

## **Munkman Lecture**

### **Causation in Tort – The Search for Principle**

#### **Speaking note - Lady Justice Smith**

1. It is a great pleasure and an honour to be invited to give this year's Munkman lecture. I confess a sense of trepidation when I learned that the previous occupant of this slot was Lord Bingham, who I regard as the greatest judge of our generation.
2. I never knew John Munkman but I was very familiar with and dependent on his book. It was one of the first text books I bought after starting in practice. It was a vital way into the mysteries of the Factories Act and the regulations designed to protect workers from the hazards of industrial life. I found the regulations difficult to fathom at times but the book was always enlightening. Today, the regulations are far more obscure and are often badly drafted. Have you ever tried tracing back into the directives to work out what the English regulation is supposed to mean? I tried recently in a case called *Allison v London Underground*. I was no wiser at the end. So the need for a book like Munkman is just as great, possibly even greater than when John Munkman began. I would like to congratulate the present editors on the current edition. It is invaluable.

3. However, today I am not going to talk about regulations affecting the workplace. I am not sure I would have the strength. Instead I am going to talk about causation in personal injury cases. Until fairly recently, the law of causation was easy. Very few cases on the topic went to the Court of Appeal. Today a significant proportion of appeals involve problems of causation. They are difficult for us and I think they are often difficult for counsel and judges at first instance. I am devoting this lecture to an attempt to sort them out. I will start from scratch so I apologise in advance if some of what I am going to say is old hat.
4. The basic rule of causation in tort is the 'but for' rule which requires that the claimant must show that, but for the defendant's breach of duty, he would probably not have suffered the injury complained of. Problems arise where two or more factors have contributed to the adverse result in respect of which damages are claimed. These problems have led to modification of the 'but for' rule in some circumstances.
5. The leading case in which the 'but for' rule was first modified in English law was *Bonnington Castings Ltd v Wardlaw* [1956] AC 232. The claimant had been exposed to some negligent and some non-negligent dust. The employers alleged that he would have had silicosis from the non-negligent dust alone so should not recover. The House of Lords held that he could recover in full; the negligent exposure had made a material

contribution to the development of his silicosis. He won even though he had not satisfied the 'but for' test.

6. In that case, no attempt was made to persuade the court to apportion. Both sides went for all or nothing. The injury was treated as indivisible. Today, such an injury would be treated as divisible and the experts would provide the information necessary for apportionment. The result would be that the claimant would recover only for that part of his loss which the defendant had caused and the 'but for' test would be satisfied.
7. Apportionment in disease cases began with the noise deafness case *Thompson v Smiths Shiprepairers Ltd* [1984] QB 405. Mustill J received expert evidence which enabled him to apportion as between the harm caused before and after the date of knowledge. He considered that, in order to be fair to both parties, he must do so; in so doing, he applied the 'but for' rule.
8. This approach of apportionment is now routinely taken in any case of industrial disease or condition where scientific knowledge can show that the condition results from the cumulative effect of exposure. There is a dose-response relationship between exposure and the severity of the disease. The injury is divisible. The experts are able to measure or assess the extent of the claimant's exposure. As you will know, that is often the approach in cases of VWF or HAVS. I will return to them later.

9. As well as claims where there has been negligent and non-negligent exposure to the same agent, as in *Wardlaw*, there are cases in which two or more different agents have contributed to the condition, one as the result of negligence, the others not. For example, coalminers who had been exposed to coal dust sued for the development of bronchitis and emphysema. Almost all of them had been cigarette smokers and that habit would also have caused or contributed to their lung disease. Turner J apportioned the damages as best he could so that the men recovered only for the estimated effects of the coal dust. Simon Brown J did the same in the unreported case *Knox and others v Cammell Laird* with men exposed to welding fumes, where cigarette smoke had also contributed to the disease. In that type of case, the apportionment exercise is more difficult. That is because, as well as assessing the extent of the negligent and non-negligent exposures, the court has to combine those assessments with its estimate of the causative potency of the different causative agents. That is usually based on (often contentious) expert opinion. The result is that the judge will often have to apply a very broad brush to apportionment. Nonetheless, it is thought to be better to do that than to refuse to make the attempt. In such cases, the 'but for' test is broadly satisfied.

10. However, there are some cases in which, however desirable it might be to apportion damages, so that the defendant only has to pay for the harm he has caused, there really is no sensible basis on which the exercise can be carried out. It should not, in my view, be carried out on the basis of speculation or guesswork. For example, I think it will usually be impossible to carry it out in a case of psychiatric injury due to stress at work. I know that, in saying that, I am disagreeing with Lady Hale and none of us do that lightly. In the Court of Appeal in *Hatton v Sunderland* [2002] ICR 613, one of a group of stress at work cases, Hale LJ, as she then was, said that, where the claimant established liability but there were other causative factors in play besides the employer's negligence, the court should apportion the damages. In fact, the court did not have to apportion damages in any of that group of cases so what she said was *obiter*. When those appeals reached the House of Lords, the House approved the general guidance she had given but declined to comment on her remarks about apportionment.
11. I don't think one can apportion damages for psychiatric injury. It seems to me to be an indivisible injury. As a rule, the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill. The claimant will almost always have a vulnerable personality. But the defendant should take the claimant as he finds him, eggshell skull or

vulnerable personality included. So having a vulnerable personality should not result in any reduction in damages.

12. Besides underlying vulnerability, there may be other potentially harmful factors at play in the claimant's life which may have contributed to the breakdown, and have been nothing to do with the negligence. If the judge decides that the other factors would probably have caused the breakdown in any event, regardless of the negligent factor, the claim will fail. But if the judge decides that both the negligent and non-negligent factors have contributed and the negligence has had a more than minimal effect, he should in my view to award full verdict damages. The defendant should not be entitled to a reduction in damages for the chance that the other factor might have caused a breakdown.
13. That is what Lord Bridge said (*obiter*) in *Hotson v East Berkshire HA* [1987] 1 AC 750. That was the case about the boy who fell out of a tree and broke his leg but the hospital did not diagnose the fracture for a week. His blood vessels were damaged and he developed avascular necrosis. The medical experts were able to assess the extent of the contributions made by the accident and the delay in treatment and the evidence was that the claimant would probably have developed avascular necrosis even without any delay. But, the point I make is that, if the medical experts had been **unable** to assess the contributions and had said

only that the delay had made a more than minimal contribution, the claimant would have succeeded in full. There would have been no apportionment. At page 784, Lord Bridge said:

“If the plaintiff had proved on a balance of probabilities that the authority’s negligent failure to diagnose and treat his injury properly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed. The decisions of this House in *Bonnington Castings v Wardlaw* and *McGhee v NCB* give no support to such a view.”

14. Let me return to cases of stress-related psychiatric injury. In general, the doctors are not able to quantify the contributions which different factors have made. Psychiatry does not lend itself to the kind of statistical analysis which orthopaedic surgeons and oncologists can provide. So the evidence is likely to be that the claimant had a vulnerable personality and there was more than one factor in play when he had the breakdown. If that is it, I think the claimant should succeed in full provided that the negligent factor was of more than minimal effect. It seems to me illogical

if, in one breath the judge says that he can say only that the negligence has made a material contribution to the injury, in the next breath he embarks on an apportionment which has to reflect the contributions which the judge has just admitted he cannot assess.

15. In a recent stress at work case in the Court of Appeal called *Dickins v O2*, [2008] EWCA Civ 1144, I gave a judgment upholding the trial judge's conclusion that the employer's negligence had made a material contribution to the claimant's breakdown. The claimant had a vulnerable personality. She had been negligently subjected to stress at work. There was evidence that she had irritable bowel syndrome. The judge could make no finding as to whether that had been caused by stress or whether it had a purely physical cause. Also there was evidence that the claimant's relationship with her partner was troubled. But, as the judge observed, that might have been a cause of stress in her life or it might have been the result of her being under stress at work. In addition, there was evidence that, about 3 years after her breakdown, her house had been flooded and the judge thought that this might have delayed her recovery from the original breakdown. Relying no doubt on Lady Hale's exhortation to apportion, the parties agreed that the judge should do so. Poor judge! How was he to do it? He obviously felt like Solomon; he took his axe and chopped the damages in half.

16. Stephen Sedley and I were bothered by this but there was nothing we could do about it as neither party had appealed on that point. However, I expressed my concern (*obiter* of course). I said that I did not think there should be apportionment across the board in a case like that. I mentioned *Rahman v Arearose* [2001] QB 351 on which Lady Hale had relied as support for her view that there should be apportionment in stress at work cases. In *Rahman*, two tortfeasors had injured the claimant and had contributed to the development of an indivisible psychiatric injury. The Court of Appeal approved a broad brush apportionment between tortfeasors so as to avoid injustice as between them. Whether such a case can be used to justify apportionment of the claimant's damages to reflect contributory causes in psychiatric injury cases, I am not at all certain. The two processes are quite different.
17. Having said that, I do think it might well be right to reduce some heads of damage on the ground that the claimant is psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort.

#### *Material contribution to Injury*

18. One of the difficulties that arise on causation is deciding whether the negligence has made a material contribution to the **injury** in which case the claimant will win in full or whether it has only made a material

contribution to the **risk of injury** in which case he will usually lose. Practically all breaches of duty will increase the risk of injury but that is enough to establish liability only if the increase in risk is big enough – I will come back to that – or if the case falls within the *Fairchild* exception which I will also come to.

19. A recent case called *Bailey v Ministry of Defence* [2008] EWCA Civ 883 is a good example of a case where it was not easy to decide whether or not the negligence had made a material contribution to the **injury**. The claimant became ill with gall bladder problems and had an exploratory procedure. It turned out to be more difficult than expected and had to be abandoned without the doctor having found the stone which was in fact blocking the bile duct. That night, due to the negligence of the staff, the claimant was not rehydrated. The following morning, she was not fit to undergo the resumed procedure and it had to be postponed. She then developed pancreatitis which is an inflammatory condition not due to negligence. So she had pancreatitis and a stone that had not been removed. She became very ill. Eventually she had to undergo two major operations and became extremely weak. One night, she vomited and because she was still weak and could not protect her airway, she inhaled her vomit and suffered a cardiac arrest, resulting in brain damage. A tragic story.

20. She sued. In the end, the main issue was causation. The claimant argued that the negligence had made a more than minimal contribution to her weakness which was the cause of the injury; she accepted that the pancreatitis was the major cause. The defendants argued that their negligence had only increased the risk of the claimant inhaling her vomit. If that were wrong and if it had contributed to her weakness, the contribution was minimal. The judge held that the negligence had made a more than minimal contribution to the weakness and the weakness was the direct cause of the injury. So the claimant succeeded in full. The Court of Appeal (Waller, Sedley and Smith LJJ) upheld the judge and, at paragraph 46 of the judgment, Waller LJ said this:

“I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability

that 'but for' an act of negligence the injury would not have happened but **can** establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed.”

21. This passage draws attention to the disadvantage which defendants face where the claimant’s medical condition is not well understood. As I have said, in *Hotson*, the claimant would have succeeded in full if the doctors had not been able to assess the contributions made by the two causative factors. But the doctors could, so the ‘but for’ rule had to be satisfied. In *Bailey*, the claimant succeeded in full because the doctors could not assess the contributions. So the ‘but for’ rule was modified.

*Contribution to Risk as Opposed to Contribution to Injury*

22. Apart from the exception to the ‘but for’ rule established in *Wardlaw*, there was, from 1973, another different exception which no one could understand: the dermatitis case *McGhee v NCB* [1973] 1 WLR 1. Very little was then known (or still is so far as I know) about the aetiology of dermatitis and the experts were unable to say whether the claimant would have got the dermatitis just from the non negligent contact with brick dust at work or whether the additional negligent contact while cycling home had made a material contribution to the disease. All they could or would say was that the extra exposure had increased the risk of him getting it.

The House of Lords held for him, saying in effect that showing a material increase in risk was the same as showing a material contribution to the disease. This was puzzling and I for one did not understand it. It is a good example of a case in which it is difficult to sort out when a cause has contributed to the **injury** as opposed to the **risk** of injury. I thought I understood the rationale after *Wilsher* when Lord Bridge said that *McGhee* had not laid down any principle of law at all; it was merely ‘a robust and pragmatic approach to the undisputed primary facts. He thought that the House had simply inferred that the negligent prolongation of the contact with dust had made a material contribution to the disease. I personally have some sympathy with that view, on the facts of *McGhee*. However, Lord Bridge’s view was expressly disavowed by House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, to which I will now come.

23. In *Fairchild*, the workmen had been exposed to asbestos in breach of duty in the course of several different employments. The expert medical evidence showed that mesothelioma can be triggered by a single asbestos fibre and it was impossible to say when that trigger had occurred. All that could be said was that the risk of the single fibre causing cell mutation was related to the extent of the exposure. So, each employer’s negligence could be said to have contributed to the **risk** of injury but not to the injury

itself. The House of Lords was clearly anxious to find for the claimants; they felt that it was fair and just that an employer who had been in breach of duty to protect from asbestos exposure should be held liable even though it might not have been his asbestos fibre that had triggered the disease.

24. The House rejected the rationale that had been accepted in *McGhee* and also rejected Lord Bridge's explanation of it. On the facts of the mesothelioma cases, there was a clear difference between making a material contribution to the **disease** and making a contribution to the **risk** of the disease. On the facts of *Fairchild*, to say that the two came to the same thing or should be deemed to be the same thing was fiction. The House did not wish to sanction a fiction so it held that cases such as *Fairchild* were to be a recognised exception to the 'but for' rule. Where the exception applied, it would be enough for the claimant to show that the defendant's negligence had made a material contribution to the **risk** of injury, even though the injury might well have been caused by the negligence of some other defendant. Since *Barker v Corus (UK) Ltd* [2006] 2 AC 572, we now know that it is enough for the claimant to show that the defendant's negligence had made a material contribution to the risk of injury even though the injury might in fact have been caused by some non-negligent factor, including a natural phenomenon or by the

claimant's own negligence. It is unfair to defendants but, as a matter of policy, that is where the risk should fall.

25. But to what cases is the *Fairchild* exception to apply? Their Lordships tried to define its scope but they did not speak with one voice. Lord Bingham said that other types of case would have to be considered as and when. Lord Nicholls said that the exception must apply only in exceptional cases! Lords Hoffmann and Rodger tried to define the conditions which would have to be satisfied. They both stressed the need to limit the exception to cases in which it was impossible, on the present state of scientific knowledge, for the claimant to satisfy the 'but for' rule. The claimant would have to show that the breach of duty had increased the risk of injury. Lord Rodger added the requirement for the claimant to show that the injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing. That he said would usually mean that the claimant must prove that his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way.
26. In *Barker*, Lord Hoffmann endorsed what Lord Rodger had said about the two causes acting in substantially the same way. He was of the view, (*obiter*) that the exception would not apply in a case of lung cancer where the two agencies were asbestos dust and smoking.

27. In *Barker*, on which I don't want to dwell, the House of Lords has changed the *Fairchild* exception into a new species of tort, the gist of which is breach of duty leading to the creation of risk of injury, where injury actually occurs. By so doing they have provided a logical justification for apportioning the damages according to the degree of contribution to the overall risk of injury. As you will know, the Government has overruled the effect of this decision in mesothelioma cases but the rule about apportionment stands potentially in respect of any other type of case to which the *Fairchild* exception applies.
28. The first two cases in which the *Fairchild* or *McGhee* exceptions were discussed in the Court of Appeal were both vibration cases. In *Transco v Griggs* [2003] EWCA Civ 564, the claimant had been exposed to very high levels of vibration and had developed symptoms in his hands. These were initially thought to be due to VWF but further examination showed that they were not and eventually the doctors agreed that he had palmar arch disease. This is a very unusual condition and its causes are not well understood. However, by eliminating all the other potential causes and because vibration was a biologically plausible cause, the claimant's expert was 80% satisfied that that was the cause. However, that was not the end of the story because there was some non-negligent vibration, as there usually is. Defence counsel submitted that the claimant could not

show that ‘but for’ the negligent exposure, he would not have developed the condition. The judge looked at *McGhee*, and also at *Fairchild* although perhaps not in great detail. He noted that, in *McGhee*, Lord Reid had said that there was no real distinction between making a material contribution to the injury and materially increasing the risk of injury. He adopted that and found for the claimant saying that the defendants’ negligence had plainly caused a very substantial increase in the risk.

29. In the Court of Appeal, Hale LJ with whom Wilson J agreed, said that on the facts of the case it looked as though the ‘but for’ rule could have been satisfied. The vibration was very bad and no attempt at reduction had been made. She was implicitly encouraging judges to decide causation based on sensible inferences from the facts – in effect the approach Lord Bridge had described in *Wilsher*. I heartily agree with that and I would encourage judges to take a robust approach in cases like this. After all they are only looking at the balance of probabilities. They do not need scientific proof. If the negligent vibration exposure was substantial, the claimant should succeed, on the basis that the negligence has probably caused the injury.
30. However, Hale LJ also went on to say that the judge’s approach, which was to apply *McGhee* and *Fairchild*, should not be disturbed. She thought that the point had not been fully argued below. But she added that there

could be little doubt that the breaches of duty had indeed increased the risk of injury. Given that the degree of exposure, the breaches of duty and medical causation had all been established, it would be an unjust legal system which did not hold the employer responsible. So, this is a case which was very similar to *McGhee* and shows that, where the facts warrant it the court will find causation proved on the basis of a material increase in risk. I am not sure that it was necessary to go down the *Fairchild* route but, if it was necessary, I think that was a proper case in which to do so because palmar arch disease is not understood. It is not known that there is a dose response relationship and therefore it is not possible to say that the negligent exposure contributed to the disease as opposed to the risk.

31. The second vibration case in which the *Fairchild* or *McGhee* exception was applied was *Brown v Corus (UK) Ltd* [2004] EWCA Civ 374. Not to be confused with *Barker*. There were 3 claimants all exposed to grossly excessive vibration and all had VWF. The defendant admitted some breaches of duty and called no evidence as to the steps it had taken to reduce the levels. Nonetheless the claimants failed because the judge held that there had been no duty to reduce the levels of vibration and the breaches of duty which had been admitted or proved had not caused the injury. The greater part of the appeal related to the judge's finding in

respect of duty and the Court held that indeed the employer was under a duty to reduce the vibration levels so far as practicable and it was in breach of that duty. The remaining issue was causation. It was by then clear that there had been some negligent exposure and some non-negligent. The Court looked at *McGhee* and *Fairchild* and held that because the claimants had shown that the breaches of duty had increased the risk of VWF, they should succeed. Quite why it was necessary for anyone to look at *McGhee* or *Fairchild* I am not sure because this seems to me to have been a clear case where *Bonnington Castings v Wardlaw* could have been applied. It is well known that there is a direct link between the extent of vibration exposure and the severity of the VWF; the two are dose related. So it could properly have been said that the breaches of duty had made a material contribution to the disease. Because the experts had not given any evidence as to the extent of the negligent and non-negligent exposure, apportionment was not possible. However, that is not the way the case was argued or decided. Plainly the right result was achieved but whether it was necessary to rely on the *McGhee* exception, I very much doubt.

32. *Gregg v Scott* [2005] 2 AC 176 was another attempt to apply the *Fairchild* exception. The claimant's cancer had not been diagnosed at the right time and he sued alleging that, if he had received prompt treatment,

he would have had a 42% chance of a cure, (defined by the doctors as survival for 10 years after diagnosis) whereas because of the delay, his chance of a cure had been reduced to 25%. The judge held that, since the claimant would probably have failed to survive for 10 years in any event (he had had a less than evens chance) he had failed to show that the negligent delay had caused a materially different outcome. The Court of Appeal and House of Lords (by a bare majority) upheld the judge. In the House of Lords, the claimant argued that the *Fairchild* exception should be extended so as to enable him to succeed because the defendant's negligence had increased the likelihood of injury. The House rejected that submission. They held that in personal injury cases, (unlike claims in contract or claims in tort for economic loss) a claimant cannot sue for the loss of or reduction in the chance of a favourable outcome or the increase in risk of an unfavourable outcome. The claimant had to satisfy the 'but for' rule and to show that the negligence was *probably* the cause of the adverse consequence. If Mr Gregg could have shown that, if treated promptly, he would have had a better than evens chance of a cure and that the delay had brought his chances down across the 50% line, he would have succeeded in full.

33. The minority view was that the requirement that the claimant has to prove on the balance of probabilities that the negligence has caused a materially

different outcome was, to use Lord Nicholls' words 'irrational and indefensible'. He and Lord Hope were of the view that the reduction in the chance of survival from 42% to 25% is a loss (albeit a smaller loss) just as is the reduction of the chance from say 55% to 25%. I will not lengthen this paper by a discussion of my own views on this decision. The law is settled.

34. Another attempt at extension was made in *Clough v First Choice Holidays and Flights Limited* [2006] EWCA Civ 15. There the claimant was injured when he fell while walking along a wall at the side of a paddling pool. The owners of the pool should have painted the wall with non-slip paint; by that failure they had increased the risk of the claimant slipping. Other causative factors were in play; the claimant's feet were wet and he had drunk a good deal of alcohol. The judge said that it would be sufficient if the claimant showed that the lack of non-slip paint had made a material contribution to the fall but he rejected the claim saying that the breach of duty 'lacked causative potency'; the accident would probably have happened irrespective of the use of non-slip paint. The judge held that this was not a case where it was sufficient to show a material increase in the risk of injury.
35. On appeal, the appellant argued that he should have succeeded because the failure to use non-slip paint had materially increased the risk of a fall.

The Court of Appeal said that the judge had been entitled to reach his conclusion. Sir Igor Judge, then President of the Queen's Bench Division admitted that he had found the point a difficult one. It seems that, if any principle is to be derived from this case, it is that the *Fairchild* exception will not apply in a personal injury claim arising from a single incident. However, I am not sure that the Court did more than hold that, on the facts, the judge had been entitled to reach his conclusion.

36. Another attempt to rely on the *Fairchild* exception occurred in *Hull v Sanderson* [2008] EWCA Civ 1211. This was about the campylobacter bacterium which is often found in poultry. The claimant became ill on contracting the infection while working as a turkey plucker. The presence of the bacterium in the turkeys was not due to negligence but the judge found a number of breaches of duty which had undoubtedly increased the risk of infection. These related mainly to the provision of gloves and the giving of suitable advice and warnings. The agreed evidence was that the bacterium could only enter the body through the mouth not through a cut or abrasion. The judge held that the employers should have warned the claimant to be careful not to touch her mouth while her hands might be contaminated. Unfortunately he did not make any clear findings of fact as to whether she would have heeded that warning.

37. When the judge came to consider causation, he held first, that the claimant had picked up the infection at work, not elsewhere, and that the most likely explanation was that she had touched her hand to her mouth while it was contaminated. Then he asked himself whether the claimant could show that, but for the negligence, she would not have contracted the infection. He found it very difficult; he said it was all very speculative. The claimant might have been more circumspect about touching her mouth if she had been warned. But he said, she might have picked up the infection from a door handle or a table which had become contaminated without negligence. She had not satisfied the 'but for' test.
38. Counsel then sought to persuade him that the case should fall within the *Fairchild* exception; it was impossible for the claimant to show exactly how she had contracted the infection. Therefore because the breaches of duty had increased the risk of injury the judge should find for her. The judge accepted that submission and the claimant won.
39. On appeal, the employers contended that this was not a *Fairchild* case. The claimant knew all she needed to know; there was no shortage of scientific knowledge. The infection had got into her mouth when she touched it with an infected hand. There were a number of breaches of duty and the claimant had to show that but for those breaches she probably would not have caught the infection.

40. The Court of Appeal said that this was not a *Fairchild* case. There was no crucial lack of scientific knowledge. True it was that no one could tell exactly how or at what stage the bacteria had got onto the claimant's hand and from there into her mouth. But that was not necessary. If the judge had analysed the factual evidence and if he had made the essential findings of fact, he could have decided the case on the balance of probabilities applying the 'but for' test. In particular he needed to find whether, if properly advised, the claimant would have worn gloves which would have greatly reduced the risk of her getting the bacteria on her hands. Also he needed to decide whether the claimant would have taken care not to touch her mouth while her hands might be contaminated. If he had made those findings in the claimant's favour, he could quite easily have inferred that, on the balance of probabilities, the breach of duty was causative. The fact that there was a chance that she could have picked the bacteria up from a door handle would not have mattered. The Court accepted that judges often have to make difficult judgments about the effect of a breach of duty but the mere fact that the case is not easy for the judge to decide does not bring it within the *Fairchild* exception.

41. So, up to now, so far as I am aware, the only case in which the *Fairchild* exception has been, in my view, properly applied was *Transco v Griggs*. No doubt there will be more attempts and I watch the space with interest.

42. However, there seems to be an increasing number of cases in which the medical experts express their views on causation in terms of increased risk. Unless and until the court decides that the particular case falls within the *Fairchild* exception, such evidence will have to be dealt with by the application of the ‘but for’ rule. The thing to understand is that, if the defendant’s negligence has more than doubled the otherwise existing risk that the claimant will develop the disease, the claimant will succeed because he will have shown that it is more likely that the negligence has caused his disease than that it has been caused by the other potential causes.
43. Mackay J first applied that rule in the Oral Contraceptive group action. It is known that taking any oral contraceptive gives rise to an increased risk of DVT. A new generation of oral contraceptives was marketed which gave rise to a greater increase in risk of DVT. The claimants had all been on the old type of contraceptive without suffering DVT and had then transferred to the new type. Each had then suffered a DVT. They sued alleging that the new product was defective. That was disputed but, even if the claimants succeeded on that, causation was going to be a real issue. The parties agreed that it would be necessary for the claimants to show that the risk from the new pill was at least twice the risk from the old pill. This issue was decided as a preliminary issue. The evidence was in the

epidemiological studies. The risks were tiny; less than 1 in a thousand if my memory serves me right. The judge held that the new pill carried an increased risk but that the increase was less than twofold. So, the claimants failed.

44. The same approach to a two fold risk is I think often adopted in cases of lung cancer caused by asbestos where the claimant was also a smoker. It was adopted recently by Mackay J in *Shortell v BICAL Construction Ltd* which is unreported. Epidemiological evidence shows that the two agencies interact synergistically. So, if the claimant had a 10% risk of the disease due to smoking and a 5% risk due to asbestos, the effect of the asbestos is to increase the total risk to 50%. So, in effect, the risk due to asbestos is 40%. That means that the asbestos has quadrupled the risk which the claimant otherwise faced. The obvious inference is that, **but for** the asbestos, the claimant would not have developed the lung cancer.
45. I was able to apply that method of arriving at 'but for' causation in a case called *Novartis Grimsby Ltd v Cookson* [2007] EWCA 1261. That was a case of bladder cancer where the claimant had been negligently exposed to dyestuffs and had also been a smoker. The experts agreed that both factors were potentially causative and that they interacted, whether additively or multiplicatively they were not sure. The recorder found for the claimant on the basis that the negligence had made a material

contribution to the disease. The employers appealed saying that this was not a case of contribution to the disease; the most the claimant could do was to show that the negligence had increased the risk of development of bladder cancer. But, they submitted, this type of case did not fall within the *Fairchild* exception. The claimant maintained that the negligence had made a material contribution to the risk, but if it had not, then the case should fall within *Fairchild*. I think probably the defendants were right and there was no material contribution to injury, only to risk. We thought we would have to decide whether the case fell within *Fairchild* but then we realised that there was another answer to the problem. The judge had accepted the evidence of one expert who said that the negligent exposure to dyestuffs had more than doubled the risk due to smoking. So, we were able to say that the claimant had satisfied the ‘but for’ test.

46. If the increase in risk had been less than two fold, the claimant would not have succeeded unless he could have relied on *Fairchild*. I think that would have been a very difficult question.
47. I called this paper the search for principle in Causation. It is not an easy search. I fear that barristers and judges will continue to have difficulty with questions of causation and that the issue will continue to occupy the time of the Court of Appeal as often as it presently does. But I hope that this might have helped just a little bit.