THE GIST OF NEGLIGENCE

PART II: THE RELATIONSHIP BETWEEN "DAMAGE" AND CAUSATION

Part I of this article looked at the question of what has in the past and may in the future be recognised as the essential and minimum requirements of actionable damage in the tort of negligence. Because reported case-law rarely addresses this issue squarely, the answer to the question is unclear in many important respects. Arguably the most important—certainly the most topical—impact of this uncertainty about what is or could be the actionable "damage" in a negligence action is on the requirements for the proof of causation, since the causation issue is subordinate to and defined by the question of what forms the gist of the action. In the cases discussed in Part I proof of causal connection between the defendant's fault and the gist of the action was not an issue. This is because in those cases there was, apart from the defendant's fault, no other relevant source of risk of the past deleterious outcome, whether defined in terms of physical or economic damage or in terms of a latent condition which would certainly, probably or possibly produce such damage in the future. The background risk of that past outcome, that is the sum of other sources of risk operating at the same time as the defendant's fault and which might have caused the outcome, was nil (B% = 0). Causation not being an issue, the relevant issue was how the gist was or could be formulated. What has to be considered now are cases where the background risk is substantial. Here causation issues are inextricably tied up with the question of the definition of the gist.

Suppose that in circumstances where B per cent. is substantial, manifest sufficient actionable damage, an "outcome," has occurred—the plaintiff has contracted cancer or his defective bridge has collapsed—and the plaintiff is met with the argument that the outcome was caused by the background risk. The traditional form of the causation issue is that the plaintiff must prove on the balance of probabilities an actual causal connection between the defendant's fault and the past damage forming the gist of his action. In terms of the almost-universal "but-for" test this means that the plaintiff must show on the balance of probabilities that but for the defendant's fault, this gist damage would not have occurred. If the gist is formulated as the outcome itself then this means he must show that the extra risk attributable to the defendant's fault.

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1 The first part of this article was published at (1988) 104 L.Q.R. 213.
(D%) is greater than B per cent. so that, more probably than not, the outcome was due to the former and not the latter.\textsuperscript{2}

The application of the traditional balance of probability test here has two intrinsic drawbacks, which are becoming more apparent and unacceptable to courts, at least in some circumstances. The most obvious one is that the test does not work where estimates of the risks B per cent. and D per cent. are simply not available. This problem is discussed later. The other is the all or nothing nature of the test.

\textit{The All or Nothing balance of probability test: the Hotson argument}

Where there are multiple possible alternative causes of an outcome which has occurred only two are usually legally relevant—the combined background risk of that outcome which the plaintiff faced (B%)\textsuperscript{3} and that added by the defendant’s fault (D%). Where D is greater than B there is no problem for the plaintiff under the traditional test because he can show that more likely than not the outcome was due to the defendant's fault.\textsuperscript{4} Even here, however, the result of the test could be criticised if the plaintiff, in being taken to have proved causal connection, is allowed to recover for the entire damage and not in proportion to the risk added by the defendant's fault. Traditionally, no discount is made (at the causation stage) for the possibility that the outcome would have occurred at some time anyway. In micro-economic terms this would by itself produce overdeterrence of the defendant's negligently created source of risk. This result can be avoided under traditional rules by the deduction being made at the valuation stage (see below).

The usual example cited of the "injustice" of the all or nothing balance of probability test here is where the background risk is greater than that added by the defendant's fault. Under the traditional test the plaintiff is unable to establish a causal connection between the defendant's fault and the outcome. If the gist is formulated in terms of that outcome there is no recovery even though the risk associated with the defendant's fault may be anything up to the level of that background risk. In other words, the defendant may negligently double the risk faced by the plaintiff yet escape liability completely. In effect he is under a duty which to this extent he is free to ignore. His negligent activity is

\textsuperscript{2} I assume throughout that B and D are independent variables, \textit{i.e.} that there is no synergistic relation between them.

\textsuperscript{3} Including any risk due to defendant's non-negligent conduct.

\textsuperscript{4} There is nothing unusual in the law's acceptance that proof that a certain outcome resulted from a particular source of risk can be established—\textit{in the absence of better evidence}—by statistical probabilities; see below.
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The balance of probability test here-and there are becoming more apparent than not, and not the latter.²

Underdeterred—in fact not deterred at all. Results like these seem to be becoming more unacceptable to some judges.³

In order to avoid these perceived injustices of the balance of probability test as applied to the issue of causation, a radical argument was advanced in Hotson v. East Berks Area Health Authority⁴, which I shall refer to as the “Hotson argument”⁵. In this case the plaintiff accidentally fell and suffered a type of hip injury which carried with it a high risk of avascular necrosis developing later. Because of the carelessness of the defendants the risk he faced was increased, and by the date of trial he was suffering from the symptoms of the necrosis. The background risk of that outcome which he had faced because of the fall was assessed at 75 per cent. (B) and the risk added by the defendant’s fault (negligent medical treatment) at 25 per cent. (D).⁶ Clearly, if the gist of the complaint were traditionally formulated in terms of contraction of necrosis, the plaintiff would fail to establish the requisite casual link on the balance of probability. The novelty of the case was that the plaintiff attempted to circumvent this result by choosing to formulate the gist of his action, not in terms of the necrosis outcome, but in terms of the lost chance of avoiding that outcome. In other words, although the plaintiff fails to establish causation on the balance of probabilities to one formulation of the damage forming the gist, he seeks to succeed in doing so to an

footnote references


³ [1987] A.C. 750 (hereafter “Hotson, House of Lords”). Versions of the argument had previously been suggested by academics, e.g. G. Robinson, “Probabilistic causation and compensation for tortious risk” (1985) 14 J.Legis. Stud. 779; M. Mandell and S. Carlin “The value of a chance: the evolution and direction of chance in tort law” (1986) 20 Suffolk U. L.R. 203; C. Newdick “Strict liability for defective damage in the pharmaceutical industry” (1985) 101 L.Q.R. 405 (in class action form); R. Jackson and J. Powell, Professional Negligence (1st ed.) (London, Sweet & Maxwell, 1982) 243; King op. cit. supra, in two almost parallel examples at pp.1363–1364, and 1382). Note that the traditional formulation of the gist can be expressed in suitably limited terms of lost chances: loss of a more than even chance of avoiding the outcome (King, op. cit. supra). The Hotson argument simply frees the formula from this “more than even” requirement—see n.22 and accompanying text.

⁶ It may be of interest to some readers to note that a distinction has to be drawn between the possible ways the percentage chances D and B could be expressed: as they appear before the outcome (B%, D%); or as seen after it B%×D%, B%×D%. If the plaintiff is suing after the outcome then the level of risk he appears to face before the outcome [(B + D)÷100] is irrelevant. It may have only been a 3% + 1% = 4% or a 30% + 10% = 40% chance of cancer or property failure etc.; or it might have been a 75% + 25% = 100% certainty as seems to have been the case in Hotson. If he is suing after the outcome the level of this earlier estimate of total apparent risk (B + D)% is irrelevant because it is now clear that his case was one where the outcome was certain and courts will not ignore that knowledge. The value of the claim will be the same, namely B%×D% = ¼ of the value of the claim where there were no other possible sources of risk that outcome would occur when it did. Nonetheless, it is preferable always to express risks as they appeared before the outcome since, if claims are able to be made at this stage, it will be necessary to use these figures to determine the value of the interest destroyed by the defendant’s fault.
alternative formulation based on loss of a chance. Importantly, the Hotson argument retains the traditional form of the causation test (see above). It simply seeks to by-pass its traditional effects by a reformulation of the destroyed interest of the plaintiff (the gist). The ramifications of the Hotson argument are profound for the issue of what can form the minimum actionable damage in negligence claims.

The fate of the Hotson argument so far

What was the fate of the Hotson argument? In general the Court of Appeal grasped the nature of the plaintiff’s argument: that it was up to the plaintiff to identify and prove (a causal connection to) his loss on the balance of probabilities; that he had identified it as loss of a chance of avoiding necrosis (and proved a causal connection to it on the balance of probabilities); and that this loss formulated simply in terms of loss of a chance should sound in damages. The defendants’ argument was essentially that such formulations of loss had not and should not be compensatable in tort and that consequently the plaintiff failed because he had failed to prove causation to the only actionable damage, namely the necrosis. The Court of Appeal, accepting that hitherto the categories of loss compensatable by tort had been restricted to proven financial or physical losses (and loss of chances consequential on such losses), thought that the categories of loss, like the categories of negligence itself, ought not to be closed and ought to extend to pure loss of a chance, i.e. one not consequential on existing physical or financial loss. An explicit reason for its decision on the point was the injustice of the operation of the traditional balance of probability test when applied to a claim where the gist is formulated in terms of the outcome rather than in terms of loss of a chance.

Once the plaintiff had identified his loss as loss of a chance and the Court of Appeal had held that it was compensatable as such, the plaintiff was entitled to damages for the value of that lost chance because he could establish on the balance of probabilities that the defendants’ fault had caused that damage. The balance of probability test on the issue of causation of past events is retained but its effects are transformed by the reformulation of the damage which forms the gist of the action.

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1 Hotson, Court of Appeal, at pp.761 (Sir John Donaldson M.R.), p.764 (Dillon L.J.).
2 ibid., at pp.759, 764. There was also concern about the contrast with parallel contract-based claims where complaints formulated in terms of lost chances are allowed, creating differences between the remedies of N.H.S. and private hospital patients: see pp.760, 768.
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Unhappily the House of Lords did not resolve the difficult question raised by the plaintiff’s argument—namely whether reformulation of the gist in terms of loss of a chance should now be acceptable. Their Lordships focussed on the traditional (but in this context, irrelevant) question of whether the plaintiff had shown a causal connection on the balance of probabilities to the necrosis, which of course he had and could not. The defendants, therefore, succeeded in their appeal because the plaintiff had failed on the issue of causation as it related to damage formulated in terms of necrosis. Their Lordships regarded this finding as releasing them from having to determine whether loss of a chance could form the gist of a complaint in negligence. The loss of a chance issue was classified as one of valuation/quantification and it was held that unless the plaintiff first succeeded on causation no issue of quantification of the loss could arise. This reasoning unfortunately fails to address the essence of the plaintiff’s argument, which was whether a claim formulated in a different way (i.e. in terms of loss of a chance) was acceptable. In other words, the loss of a chance issue here is not about the quantification/valuation of the interest destroyed (all judges accepted the trial judge’s valuation of the lost chance as 25%) but whether loss of a chance could constitute the gist to which the causation enquiry would be directed.\(^\text{11}\)

Consideration of the plaintiff’s argument was, therefore, essential before any issue of causation could be addressed. It cannot be over-emphasised that the formulation of the “damage” forming the gist of the action defines the causation question. Logically one can only deal with causation after one knows what the damage forming the gist of the action is.

Although the House of Lords did not pronounce definitively on the plaintiff’s argument in this particular case, their Lordships dealt briefly with the argument and made some tentative remarks about it. Lord Bridge thought the plaintiff’s argument that loss of a chance should be actionable in tort was “superficially attractive” but that there were “formidable difficulties” in accepting it.\(^\text{12}\) Lord MacKay considered the issue at greater length but concluded that it would be unwise in the present case to rule that a plaintiff could never recover for pure loss of chance. Both he and Lord Ackner dismissed the application of the loss of a chance argument to the facts in Hotson by saying that the court should determine the

\(^{10}\) Hotson, House of Lords, at pp.782–783, (per Lord Bridge); p.785 (per Lord MacKay); pp.791–792 (per Lord Ackner).

\(^{11}\) King’s important article, supra, n.5, fails to make clear (i) this distinction between identification/formulation of loss and its quantification, and (ii) the interdependence of issues of identification and causation.

\(^{12}\) Hotson, House of Lords, at pp.782 (per Lord Bridge).
chances of necrosis before the defendants' negligence; and since at this time it was the case that the plaintiff more probably than not would develop necrosis (because B% = 75%), in legal terms he had no chance of avoiding the necrosis: that by this stage he was "doomed" and the sole cause of the necrosis had to be taken to be the initial trauma. It was, therefore, not "correct to say that on arrival at the hospital he had a 25 per cent. chance of recovery"; and therefore the hospital's later negligence could not be said to have caused him the loss of any such chance. This line of reasoning pre-empts any consideration of the loss of a chance argument in cases of sequential exposure to risks denying any legal relevance to the scientific evidence that on arrival at hospital there was still a 25 per cent. chance of avoiding necrosis. To reiterate: this evidence meant that 25 out of 100 persons arriving at the hospital in the plaintiff's condition would not have suffered the necrosis (in the absence of the defendant's fault); and it is impossible to say that this plaintiff on entry to hospital was "doomed" because he may himself have been one of the 25 who would have escaped but for the defendant's action. Perhaps what can implicitly be drawn from this and the other reasoning of the Law Lords in *Hotson* is that they were to address the argument squarely, they would reject it even in cases of contemporaneous risks. This would tally with the argument set out in Part I of this article, that one reason for the House of Lords' requirement of physical changes laid down in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* may have been a hostility to the recognition of purely speculative claims (see below).

Possible wider applications of the Hotson argument

There seems no obvious reason why the *Hotson* argument could not equally be raised in a case not involving personal injuries. A plaintiff whose defective box girder bridge has collapsed might argue that, although there were other possible alternative causes for the collapse in the background, the defect due to the defendant's fault independently increased the risk of collapse, that this thereby lessened or eliminated his chance of avoiding that outcome, and that he should be able to recover for the loss of this chance.

Similarly it could be argued that the *Hotson* argument does not depend on the plaintiff waiting to sue until after the outcome has occurred. In *Hotson* the plaintiff argued that actionable damage could be constituted by loss of a chance of avoiding an outcome

13 *Hotson*, House of Lords, at pp.785, 789–990 (Lord Mackay); pp.792–793 (Lord Ackner).
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(which in that case had happened to have been rendered certain by the addition of the risk due to the defendant’s fault, i.e. B + D = 100%). The formulation of actionable damage did not seem to depend on the past occurrence of the outcome itself, i.e. it was not formulated as “this outcome (necrosis) having happened, the plaintiff is suing for the loss of a chance of avoiding it.” Why then could not a plaintiff sue before the outcome, at least if he could prove that as a result of the defendant’s fault the outcome was inevitable just as it had been for the “doomed” victim in Hotson? More important, recognition of the Hotson argument would open up the possibility of purely speculative claims where the outcome was merely probable or possible. In other words, it would support a plaintiff recovering something where all he could show was that the defendant’s fault had increased his risk of a future outcome (such as cancer or property collapse) from 20 per cent. to 30 per cent. The prospect of such claims was, indeed, used by the defendants in Hotson to argue against the recognition of loss of chance claims.

The Hotson argument, then, leads to some of the same questions which the latent damage limitation cases discussed in Part I raised: could a plaintiff sue before physical changes to his person and property if these were certain to occur? If so, what if they were less than certain to occur? In both Part I and Part II, arguments in favour of such accelerated claims are tantamount to arguments in favour of allowing recovery for pure loss of a chance. In Part I it is simply the loss of a chance of avoiding an outcome, which, if it occurs, will indisputably be due to the defendant’s fault. In relation to the cases discussed so far in Part II (i.e., multiple possible alternative cause cases), the argument is more radical: it allows such accelerated claims formulated in terms of loss of a chance of avoiding the outcome even where, if the outcome occurs, it will not be certain that it was due to the defendant’s fault.

Some of the same points made in Part I also apply to the Hotson argument. For example, it may be possible to avoid the recognition of purely speculative claims by restricting the Hotson argument to cases where the outcome has occurred or is certain to occur. A convincing rationale for such a restriction on the sort of cases where loss of a chance could form actionable damage would, however, have to be found. Further, any restriction on the contexts in which loss of a chance per se is actionable would have to take into account the fact that courts have in the past treated certain economic loss claims in a way indistinguishable from claims for loss.

16 Hotson, Court of Appeal, at pp.762 (Sir John Donaldson M.R.), pp.769 (Croom-Johnson L.J.).
of a chance. Another common point is that uncertainty about whether loss of a chance can itself form actionable damage means that the relevant "injury" or "damage" for the purposes of the limitation laws (and insurance cover) may be unclear, creating uncertainty about when limitation periods (and insurance cover) begin to run.

But some of the difficulties seen by the House of Lords in the Hotson argument are artificial. The most important arises from the view that it makes an inroad into the traditional all or nothing balance of probability test of causation as it applies to past events. Their Lordships seem to conclude that the all or nothing balance of probabilities test is breached by the Hotson argument because it produces the following results: first, a plaintiff could recover where the background risk exceeds D per cent.; secondly, in a case where D per cent. exceeds the background risk the plaintiff would recover only in proportion to the risk added by the defendant's fault. These results make it appear that the plaintiffs are recovering to the extent but only to the extent that they have proven causation. Lord Ackner rejects such an inroad on the traditional test in the following terms:

"Once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100 per cent. certainty . . . [If causation is established on the balance of probabilities] such a finding does not permit any discounting—to do so would be to propound a wholly new doctrine which has no support to principle or authority and would give rise to many complications in the search for mathematical or statistical exactitude."[18]

This seems to misread the Hotson argument, which does not dispute the traditional all or nothing causation rule; it agrees with the rule that once causation is proved to a past loss on the balance of probabilities, then the loss thereby proved to have been caused by the defendant's fault is payable in full and no discount is made for the possibility that the loss was not so caused. What it does argue is that the claim should be formulated in terms of a different past event: the past loss of a chance (albeit of avoiding an outcome which may not yet have happened) to which the all or nothing balance of probabilities test for causation of past events still applies. Once it is proven on the balance of probabilities that the

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chance was lost due to the defendant’s fault, this loss is payable in full and no discount is made for the possibility that this chance was lost due to some other cause.

That a discount may seem to be being made under the Hotson argument stems from the fact that the plaintiff would recover a proportion of the cost to him of the entire outcome. But, of course, that proportion is the full value of the claim formulated in terms of only the loss of a chance. Indeed, recovery of only a proportion of the outcome’s cost reflects an intrinsic strength of the loss of a chance approach which may not be immediately apparent. This is that, by definition, it ensures that in assessing what chance of avoiding the outcome the plaintiff has lost because of the defendant’s fault, account is taken of all possible sources of risk that the outcome would have occurred at some time anyway (B*), not just the background sources of risk which the victim faced when the outcome actually occurred and which therefore were the possible alternative causes of the outcome (B). This ensures a more accurate valuation of the impact of the defendant’s conduct on the plaintiff. It is true that some courts attempt something very much like this in claims formulated in terms of the outcome. Thus, for example, in Smith v. Leech Brain & Co. Ltd. causation to the relevant injury (cancer) was incontrovertibly proved—it was clear on the facts that it had been the defendant’s fault which had triggered the victim’s pre-existing susceptibility to cancer. But in subsequently valuing what the victim had lost by this event the court took into account the risk that it would have been triggered at some time anyway, i.e. that what the defendant had destroyed was a less than certain chance that cancer would be avoided; so he only had to pay a proportion of the total cost of the injury to the plaintiff (the victim’s widow). The “discount” is made not to reflect

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19 The point does not emerge from the facts in Hotson because in that case B and B* were indistinguishable.
20 [1962] 2 Q.B. 405, at p.416 (per Lord Parker C.J.). See also Clark v. MacLennan [1983] 1 All E.R. 416 at p.433 where damages for the carrying out of a negligently premature surgical operation were discounted by one third to take into account the risk that the operation, even if performed at the correct time, would not have been successful anyway. If, in the absence of defendant’s fault, the outcome was nevertheless certain, then a crude assessment would be that, in traditional terms, the discount is 100% or, in lost chance terms, no chance has been lost by the addition of D% risk of that outcome. This would explain the result in such cases as Cutler v. Vauxhall Motors Ltd. [1971] 1 Q.B. 418 (note especially dissent by Russell L.J. who allowed “a very considerable but not total offset”); Barnett v. Chelsea & Kensington Hosp. Management Committee [1969] 1 Q.B. 428, discussed by Dillon L.J. in Houson, Court of Appeal, at pp.764; McWilliams v. Sir William Arrol & Co. Ltd. [1962] 1 W.L.R. 295 (H.L.) on the assumption the Lords regarded the chance that the victim would have used the safety equipment as nil—see J. Fraser and D. Howarth, “More concern for cause” (1984) 4 Legal Studies 131, at p.136. A more accurate approach would take account of the chance that D% had accelerated the outcome. Compare on a related issue, Performance Cars Ltd. v. Abraham [1962] 1 Q.B. 33 where the outcome complained of was the loss associated with the need to respray a car, and Jobling v. Assoc. Dairies [1982] A.C. 794. On U.S. case-law see King, op. cit. supra, n.5, and Mandell and Carlin, op. cit. supra, n.6.
the chance that the triggering had been due to a cause other than the defendant's fault (because it was clear this had not been the case) but to reflect the true value of the loss which the defendant had caused the plaintiff to suffer. In many cases, if not all, this approach will give a result indistinguishable from that produced had the claim been framed in terms of loss of a chance.

The difference, then, between post-outcome claims formulated in traditional terms of "outcome" and those formulated in terms of lost chances is not that the latter offend the all or nothing test of causation. In both the result is that once causation to a loss is proved (conclusively as in Smith v. Leech Brain, or on the balance of probabilities where better evidence is unavailable) the value of that loss is payable in full with no deduction for the chance, if any, that the loss was caused other than by the defendant's fault. The difference is that in traditionally formulated claims any "discount" made to value the loss appropriately, by taking into account the chance that the outcome would have occurred at some stage anyway, is postponed to the stage of the valuation of the destroyed interest (and often overlooked by defence counsel and judges), while in cases formulated in terms of a lost chance this feature of the valuation of the claim is incorporated directly into the definition of the injury for which damages are sought. So a significant advantage of the Hotson argument in favour of lost chance formulations—quite apart from letting in claims where the background risk exceeds the defendant's negligence—is that it ensures that account is taken, in the valuation of claims brought after the outcome, of the chance that the outcome would have occurred, at some time anyway. In the interests of doing justice to defendants, therefore, there is a strong argument that even in cases where the plaintiff could prove causation in a claim formulated in terms of a past outcome (because D% exceeds B%), all claims would be better formulated in terms of loss of a chance to ensure that the valuation of the claim will take all relevant risks into account. Given that the result in cases such as Smith v. Leech Brain is close to, if not indistinguishable from, that which would have been produced had the claim been overtly formulated in terms of loss of a chance, such a development may not be as novel in the law of negligence as it at first appears.21

One can see good reasons why the Law Lords might have been keen to defend the all or nothing balance of probability test. Were plaintiffs to be able to recover in proportion to the degree to which

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21 See supra, n.6.
they had established their claim, the handling and valuation of multi-issue claims would be made highly complex. On the other hand, as emphasised earlier, it is quite possible for the law to support the all or nothing test for issues like duty and breach and yet adopt the Hotson argument. What the latter does do, of course, is to ensure that each claim will have to address the question of the exact nature of the interest which the defendant's fault has destroyed; and in cases of multiple possible alternative causes this necessitates resort to statistics if there is no better evidence. But the fact that the Hotson argument depends on statistical estimates should not engender the sort of caution in the courts that it seems to be doing. After all, this fact only requires consideration of a question which under traditional rules can and arguably ought always to be considered. What is more, statistics have long been recognised by courts as a legitimate tool not only for valuing the destroyed interest, but also to establish causation itself in the absence of better evidence and to handle other causal complications such as those arising in cases of contributory negligence and multiple tortfeasors. In these contexts "statistical exactitude" has never been required, courts being satisfied with relatively rough estimates.

Another attraction of the Hotson argument is that, at least in theory, it should provide more finely tuned deterrent effects than is possible when the gist of the claim is defined in terms of the deleterious outcome itself. In the latter case, the effect of the all or nothing balance of probability test operating on that formulation is that the relevant sources of risk are either under- or over-deterr ed (see above). A defendant may contribute as much risk of the outcome as exists in the background and yet escape liability completely (thus being undeterred) while the defendant whose contribution to risk is only slightly above that of the background risk is made to compensate the victim for the full outcome (i.e. is over-deterr ed) unless the Smith v. Leech Brain point is raised at the trial or in the settlement bargaining. If the loss of a chance argument is adopted, the defendant will only pay in proportion to the risk his action added to that already faced by the plaintiff.

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22 See Hotson, Court of Appeal, at p.760 (per Sir John Donaldson, M.R.).
23 But some individual judges find the logic of the statistical tool elusive. See e.g. misunderstanding of statistical argument in McGhee v. National Coal Board [1973] 1 W.L.R. 1, at pp.12-13 (per Lord Salmon), discussed in J. Stapleton, Disease and the Compensation Debate (Oxford, Clarendon Press, 1986) 40; Hotson, Court of Appeal, at pp.769, 770 (per Croom-Johnson, L.J.) to the effect that general statistical chance was insufficient.
24 On the deterrence goal see Robinson, op. cit. supra, n.6; King, op. cit. supra, n.5, at pp.1377 and 1381-1382. There is a potential confusion in the literature: some writers discuss deterrence in the context of actual causation of an outcome while others do so in the context of the increased risk of an outcome: see R. Wright, “Actual causation vs. probabilistic linkage: the bane of economic analysis” (1985) 14 J.Leg.Stud. 435. Fine-tuning deterrence may be outweighed by the goal of compensating the plaintiff in full and/or avoiding unattractive outcomes, resulting in courts holding a defendant liable to pay in full for an outcome he has not been shown to cause; see, e.g. McGhee, supra; Fraser and Howarth op. cit. supra, n.20, at pp.138 et seq. on the problem in Baker v. Willoughby [1970] A.C. 467.
This also has the attraction that it reduces the possible situations in which the defendant is under a legal duty which he is effectively free to ignore—situations which some judges find distasteful (see below).

Another way of putting this closer link between the proportion of risk contributed by the defendant's fault and the amount that he is called on to pay is that the defendant is not made liable for contributions to the overall risk of the outcome which, whether he was negligent or not, were totally outside his control. The over-deterrence involved when a defendant is held responsible to pay for risks completely outside his control is one of the perceived "injustices" of the balance of probability test applied to formulations of gist in terms of the outcome itself when the risk added by the defendant's fault is greater than the background risk of the outcome. It is also a major objection to the way recovery was allowed in an important case where estimates of relative contributions to overall risk were unassessable (see below).

**Where D is the only source of risk but is unassessable**

Earlier it was noted that the most obvious problem presented to plaintiffs by the balance of probability test of causation when applied to claims formulated in terms of some overt outcome such as necrosis is that it depends on the availability of estimates of the relative contributions to the risk of that outcome made by the defendant's fault, D per cent., and by other background sources, B per cent. Of course, where D is the only source of risk and the outcome has already occurred by the time of trial there is no problem in establishing causation, so the unassessability of D is irrelevant. But if the outcome has not occurred, then, even if D were the only source of risk, and even if speculative claims based on loss of a chance were allowed in theory, in practice they would fail in these conditions. This is not because causation would be impossible to prove—after all the only cause of the lost chance would be the defendant's fault—but because the unassessability of D per cent. would prevent the valuation of the lost chance of avoiding that outcome. So, for example, even if the plaintiff's only exposure to asbestos was due to the defendant's fault and it was clear that exposure had increased his risk of asbestos disease manifesting itself in the future, if that degree of risk was unassessable he would be unable to claim for the lost chance of avoiding that disease before he manifested symptoms, because he would not be able to evaluate the lost chance.
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Evidentiary gaps: the McGhee and Wilsher cases

Where the defendant's fault is not the only source of risk and the relative contributions of risk from D and B cannot be assessed, then, even if the outcome has occurred, proof of causation on the balance of probabilities to damage formulated in terms of the outcome will be impossible because it cannot be shown that D per cent. is greater than B per cent.

So far we have assumed that the mechanism by which the outcome has occurred was known to be either solely due to D or solely due to B. But what if the mechanism is unknown, a common problem in disease cases? Suppose there are two sources of risk each independently capable of producing a type of outcome and that outcome is capable of varying degrees of gravity (e.g. diseases such as pneumoconiosis and dermatitis). When a person has been exposed to both sources and then suffers that type of outcome, the mechanism at work may either have been that the total outcome was entirely produced by one of the sources alone (as above: what I shall call the “alternative cause mechanism”) or that both sources caused an effect and the total gravity of the outcome is an aggregate of these two effects (what I shall call the “cumulative cause mechanism”). Unless evidence is available that one or other mechanism was at work the better conclusion would appear to be that either mechanism could have been at work, and factors such as whether the exposure to the sources was consecutive rather than contemporaneous and whether the sources were of the same type allow no presumption to be drawn in favour of one mechanism rather than another (see below).

Clearly, where a plaintiff is faced with an evidentiary gap constituted not only by the unassessibility of contributions of risk from D and B, but also by an unknown mechanism, he must fail under orthodox rules of causation. Exactly such a fact situation presented itself to the House of Lords in McGhee v. National Coal Board. Here an employee was exposed during work hours to a brick dust which carried with it a risk of dermatitis. On top of this background risk, the defendant's negligence in not providing after-work showers added a further period of risky exposure because the worker was unable to remove the dust until he arrived home. Unfortunately, experts were unable to estimate—even crudely—the relative contributions to the total risk of the two possible causes, exposure at work and exposure on the way home, or to say what sort of mechanism was involved. Although under orthodox rules of causation the pursuer in that case ought to have failed, the House...
of Lords allowed him to recover on the basis, it seems, that in the special circumstances of such an evidentiary gap no useful distinction was to be drawn between a source materially contributing to the risk of an outcome and that source materially contributing to the outcome itself. To many commentators the reasoning in McGhee appeared, in cases of such evidentiary gaps, to allow the abandonment of the orthodox form of the causation test (i.e. proof on the balance of probabilities of actual causal connection to some damage). In its place the House of Lords seemed to approve a test so minimal that it could be satisfied simply by showing that D existed (i.e. that the defendant’s fault had materially increased the risk of such damage), whereupon the burden of proof shifted to the defendant.27

There were many problems with this supposed McGhee “doctrine”: in particular the reasoning of the House of Lords seemed to fail to distinguish clearly between the alternative cause mechanism and the cumulative cause mechanism. This led the House of Lords to draw an analogy with an earlier case decided by the House, Bonnington Castings Ltd. v. Wardlaw, 28 which was unequivocally a case of cumulative causes (the pursuer’s lung condition was due to the combined effects of workplace dust from a number of sources, only one of which was the subject of the complaint in negligence). This seemed an inappropriate analogy to use in McGhee, where the mechanism was unknown and the medical evidence did not seem to allow an inference of cumulative causes to be drawn; for if this had been possible, as Lord Reid himself may have recognised,29 McGhee would have been indistinguishable from Bonnington Castings.

Whatever the technical difficulties with McGhee, its most worrying aspect was constituted by the injustices it could create for

26 See McGhee at p.4 although Lord Reid may have been confusing a cumulative cause mechanism with a “threshold” mechanism; see below, n.35.
27 Unorthodox approaches are not unknown in this area of the law—see the abandonment of the substantive “but-for” aspect of the causation test in some cases of multiple sufficient causes when they operate concurrently (e.g. two tortfeasors each shoot at and hit V, either shot being sufficient to kill V: Hart and Honoré, Causation in the Law (2nd ed. 1985) at p.235 or sequentially (e.g. Baker v. Willoughby [1970] A.C. 467). The general view is that causal connection in such cases: Hart and Honoré call them cases of “additional causation,” and North Americans call it “substantial factor causation.” If liability is imposed in cases of multiple possible alternative causes (e.g. two tortfeasors each shoot at V who is hit by only one shot: Cook v. Lewis [1952] 1 D.L.R. 1) even this form of causal connection is absent.
28 [1956] A.C. 613 (hereafter “Bonnington Castings”). The narrow ratio of this case was simply that the burden of proof of causation is on the plaintiff.
29 On both Lord Reid’s analysis and the subsequent majority decision in McGhee: the defendant was found negligent but had increased the risk of an effect. On both
a defendant, especially where not all sources of risk were under his control as they had been in the case itself. 30 It was for just such an extension of what appeared to be the McGhee "doctrine" that the plaintiff argued in the recent medical negligence case of Wilsher v. Essex Area Health Authority. 31 Here a premature baby had faced a background risk of the adverse outcome which he in fact suffered (retrolental fibroplasia, "RLF," an incurable condition of the retina). This background risk was not the result of conduct by, nor subject to the control of, the defendant; it was simply a risk the baby faced by virtue of being born prematurely. The plaintiff argued that the defendant's fault had materially increased the risk of this outcome. 32 However, the size of this added risk and the background risk were unknown, as was the mechanism by which RLF could be caused. Accordingly the plaintiff argued on the basis of McGhee that if he could prove the defendant's fault had increased the risk of the outcome he had sufficiently established causation and the burden of proof would shift to the defendant.

Lord Bridge, with whom the other members of the House unanimously agreed, rejected the argument that McGhee had laid down any "esoteric principle" of causation or of burden of proof. Rather he saw a majority of the judgments in that case as resting on a common sense inference of cumulative causation. He acknowledged that, whereas in Bonnington Castings a cumulative cause mechanism was unequivocally involved, in McGhee it was unclear whether the disease was caused by both D and B or by one source alone. But, he argued,

"where the layman is told by the doctors that the longer the brick dust remains on the body the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis." 33

In other words, in such circumstances of evidentiary uncertainty as in McGhee it is reasonable to infer—as Lord Bridge interprets the majority of those sitting in that case as having done—that the defendant's fault had not merely increased the risk of dermatitis but had in fact contributed an effect which formed part of the total effect. Once the inference of cumulative causation is drawn the

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30 On both types of difficulty see Stapleton, op.cit. supra, n.23, at pp.39-40, 46-49, 55-57.
32 A point the defendant disputed; see Wilsher at p.562.
33 See Wilsher at p.567.
plaintiff will be able to satisfy the orthodox balance of probability test of causation since he can show that a portion at least of his total injury was caused by the defendant. The analogy with *Bonnington Castings* then appears well-justified.

Lord Bridge’s reinterpretation of the speeches in *McGhee* is a neat solution to the problems that case seemed to pose for the form of the causation issue and the burden of proof. The orthodox form is reasserted—that on the balance of probabilities some damage was actually caused by the defendant—and the burden of proof is reaffirmed as lying on the plaintiff. There are, however, difficulties with this analysis. For example, it is not clear why, if there is doubt about aetiology, the common sense inference is in favour of a cumulative cause mechanism rather than an alternative cause mechanism. The factors stressed by Lord Bridge—that B and D were exactly the same type of source of risk (i.e. dust) to which the victim was exposed consecutively—do not seem to support the inference.34

The most important difficulty with the House of Lord’s analysis in *Wilscher* is that it does not eliminate the principal objection to the *Bonnington Castings* and *McGhee* cases, that at the end of the day the defendant was called on to pay for injuries which he had not been shown on the balance of probabilities to have caused. How was this? In *Bonnington Castings* and, following its reinterpretation in *Wilscher*, in *McGhee*, the pursuer is rightly regarded as having no difficulty in satisfying the causation issue in its orthodox form because, by definition, when a cumulative cause mechanism operates, each source independently contributes some effect. Once such a mechanism is proved or inferred a plaintiff can show causation to a portion of the total injury. But while it is true to say he can satisfy the causation test, it is important to realise that it is one which relates to only a portion of the overall injury. Herein lies the reason why *Wilscher* has not resolved the basic problem presented by *McGhee*, for in that case, as in *Bonnington Castings*, the pursuer was allowed to recover for the entire injury, not just for the portion of that injury which he had proved to have been caused by the defender’s fault. This is tantamount to allowing the gist of the claim to be formulated in terms of the entire outcome while the causation requirement which the plaintiff is asked to satisfy is not different.

This non-orthodox view which the maxim of causation was able to receive because it has been unable to do so in connection with the *Bonnington Castings* cases still represents the orthodoxy. It is shown of the basic internalism in the *Bonnington Castings* cases. This radiates from Lord Bridge’s interpretation of causation.

Of course, the problem of the cumulative model, the assumption of an unnecessary externalisation of the entire outcome of some injury, the cumulative causation cases under *Bonnington Castings*, the plaintiff’s ability to have no basis for his claim. The cumulative causation cases and the courts not having a basis for the plaintiff’s claim must coincide with the “damage” in “damage” the plaintiff has been shown to have sustained.”

34 Recovered orthodoxy ruled that it was not necessary to show that a “threshold” injury was caused in order to satisfy the evidence that the *Bonnington Castings* case of the House of Lords 29

36 In *Fitzgerald v. Lane*, supra (pedestrian hit by one negligent driver then by another). The fact that in circumstances such as those in *McGhee* a doctor may well state that the longer the exposure to dust the greater the risk of disease carries with it no implication that the disease is caused by both sources. It is simply one form of a more general truism: that the more numerous the sources of risk (of whatever type) and the longer the period of exposure, the greater the risk. The alternative cause mechanism is equally compatible with such a statement and would seem to be no less likely where the sources are alike and the exposures sequential.

37 Clark & *Clarke’s* aggregate of *Wilscher* plaintiff was
asked to satisfy is limited to only a portion of that gist damage. This non-coincidence of gist damage and the damage in respect of which the causal issue is formulated means that a plaintiff is also able to recover for that part of the overall injury to which he has been unable on the balance of probabilities to show any causal connection. Thus, even though the form of the causal issue in these cases may now be seen as the orthodox one, the outcome still represents an abandonment of the traditional rule that the defendant should only pay for past injuries which he has been shown on the balance of probabilities to have caused. It over-internalises costs to the defendant and over-deters his conduct. This radical, pro-plaintiff result seems to be unaffected by Lord Bridge’s analysis in Wilsher.\footnote{Recovery of the cost of the entire injury in McGhee might, in theory, be explained under orthodox rules, for example if it is inferred that the alternative cause mechanism operated and that it was more likely that the later period of exposure had been the operative cause; or if a “threshold” mechanism is inferred whereby each period of exposure was insufficient to cause any injury, but together they passed some threshold level of exposure whereby the total injury was triggered. The barrier to such rationalizations of the result in McGhee is that there was no evidence that one of these mechanisms was proved, or that its inference underlay the reasoning of the House of Lords.}

Of course, if some estimates of D and B can be made in a cumulative cause case, the abandonment of traditional rules is unnecessary, because it will be known to what extent the formulation of the gist damage must be cut down to fit the portion of the entire injury to which causation can be shown. The eagerness of some courts to accept such crude estimates in the case of cumulative causation attests to their preference for deciding these cases under orthodox rules.\footnote{See, e.g. Thompson v. Smith’s Shiprepairers (North Shields) Ltd. [1984] Q.B. 405 at pp.438-444, 450 (apportionment between causes adopted despite a “rough and ready” result) and cases cited therein. In the case of sequential exposures to sources of risk courts use the realistic lengths of exposure to apportion the total injury between sources, although the attitude taken in cases of contemporaneous exposures is less clear: see Stapleton, op. cit. supra, n.23, at pp.28-29.} But where there is an evidentiary gap, as there was in McGhee and Wilsher, (and perhaps in Bonnington Castings), such that D and B cannot be ascertained at all, the plaintiff cannot succeed under orthodox rules. There is simply no basis on which the gist-damage can be cut down even if a cumulative cause mechanism is inferred. If, for policy reasons, courts nonetheless want plaintiffs so succeed in such cases, they must countenance the severance of the traditional link between the “damage” on which the causation question operates and the “damage” forming the gist of the action, and accept the radical consequence of defendants paying for damage which they have not been shown to have caused. In one case Donovan J. explicitly accepted this course\footnote{Clarkson v. Modern Foundries Ltd. [1957] 1 W.L.R. 1210. Here the total injury was the aggregate of effects from innocent (i.e. outside the limitation period) and guilty sources, yet the plaintiff was allowed to recover for the total injury.} and in another Mustill J. considered it
favouredly in an obiter dictum. It may even have been the implicit intention of the House of Lords in Bonnington Castings to do so, although this is highly unlikely given the paucity of evidence that this important issue was addressed. More convincing is the idea that the House of Lords in McGhee, in particular Lord Wilberforce, appreciated the necessity of abandoning traditional ideas if the plaintiff was to be allowed to win in cases of such evidentiary gaps. It remains unclear what sort of evidentiary difficulties and policy considerations may persuade future courts to follow this unorthodox route.

The relationship of the Hotson and McGhee/Wilsher cases

What the Hotson and McGhee/Wilsher fact situations have in common is that they are both situations in which under orthodox rules the plaintiff would fail to establish on the balance of probabilities the necessary causal connection where the gist of the claim is formulated in terms of the entire outcome. To allow recovery in such cases radical new arguments will have to be accepted. These are, respectively, that the gist can be formulated in terms of the loss of a chance; and that the “damage” which forms the gist of the action need not be the same as the “damage” to which a causal connection must be traced, allowing recovery for injury to which no causal connection has been shown.

Both arguments open up the prospect of recovery in negligence by a much wider range of plaintiffs although, interestingly they generally arise in fact situations which are mutually exclusive.

38 Thompson v. Smith's Shipwrights (North Shields) Ltd., supra, at pp.438-439; but contrast his later, perhaps more conservative, view in Wilsher v. Essex A.H.A. [1987] Q.B. 730 (C.A.) at p.754 (that “it would be wrong to hold the defendants liable for a contribution to the plaintiff’s hearing losses which was known not to be the result of the defendant’s breach”). Hart and Honore, op. cit. supra., n.27, at pp.228-229 also approve the radical approach.

39 The discussion by Hart and Honore, op. cit. supra., n.27, at p.410 of a material contribution “doctrine” in the context of Bonnington Castings and McGhee is puzzling because, apart from a short passage in Lord Keith’s judgment in the former case (at p.626) there is little to indicate that such a startling doctrine was being formulated.

40 Should it be the case—as it seems it may be at present—that where D and B are unassessable the plaintiff is still allowed to be defeated by orthodox rules unless a cumulative cause mechanism can be proven or inferred? To what special considerations does the latter circumstance give rise? Does it only do so when other factors are present? Interestingly, Clarkson, Bonnington Castings and McGhee are all (a) employment cases and (b) cases where all sources of risk were under the control of the defendant. Are these unstated factors which singly or together justify the radical result in these cases? The other common factor, that all involved the same type of risk, does not seem to provide an adequate independent policy reason for unorthodox treatment—contrast Browne-Wilkinson V.-C. in Wilsher v. Essex A.H.A. [1987] 1 Q.B. 730 at pp.779-780, quoted with approval by Lord Bridge in Wilsher at pp.569-570. Nor does it provide the basis for inferences about causal mechanisms—see supra, n.34.

41 Contrast the view of Lord Mackay (Hoton, House of Lords, at p.780) who seems to link the fate of the Hoton argument with that of the McGhee “doctrine,” and the view of Phillips J. in Bryce v. Swan Hunter Group Plc. [1987] 2 Lloyd’s Rep. 426 at p.442, who seems to suggest that the two doctrines may represent alternative approaches to the same facts. At most this overlap could only occur where the risks are assessable, an example of which may be Fitzgerald v. Lane, supra, n.31, where on one reading of the medical evidence the risks were assessable yet the Court of Appeal applied McGhee.
The Hotson argument relies on a reformulation of the claim in terms of lost chances and depends on the assessability of the background risk of the deleterious outcome (B\%) and the risk added by the defendant's negligence (D\%), because recovery is limited to the degree of risk added by the defendant's fault. This device for circumventing the result of applying the traditional balance of probabilities test to claims couched in terms of outcome breaks down where there is an "evidentiary gap" caused by the unassessability of B per cent. and D per cent. because, although causation to the lost chance can be proved (see above), the claim would still fail because the plaintiff could not value the chance which he has undoubtedly lost. It was in just such a case of an evidentiary gap, where the Hotson argument could not have provided any help for a plaintiff, that the pursuer in McGhee was allowed to recover for the entire damage. This is a result even more radically pro-plaintiff than the Hotson argument. Under the latter, at least the plaintiff only recovers in proportion to the degree of risk of the outcome contributed by the defendant's fault, and there is no need to abandon the idea that the defendant should only pay for what he has been shown on the balance of probabilities to have caused. The caution of the House of Lords towards the more modest Hotson argument and its recent rejection of the "radical doctrine" interpretation of McGhee suggest that, were the intrinsically radical nature of the implications of Bonnington Castings and McGhee to be raised before the House, it would probably reject them. It would do so in favour of orthodox rules, in particular the traditional requirement that the "damage" which forms the gist of the action is the damage to which a causal connection has to be proved. Certainly, clear judicial confirmation and clarification of the latter relationship would resolve many of the important questions left open after both the Hotson and Wilsher cases.

**Conclusions**

This article can be summarised in the following points.

1. Observable manifestation of physical changes in the plaintiff's person or property are not necessary for a claim in negligence.
2. At least in personal injuries cases and cases where physical changes have occurred by the date of trial, the courts seem to treat the occurrence of such physical changes as the necessary gist of the action, *i.e.* the prior defective condition of the plaintiff or his property which has given rise to the physical changes is not itself regarded as actionable physical damage.
3. This requirement is not necessary if the claim is formulated in terms of economic loss, as in Junior Books, or if it qualifies as an exceptional property-damage case where the property is “doomed from the start”; but both these exceptions are currently interpreted extremely narrowly.

4. Consideration of latent personal injuries cases and property cases which could be construed as based on physical damage or economic loss throws doubt on the logic and workability of the requirement of physical changes. Its policy basis, if any, is unclear. In so far, for example, as it may have been a response to limitation difficulties formerly faced by plaintiffs in latent damage cases, it is no longer justified.

5. There are arguments for the abandonment of physical changes as a requirement of minimum actionable damage, including fairness to plaintiffs and mitigation of damage.

6. One problem with allowing claims in the absence of (what in practice have to be overt) physical changes, however, would be that it would make more difficult maintenance of the traditional distinction between property damage and economic loss.

7. A second problem with allowing claims in the absence of overt physical changes would be that it would be more difficult (although not impossible) to define minimum actionable damage in such a way as to exclude purely speculative claims. If the owner of a house which is yet to suffer physical effects due to the defendant’s past fault is to be allowed to sue for the certainty that one day it will collapse (i.e. where he can prove it is “doomed”), it may be difficult for courts to justify refusing a remedy in situations where future collapse is only a probability or even when it is only a mere possibility. Allowing such claims is tantamount to recognition that mere loss of a chance of avoiding a deleterious outcome can itself constitute actionable damage in negligence.

8. The argument that such claims should be allowed has recently been made in the Hotson litigation in an attempt to circumvent a difficulty faced by certain plaintiffs on the issue of causation when there are multiple possible alternative causes of the deleterious outcome. This “Hotson argument” was accepted by the Court of Appeal in a case where the outcome had already occurred, but the House of Lords side-stepped the argument and have yet to pronounce on it.

9. The response of the House of Lords in Hotson seems likely to be due to an implicit hostility to, or at least grave caution about, the argument. This may be due to the wide-ranging effects that it could have, which include (a) allowing claims to

10. This is a separate issue from the question of whether or not the provisions of the Limitation Act 1980 are applicable, which has been dealt with elsewhere, and is not relevant to the current consideration.

11. Whether or not the provisions of the Limitation Act 1980 apply depends on the nature and extent of the damage, and not just on the fact that it is economic loss.

12. In the absence of an overt physical change, economic loss should be actionable as economic loss.
necessary if the claim is formulated in terms of Junior Books, or if it qualifies as personal injury and is based on physical damage or injury. The logic and workability of the changes. Its policy basis, if any, is questionable, as it may have been a response to the issues faced by plaintiffs in latent damage cases.

Abandonment of physical changes and actionable damage, including the negation of damage. Claims in the absence of (what in physical changes, however, would be called) maintenance of the traditional concept of damage and economic loss. Giving claims in the absence of overt negligence that it would be more difficult to define minimum actionable damage than purely speculative claims. If the plaintiff has suffered physical effects due to his fault, he is to be allowed to sue for the future collapse (i.e. where he can prove the difficulty for courts to justify refusing to take into account the possibility. Allowing such a limitation that mere loss of a chance can itself constitute actionable damage.

Claims should be allowed has recently been attempted in an attempt to circumvent the possibility of the possible alternative causes of the Hotsen argument" was accepted by the Court where the outcome had already been reached. Lordships side-stepped the argument on it.

The Lords in Hotsen seems likely to have addressed to, or at least grave caution may be due to the wide-ranging implications which include (a) allowing claims to be made before the deleterious outcome occurs even when its occurrence is speculative, and (b) suggesting that the traditional formulation of claims in terms of outcome should be replaced in all cases by a formulation in terms of loss of a chance, to ensure that the risk that the deleterious outcome would have occurred at some time anyway is always taken into account in the valuation of the claim.

10. The novelty of such results is less than it seems since (a) courts in certain economic loss cases appear to accept that the purely speculative risk that a loss will occur is actionable per se, i.e. before the outcome has occurred; and (b) courts in certain traditionally formulated personal injury claims brought after the outcome has occurred appear to have valued the loss suffered by the plaintiff in a way similar to, if not indistinguishable from, the way in which it would be valued if the loss were directly recognised as a lost chance of avoiding that outcome.

11. Where there exists an evidential gap produced by the unassessability of the relative contributions to the risk of the outcome made by the defendant's fault and other sources, a plaintiff cannot succeed under orthodox rules. However, the plaintiff succeeded despite such an evidential gap in McGhee. Recently in Wilsher the House of Lords has interpreted the explicit reasoning in McGhee but its radical outcome has yet to be explained.

12. Important questions left open after Hotsen and Wilsher would be resolved by judicial confirmation that the past "damage" forming the gist of an action must coincide with the "damage" to which a causal connection on the balance of probabilities must be proved.

The question of what does and what could form actionable damage in negligence has not received adequate attention. While this neglect generates uncertainty in specific areas, such as the law of limitation of actions, its most important effects are that it blurs the limits of the tort itself and confuses the causation issue. Until courts develop a coherent concept of what can constitute actionable damage and propound clearly its relationship to the causation issue, plaintiffs will not have adequate guidance on what interests are protected by negligence and consequently how soon they can sue and what damages they can recover.

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