Act 2006 provides that liable parties who cannot obtain contribution may, through regulations, be provided with a degree of compensation in turn for their over-exposure to liability. The Compensation Act 2006 (Contribution for Mesothelioma Claims) Regulations 2006 make relevant amendments to the Financial Services Compensation Scheme to allow this to happen. The legislative scheme more clearly holds a balance between claimants and defendants than the decision in *Barker*, even if it is (like the contribution legislation itself) tilted in favour of claimants.

<sup>71</sup> C Ettinger, ‘The Impact of *Barker v Corus (UK) Ltd* in Mesothelioma Cases’, seminar paper at the British Institute of International and Comparative Law, ‘*Barker v Corus*—the Emergence of a New Tort?’, 5 June 2006.

<sup>72</sup> See De Saullés, above at n 41.

*In re Pleural Plaques*

The *Pleural Plaques* litigation is closely related to *Barker* both in the sense that it affects the total exposure to liabilities for asbestos-related diseases, and in the sense that it raises the question of liability for increased risk per se. It also further illustrates a more protective approach to defendants (or perhaps to the sources of compensation) in asbestos-related disease litigation. Here the Court of Appeal, by a majority, reversed the practice of twenty years of paying modest compensation for the development of pleural plaques. From start to finish, the majority of the Court of Appeal explained all the elements of the decision as turning on 'policy'. Smith LJ in dissent disagreed directly with some of the policy findings.

The key issue in this case clearly concerns actionable damage. Here, the question is when, in a personal injury action, a claimant can be said to be suffering from damage sufficient to ground an action? The answer to this question has a number of implications, including the question of when the limitation period will start to run. If pleural plaques are actionable damage, then the limitation period will begin to run when there is the necessary knowledge of them (Limitation Act 1980, s 14). At the time of *Cartledge v Jopling* [1963] AC 758, a case which exemplified the need for fundamental change in the law of limitation, the period began to run when the relevant injury occurred—even if it was not discoverable. Although the *Cartledge* problem has been removed for undiscovered conditions, there will still be a problem after the Court of Appeal decision in advising claimants when they must proceed, since they must wait until their injury is 'material'. It was also accepted by the Court of Appeal that there is only *one* action for each negligent act—even if further damage later transpires. There are not separate tort actions dependent on new damage.<sup>73</sup> 'Litigation should be final.'

The 'damage' suffered by the claimants was said to come in three parts. First, they had suffered personal injury in the form of 'pleural plaques'. These take the form of internal tissue changes to the lungs and are usually without symptoms (although in 1% of cases they can affect lung function). They are typically discovered through x-ray examination. It appears to have been accepted by the claimants that although these plaques were (they argued) physical injury, they were not sufficient

<sup>73</sup> Smith LJ referred at paras [121] and [122] to Lord Reid in *Cartledge v Jopling*: a further injury arising at a later date from the same wrongful act does not give rise to a further cause of action.

in themselves to ground an action. They did not amount to material damage.<sup>74</sup>

Second, these plaques are associated with an increased risk of contracting pernicious asbestos-related diseases such as asbestosis and mesothelioma. They do not cause such diseases nor develop into them. But pleural plaques are known to be a 'marker' that the sufferer has been exposed to asbestos in such quantities that the risk of these diseases is significantly raised. The second component of the claim is therefore risk of future disease.

Third, the knowledge of suffering the plaques is the cause of anxiety, *because of* the implications for future disease. It might be argued that this anxiety is not entirely logical. Exposure to asbestos *per se*, not the presence of these 'markers', should be the real source of concern. But the existence of plaques exemplifies to the sufferer in no uncertain terms that their lungs have been pierced by asbestos fibres; and that they are showing a physical manifestation of the possibility of pernicious disease.

The claimants argued then that they had suffered *personal injury* (plaques); and that their injury was actionable since it was not merely 'trivial'. What made it not merely trivial was the addition of *anxiety*, and *risk of future disease*. In one case (*Grieves v Everard*) there was a fourth component, in the form of depressive illness. This we know *is* capable of being compensated in its own right (without personal injury), but the majority nevertheless held that it was not recoverable in this case, because the claimant's illness was not foreseeable. This amounts to an argument that the claimant had not shown sufficient 'fortitude'. If he had, the illness would have been foreseeable. This is very hard to reconcile with the decision in *Page v Smith* [1996] AC 155, which treated individuals who are within the 'zone of danger' created by a breach of duty as 'primary' victims. The claimant here was clearly within a zone of danger, and is still at risk of physical injury. In a primary victim case, the special control devices applied to secondary victim claims and set out in *Alcock v Chief Constable*

<sup>74</sup> Notably, pleural plaques are not by themselves a prescribed disease for the purposes of industrial disablement benefit. In its Report of July 2005 (reviewing the prescription of asbestos-related disease), the Industrial Injuries Advisory Council did not recommend any change in the treatment of pleural plaques: 'The Council recognises that symptomatic pleural plaques can occur. However, there is a lack of evidence that they cause impairment of lung function sufficient to cause disability. In civil litigation pleural plaques may attract compensation, although this is generally for the psychological distress and for associated risk of other asbestos-related disease.' See Industrial Injuries Advisory Council, *Report by the IAC in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of the asbestos-related diseases* (2005) Cm 6553, at para [73]. Note that this relates to whether plaques cause *disablement*, rather than whether they can amount to material injury.

of *South Yorkshire* [1992] 1 AC 310 do not apply.<sup>75</sup> It should particularly be noted that the interpretation of 'foreseeability' with hindsight applied in secondary victim cases is itself a control device.<sup>76</sup>

While *Page v Smith* has been criticized for taking a restrictive approach to the definition of primary victims, it seems that the majority of the Court of Appeal in this case (Lord Phillips MR and Longmore LJ) disapproved rather of the *claimant-friendly* impact of *Page v Smith* in cases like this, in that it took the step of treating psychiatric damage as genuinely a form of personal injury. Extra-judicially, Lord Phillips has indeed said that he disapproves of the suspension of control devices (particularly the special meaning of foreseeability) in cases where the claimant is endangered, but not physically injured: 'If a claimant has not in fact sustained such an injury, I do not see why he should be entitled to recover for psychiatric injury which he has sustained because of a special susceptibility, although a person of reasonable fortitude would not be affected.'<sup>77</sup> In addition to the response to asbestos-related disease itself, this case also therefore seems to reverse the trend toward treating damage to the mind as truly equivalent to physical personal injury. By contrast in the case of *Corr v IBC* [2006] 3 WLR 395, the majority of a differently constituted Court of Appeal was content to rely on *Page v Smith*, and especially on the way in which it identified depression as an element of personal injury, for the purposes of foreseeability. This was a key step in the finding that a claim could be sustained for death by suicide where this suicide was the foreseeable result of depression experienced after a serious industrial accident.

When taken together with the treatment of anxiety, the decision in the *Pleural Plaques* litigation seems to adopt the sort of 'priority' of injuries which had begun to be rejected as old-fashioned and unenlightened. But here, and particularly in respect of anxiety rather than depression, the idea of such a priority has a more immediate context. Arguably, the problem of insolvency noted in respect of *Barker* means that funds for compensating asbestos-related diseases are limited, and likely to shrink, with the peak in such claims shortly to come (between 2010 and 2020). There is some urgency to the issue of prioritization. The question of priority

<sup>75</sup> For recent analysis of the broadening range of cases which can be called 'primary victim' cases, see P Handford, 'Psychiatric Injury in Breach of a Relationship' (2007) 27 *Legal Studies* 26–50.

<sup>76</sup> *Page v Smith* was criticized for this reason by Lord Goff in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

<sup>77</sup> Lord Phillips, 'Liability for Psychiatric Injury', Personal Injury Bar Association Lecture, 23 November 2004.

may be underscored by distributive concerns playing on the minds of the judges. But that is not entirely what was said.

Rather, three separate policy heads were expressly identified by the majority. Notably, these failed to address the claimants' arguments about a 'mix' of the three forms of 'damage' claimed, and did not adequately explain why twenty years of practice in compensating for the existence of plaques has been wrong. There were some more general arguments in addition. These largely failed to address the wider distributive issue which may explain the decision.

First, the argument that the plaques themselves are material physical injury was defeated by the policy encapsulated in the principle '*de minimis non curat lex*'. 'Trivial injuries' should not be compensated. This does not answer the claimants' argument that taking the various elements *together*, their injury is not trivial.

Second, the risk of future disease is not to be compensated because with hindsight, any such award is certain to be wrong. This is unconvincing in itself because the claimants could seek a provisional award if they wished.<sup>78</sup> If this should be done, they would be compensated for the two other heads of damage, and could return for an assessment of damages relating to the serious disease if this did eventuate. If instead they should choose an immediate final award to reflect the risk of future disease,<sup>79</sup> the risk of being wrong is on them (and of course on their dependants). No parallel risk falls on defendants as a class since over time, in this instance, the *right* amount ought to be sought by all claimants for the disease, either through early and partial payment, or through provisional awards where the decision is left until a later date. There is no general over-exposure problem caused by the 'risk of future disease' head. There is however an issue surrounding the priority of claimants, if it should prove to be the case that compensation funds are limited. But as in *Barker*, no concrete evidence appears to have been advanced to establish whether such funds are genuinely limited.

Third, anxiety is not to be compensated because of difficulties of proof and of assessing the moment at which the action should arise. Again this does not address the solution to this problem which is provided by

<sup>78</sup> Supreme Court Act 1981, s 32A.

<sup>79</sup> This award would itself be subject to deduction to reflect the fact that it was being obtained early. In one of the cases, liability was admitted and the only question concerned the correct approach to quantum. General damages in this case have subsequently been assessed at £15,500 to include all elements of the claim including risk of future disease; the pecuniary award has been assessed at £8,500 to represent the risk of future loss, plus £2,000 to reflect the risk of needing nursing services and equipment: *Hindson v Pipe Wharf House (Swansea) Ltd* (2007) EWHC 273 (QB).



integrating the claims. The difficulty of assessing the moment at which the action should arise is resolved by knowledge of the plaques. Therefore, this policy reason is importantly supported by a separate argument, at para [66]: why should those with plaques have the 'privilege' of a claim for anxiety, which those without plaques (but clearly exposed to asbestos) do not have? This gets much closer to the distributive question, of compensation priority.

More general policy reasons against liability included the temptation that might be placed on claimants to 'gamble' on an early final award; and the inducement that would be provided to claims companies to go seeking people with pleural plaques. If this occurred, the result would be to create further anxiety which does not at present exist.

In dissent, Smith LJ argued that the plaques were themselves a physical injury, and that this injury was not trivial because of its effects on the claimant. The strongest argument deployed in support of this view was undoubtedly a comparison with external scarring. Such scarring, Smith LJ explained, is actionable when it has *cosmetic effect*, even if as here the scar is in no sense disabling. In such a case, the action is allowed because of the cosmetic effect and the impact on the mind of the claimant; but it remains the case that the injury is the scar, not the effect on the mind. Aggregation of effects is therefore quite normal. Is there an answer to this compelling argument?

It is suggested that the only possible principled answer would require an unpalatable distinction to be made between the claimants' responses to external and internal scarring, respectively. It might even require that the anxiety experienced by the claimants in this case should be treated as 'unreasonable'. There seems no convincing reason to adopt this view of their understandable response. It seems preferable to confess that the distributive concerns noted above led the majority into this distinction.

The decision reached in this litigation will affect the order in which claims for asbestos-related disease are satisfied. It will also lead to delay in payments to some of those who are at risk of future disease in order to bring their position into line with those without plaques. If the treatment of *Grieves* itself stands, there will be no payments for actual depressive illnesses caused by the knowledge of risk, because it is regarded as unforeseeable. The key concern perhaps is whether the policy arguments articulated by the court are really the only ones that are operating. If the decision is driven by distributive concerns, the reality of those concerns surely needs to be tested.

In cases of asbestos-related disease, the relevant breaches of duty are in the past, but many of the claims are in the future. The problem is one of

compensation. As *Barker v Corus* identified, most of the payments will come from a limited and shrinking pool of insurers and employers.<sup>80</sup> Is it right to think about fairness in a different way in these cases? Are we more concerned with the source, scale, and timing of *compensation* for those in need, than with blame and corrective justice? If so, the apparent trend against claimants is incidental.<sup>81</sup> The real trend is in favour of protection of defendants and perhaps the broader common interest.

## Conclusions

The cases considered here all illustrate the importance of the compensatory function of the tort of negligence. And they also illustrate different challenges to that compensatory function. In *Chester v Afshar*, the challenge is whether the tort of negligence can protect new interests (or, to put it a slightly different way, protect against new ‘forms of damage’). The unaddressed and vital question is the role of compensation for personal injury, if the duty is to respect autonomy. Though *Chester v Afshar* may suggest a new ‘vindictory’ function for negligence the logical problems created (though not fully articulated) by this case tend to illustrate the central connection between negligence, and allocation of the risk of accidental damage. In *Barker* and *In re Pleural Plaques* on the other hand, the really serious questions are chiefly distributive. The ‘conceptual’ basis for changing the type of damage in *Barker*—by redefining the risk—does not convince.

As is well known, Glanville Williams was a champion of the ‘risk principle’, which holds that recoverable damages in the tort of negligence are defined by reference to the risk against which the claimant ought to have been protected. But he recognized that the logic of this ought to give way in certain respects where personal injury was concerned. ‘Human bodies are too fragile, and life too precarious’, he suggested, to maintain ‘the cold logical analysis’ of such cases.<sup>82</sup> Williams had in mind the egg-shell skull

<sup>80</sup> In *Re T & N* [2006] EWHC 1447 (Ch) it was held that schemes reached by agreement between liability insurers and administrators of an insured company, which effectively withdraw liability insurance in respect of certain historical periods and therefore remove the source of compensation for individuals employed during those periods, are valid and do not breach the obligation to insure imposed by the Employers’ Liability (Compulsory Insurance) Act 1969.

<sup>81</sup> Though note the arguments of De Saullés, above at n 41, that claimants sometimes are vilified through the terms in which ‘compensation culture’ is debated.

<sup>82</sup> G Williams, ‘The Risk Principle’ (1961) 77 *Law Quarterly Review* 179, at 196.

principle when he made these remarks, and he accepted the need for this principle despite its incompatibility (in his view) with the development of *The Wagon Mound* approach.

The risk principle, even in its *Wagon Mound* guise, was always an integrated approach, and 'scope of duty analysis' updates this principle to an era where the transfer of risk to defendants is in many cases thought to require closer and more detailed justification. But *Barker* and *In re Pleural Plaques* illustrate that Williams' idea, that personal injury is different, is now being dramatically qualified. This is occurring even in the industrial context, where it might be thought to be at its strongest, since the risks and benefits are clearly not reciprocal.

The reasons behind this are connected with the loss-spreading model of tort. Funds are limited; third party insurance is a fallible mechanism; potential claimants must compete with other collective and commercial interests—and with each other. These are the sorts of issues explored within the social welfare, risk spreading model of tort law.<sup>83</sup> The explanations will not be found in the conceptual and 'fairness' arguments deployed, nor in the more purely 'normative' approach to negligence duties.

<sup>83</sup> See Atiyah, at n 22 above, and Hepple, at n 20, above.