OCCAM’S RAZOR REVEALS AN ORTHODOX BASIS FOR CHESTER v AFSHAR

INTRODUCTION

Lawyers across the common law world often find “causation” problematic. This is because we do not actually agree on what we mean by that and other causal terms. Sometimes by “causation” lawyers mean just the objective question of historical “fact”\(^1\): whether the defendant’s breach of obligation had anything at all to do with the production of the claimant’s injury. Other times lawyers use causal terminology not merely for this idea of historical involvement but for a separate notion of “causal connection” which, together with a third notion of “remoteness”, concerns the normative evaluation of whether this particular consequence of the defendant’s breach is one for which he should be held legally responsible. The most well known version of this three-step approach was that championed by Hart and Honoré.\(^2\) For them, even where a factor is historically involved in the production of an outcome, or to use their terms, even when it is “a causally relevant factor” in relation to that outcome, it will not be a “cause” of it where there is no “causal connection” between the factor and outcome. Yet it is not at all clear what they mean by a “causal connection”, what therefore beyond historical involvement they mean by a “cause”, and where the line between “causal connection” and “remoteness” lies.\(^3\)

The three-step Hart and Honoré approach is both inconvenient and obfuscatory. Clarity in legal reasoning will not be improved in this area until it is abandoned in favour of a two-step analysis consisting of the factual issue of historical involvement and the normative question of whether a particular consequence of breach should be judged to be within the scope of liability for the breach. Had the two-step approach been used in the recent medical failure to warn case of Chester v Afshar\(^4\) it would have been apparent that, unlike the situation in Fairchild v Glenhaven Funeral Services Ltd,\(^5\) the success of the claimant did not require any departure from orthodoxy, contrary to what the Law Lords were misled into thinking. It simply required the court to decide and explain whether

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\(^1\)See for example Restatement of the Law (Third) of Torts: Liability for Physical Harm (Proposed Final Draft, April 6, 2005), American Law Institute (hereafter “Draft Third Restatement”) which abandon the vague terminology of “proximate cause”, “substantial factor” and “legal cause” in favour of two steps, “factual cause” in Ch.5 and “scope of liability” in Ch.6; Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences” (2001) 54 Vanderbilt L.R. 941 (hereafter “Legal Cause”).

\(^2\)Causation in the Law (2nd edn, 1985).


the defendant should be held liable for this particular type of outcome of
the defendant’s breach specifically, as we will see, when and why non-
coincidental consequences of a breach of an obligation to warn should
fall within the appropriate scope of liability for consequences of breach
in the tort of negligence.

In the House of Lords, the relevant established facts of the case were
few. At a consultation on November 18, 1994 Mr Afshar, a surgeon,
breached his duty to Miss Chester by failing to warn her of a small
(1-2 per cent) but unavoidable risk that the operation he was proposing,
however expertly performed, might lead to a seriously adverse result,
namely cauda equina syndrome. Three days later, on November 21, the
surgery was skillfully performed by Mr Afshar but nevertheless led to Miss
Chester suffering this syndrome. The trial judge concluded that, if duly
warned, Miss Chester would not have undergone surgery on November
21,\textsuperscript{6} but would have done further research on the risks and discussed the
matter with others. However, the trial judge did not find (and was not
invited to find) that Miss Chester, if warned as she should have been,
would probably not have agreed to surgery at all.

I. HISTORICAL INVOLVEMENT

Let us ignore the ambiguities of causal language for the moment. It is well
accepted that, to succeed in her cause of action in the tort of negligence,
Miss Chester had to establish, among other things, that Mr Afshar’s
breach played some “historical role” in bringing about her syndrome. The
simplest way a claimant can establish the necessary historical involvement
is by showing that but-for that breach he or she would not have suffered
the outcome of which complaint is made. Three points about the but-for
approach need to be mentioned. First, it is no objection to the law’s use
of the but-for approach that an infinite number of factors will satisfy it.
This is because prior analytical requirements such as duty and breach will
have already focused the law’s attention on only a manageable handful
of candidates to be tested.\textsuperscript{7}

Secondly, sometimes a claimant cannot show this “but for” relation
even though historical involvement clearly exists. This occurs when the
outcome was “overdetermined”, as when two hunters, X and Y, carelessly
and simultaneously shoot into a forest, both bullets hitting a walker who
dies, the medical evidence being clear that either shot would have been

\textsuperscript{6}Contrast \textit{Paul Davidson Taylor v White} [2004] EWCA Civ 1511 where the claimant could not establish
that, but for the breach, he would have changed his behaviour in any way. The Court of Appeal agreed
with the trial judge that he would have persisted with exactly the same course of behaviour. See also
\textit{Beary v Pall Mall Investments} [2005] EWCA Civ 415.

\textsuperscript{7}Draft Third Restatement at p.439: “other limitations exist to winnow out causes that are not of interest
to tort law”.
sufficient to kill the walker. The history of how the walker died cannot be told without reference to at least the conduct of one hunter. But the conduct of X is identical to that of Y so we can say that both the conduct of X and the conduct of Y share the same quality of “historical involvement”. The phenomenon of overdetermination is well known to scientists and is one for which experiment or mere thought experiment could test. In a brilliant insight Hart and Honoré correctly identified for lawyers a reliable way to test whether a factor was historically involved in this way, a relation they called being a “causally relevant condition”.

That test, later popularised in the United States by Richard Wright as the “NESS” test, says that a factor is historically involved if it is necessary for the sufficiency of a set of factors, present in the case, that were sufficient for the outcome. Hunter No.1 is a NESS factor because, if one takes the factors present minus Hunter No.2, then that set is sufficient to produce the death of the walker and Hunter No.1 is necessary for the sufficiency of that set. So the analysis of historical involvement is clear. First, if but-for the defendant’s breach the outcome would not have happened, the breach is historically involved in bringing about the outcome. Secondly, even if it would still have happened, the breach is historically involved in bringing about the outcome, if the breach was a NESS factor in relation to the outcome, Thirdly, if the breach is neither a but-for nor a NESS factor it is not historically involved. We do not, however, need to go to this level of complexity in this instance because Miss Chester’s syndrome was not overdetermined: there were not multiple sufficient factors producing the outcome as there were in the hunters’ case. In Chester v Afshar the but-for test is an adequate test for historical involvement.

The third issue to note about the but-for test is that sometimes a claimant cannot show this “but for” relation because there are critical evidentiary gaps. In rare cases such as Cook v Lewis and Fairchild v Glenhaven Funeral Services Ltd. courts are willing to carve out exceptional rules of law to allow claimants to jump such evidentiary gaps that would otherwise prevent proof of historical involvement. This exceptional body of law is also not relevant here because, or so I will argue, Miss Chester had sufficient evidence to establish the but-for historical relation in a straightforward orthodox manner.

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12Above, fn.5. As to the character of the Fairchild rule see below, fn.77.
But for historical involvement of Mr Afshar's breach is established

Had the trial judge found that, if warned, Miss Chester would never have had the operation at all, she would have easily been able to establish that but-for the breach she would not have suffered the syndrome. But the trial judge, no doubt regarding as too speculative Miss Chester's possible reaction to the further research she would have done, did not make this finding.

Nonetheless, Miss Chester had a sound argument for establishing the but-for relation between the breach and the syndrome. She correctly argued that, had she delayed her operation until a later time then, even if she would eventually have had it, the odds she would have faced would have been 1-2 per cent. Since, but for the breach, she probably would not have suffered the syndrome, historical involvement of the breach in the syndrome was established by satisfaction of the but-for test. Oddly, neither Lord Bingham of Cornhill nor Lord Hoffmann accepted this argument. Lord Hoffmann thought:

“This argument is about as logical as saying that if one had been told, on entering a casino, that the odds on No 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail. The judge found as a fact that the risk would have been precisely the same whether it was done then or later or by that competent surgeon or by another.

It follows that the claimant failed to prove that the defendant’s breach of duty caused her loss...”

With great respect, the reasoning of His Lordship on this point is flawed. The correct analogy would be if two punters were informed of those odds. One decides to delay. The second punter immediately bets on No.7 and wins. The delaying punter would be wrong to believe that he is likely to win on No.7 when he returns to gamble at a later date. The odds for an unplayed bet on No.7 remain the a priori odds of 1 in 37 even if No.7 happened to come up on one occasion in the actual past, namely when the second punter won. Given those a priori odds the delaying punter is likely to lose if he gambles at a later date. Similarly, the fact that, against the a priori probabilities, Miss Chester happened to “win” the syndrome when she had the operation on November 21, does not affect the odds

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13 On which see Chester, above, fn.4 at [61] and [81], per Lord Hope of Craighead.
14 Chester, above, fn.4, at [8], per Lord Bingham.
15 Ibid., at [31]-[32], per Lord Hoffmann.
that attach to the hypothetical later operation which, but for the breach, she might have undergone after a delay.

It would be different if the evidence had been that, of those who have this operation, there is a subclass of 1-2 per cent who are physiologically bound to get the syndrome. If this had been the case then we would know that Miss Chester is a member of that susceptible class and we would know that she would have suffered the syndrome whenever she underwent the operation. But this was not the evidence in the case. The evidence was taken to be that the risk of the syndrome was random among those undergoing the operation. The a priori odds remain the same whenever and wherever and upon whom the operation is carried out.

Confusion generated by the artificial construct of different “causal connections”

In Chester v Afshar the legacy of the three-step approach of Hart and Honoré led all Law Lords to frame the controversy as one relating to “causation”. Moreover, a majority of Law Lords thought that the claimant’s case required them to consider departing “from established principles of causation”. As we have seen, Hart and Honoré chose to define “cause” in such a way that, even where a factor is historically involved in the production of an outcome, it will not be a “cause” where there is no “causal connection” between the factor and outcome. To be a Hart and Honoré “cause” more than historical involvement must be shown; there must be an appropriate form of “causal connection” to the outcome. But they construct more than one “causal connection”. For example, they define the “central” type of causal connection as one which can only be established if, between breach and consequence, there is no intervention of abnormal physical phenomena such as lightning or of voluntary human conduct. Suppose, I carelessly break your leg and on the way to hospital your ambulance is struck by lightning or a deliberate terrorist bomb attack. You die from your burns. I will not be held liable for your death. Hart and Honoré choose to say that the intervention of, say, the lightning, being an Act of God, negativized “causal connection in the ordinary sense”.

But there are many cases where defendants have been held liable despite such interventions: defendants, such as a lightning rod installers

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16For example see Chester, above, fn.4: “the central question is whether the conventional approach to causation in negligence actions should be varied”, per Lord Bingham at [1]; whether to depart “from established principles of causation” or adhere “to traditionalist causation techniques”, per Lord Steyn at [20]-[21]: “the present case—cannot neatly be accommodated within conventional causation principles”, per Lord Steyn at [22]: “the issue which is in dispute is now confined to the issue of causation”, per Lord Hope at [31]; “a solution to this problem which is in Miss Chester’s favour cannot be based on conventional causation principles”, per Lord Hope at [81]; “whether, in the unusual circumstances of this case, justice requires the normal approach to causation to be modified” at [85], per Lord Hope.

17Hart and Honoré, fn.9 at p.xiv (emphasis added).
or golf clubs, are held liable for lightning injuries; and defendants are held liable despite the intervention of criminals. Confronted with such cases Hart and Honoré must construct different forms of “causal connection” such as “occasioning harm” to accommodate these liability results. Five main objections can be made to Hart and Honoré’s elaborate differentiation of different types of “causal connection”.

First, it does not reflect judicial terminology: courts rarely rely on these strange distinct constructs of “causal connection” to guide their analysis. As Lord Reid made clear in Dorset Yacht Co v Home Office:

“It has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness...every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant’s conduct caused the plaintiff loss.”

Secondly, Hart and Honoré’s characterisation of their “central” type of causal connection would seem to be oddly rare in practice for, apart from “running down” cases, in most negligence cases the story linking breach of duty with the claimant’s injury passes through and requires the intervention of voluntary human action, such as that of the retailer and purchaser in Donoghue v Stevenson.

Thirdly, the notion that, even within the same cause of action, the law may prescribe different “causal connections” to be established inserts an empty obfuscatory step in legal analysis. When courts try to deploy “causal connection” as an analytical tool rather than as a conclusionary statement that liability is to be imposed, they face bewilderment. Take the judgment of Lord Steyn in Smith New Court Securities Ltd v Scrimgeour Vickers Ltd. Here it was clear that the defendant’s breach of obligation, a fraud inducing the claimant to make a particular investment in Company X, had been historically involved in the claimant’s suffering the relevant loss because it had “locked” the claimant into investment in Company X at a share price that was, inter alia, falsely inflated by a pre-existing internal fraud by an independent third party. The question was whether,

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18 See for example, White v Schroebelem, 18 A.2d 185 at 185–188 (N.H. 1941); Mauzner v Atlantic City Country Club, Inc., 691 A.2d 826 (N.J. Super. Ct. App. Div. 1997); Restatement, Second, Torts, § 442B, Comment a, ill. 1; Johnson v Kosmos Portland Cement Co, 64 F.2d 193 at 196 (6th Cir. 1933).
21[1932] A.C. 562. To lever such cases into place Hart and Honoré are forced to construct ever more elaborate and vague differentiations, namely that “an act done without knowledge or appreciation of the circumstances does not negative causal connection”: Hart and Honoré, above, fn.9 at p.149.
as between the defendant fraudster and the innocent claimant party, the defendant fraudster should be liable for the loss involved in the drop in share price when the second unrelated fraud was discovered. Though Lord Steyn embraced the orthodox position that “causation is a question of fact” he stated that the but-for test of a “causal link” does not always yield the “correct” result. Though his Lordship noted that courts have, as a response, used additional terminological devices such as “substantial factor” and “sufficient causal connection,” he did not recognise that these were merely the inadequate devices that courts were once, before the isolation of the NESS test, forced to resort to as they struggled to deal with overdetermined outcomes. He was led to believe that he must apply these terms to the case before him, as an additional step between historical involvement and remoteness: that the claimant must not only establish that but-for the defendant’s fraud he would not have suffered the loss associated with the second fraud, but the claimant must also establish that there was an appropriate “causal connection” between the defendant’s fraud and the loss due to the second fraud. But, as Lord Steyn seems to realise, these terms are empty of identifiable stable content and there is no way, short of mere assertion, by which a judge can indicate that the claimant has established this separate requirement of “causal connection”. His Lordship is driven merely to assert that

“the causative influence of the fraud is not significantly attenuated or diluted by other causative factors acting simultaneously with or subsequent to the fraud. . . . In the actual circumstances of this case I am satisfied that there was a sufficient causal link between the [defendant’s] fraud and [the claimant’s] loss.”

In other words, requiring as an additional step between historical involvement and remoteness, that the claimant prove an appropriate “causal connection” inserts a wholly empty step in the analysis. Moreover, it can obscure the factors which do influence a court in relation to which consequences of breach the defendant should be liable for, for example whether or not to impose liability for lightning injuries or those injuries that follow the voluntary conduct of a third person.

Fortunately, when Lord Steyn considered the scope-of-liability-for-consequences question in *Smith New Court* (which, conventionally though confusingly, has been described as the “remoteness” question), he exposed normative reasons why the loss associated with the second fraud, though due to the voluntary intervention of the third party fraudster,

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24 *ibid*.

25 The perimeter rule of which is “directness” in the tort of deceit.
should, in Lord Steyn’s opinion, come within the scope of liability of the defendant fraudster:

"a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First it serves a deterrent purpose in discouraging fraud. ... in the battle against fraud civil remedies can play a useful and beneficial role. Secondly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud.""  

The fourth objection that can be made to Hart and Honore’s differentiation of different types of “causal connection” is that it risks “exalting to the status of propositions of law what really are particular applications [of a legal rule] to special facts”, raising the prospect that “the precedent system will die from a surfeit of authorities”. This danger seemed realised when, in his 2005 Blackstone Lecture Lord Hoffmann stated that “if liability is based on fault, as in negligence, the law will usually apply the standard criteria” which, following Hart and Honore’s “central” type of “causal connection”, he formulated as “the defendant caused the harm if, but for his act, it would not have happened and if there had been no other intentional human act or subsequent unusual natural occurrence without which the harm would not have happened”. His Lordship then acknowledged that the law sometimes deviates from the standard criteria, and presumably this is how he would rationalise the finding of liability in Dorset Yacht: presumably, there, the law had, implicitly, prescribed that a “causal connection” constituted by merely “occasioning” or “facilitating” harm was sufficient for liability. But his Lordship not only says that “the question of what counts as a consequence for which one is liable depends on the kind of causal connection which the law prescribes for liability under that particular rule” but that “the question of what should count as a sufficient causal connection is a question of law”. Yet if the type of “causal connection” allegedly required by the law is frozen as a factually-specified rule of law, a lower court facing an identical fact situation

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26 In contrast, U.S. courts conclude that the normative balance tilts against including such a loss as within the appropriate scope of the liability of the defendant-fraudster.
28 Eason v London & North Eastern Railway Co [1944] K.B. 421 at 426 (per du Parcq L.J.), addressing the parallel concern that, if a court does not make it clear that its analysis of factual features of a case merely goes to that court’s decision on breach, a later court may misinterpret those comments as a statement of a factually-specified duty, and that later court may feel constrained to uphold liability even though on the facts the trial judge would have refused liability.
29 Qualcast (Wolverhampton) Ltd v Haynes [1959] A.C. 743 at 757-758 (Lord Somervell of Harrow), again addressing the concern about the duty/breach boundary.
31 ibid., at p.598.
32 ibid., at p.597 (emphasis added).
as that in *Dorset Yacht*, except that the foreseeable vandalism happened months after the escape, may feel constrained to uphold liability, because the defendant’s conduct “occasioned” and “facilitated” the harm just as squarely as in *Dorset Yacht* itself, even though on the facts the trial judge would have refused liability.

The fifth objection that can be made to Hart and Honoré’s, differentiation of different types of “causal connection” is that it may ambush litigants because they are unable to anticipate which “causal connection” the court will apply to the case. Of course, where the obligation is statutory there will be some guidance as to what the purpose of its imposition was and therefore some advance guidance may be gleaned as to which consequences of its breach the defendant should be liable for, or in Hart, Honoré and Lord Hoffmann’s terminology, what type of “causal connection” between breach and consequence is required. In the case of statutory obligations courts may be able to deduce that Parliament intended only certain “mischiefs” to fall within the scope of liability for consequences. Thus in *Gorris v Scott* the court held that the particular consequence of breach in that case (inadequately penned sheep washed overboard) fell outside the mischiefs to which the statutory obligation to fence was directed (disease transmission).

However, when we turn to the *common law* duty of care, it is no more than a crude bootstraps argument to assert that we somehow “know” what the “purpose” or “scope” of the duty was, and which consequences of its breach were those to which the imposition of that duty was directed. For example, simply to assert that my duty of care to you did not extend to a particular consequence of my carelessness, or that the *content* of the standard of care of that duty did not include an obligation to take care with respect to that sort of consequence is simply to fold into the definition of the duty or its content, and thereby disguise, a conclusion on the separate scope-of-liability-for-consequences-of-breach question. Imposition of a duty of care tells us no more than that the

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33See for example, the facts of *State of New South Wales v Godfrey* [2004] NSWCA 113; [2004] Aust. Torts Rep. 81-741, where the escapee, an habitual thief, injured the plaintiff during an armed robbery two and a half months after escape.

34(1874) L.R. 9 Ex. 125.

35Conversely in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22 the House of Lords held the consequence that followed from the intervention of a vandal to be within the scope of the statutory strict liability of the defendant.

36The analogue of this bootstraps argument in U.S. jurisprudence is the “scope of the risk” idea: Stapleton, “Legal Cause”, above, fn.1 at pp.994-996.


38Such as your death from lightning when it strikes the ambulance carrying you to hospital after you have carelessly broken your leg.

39Of course, an undertaking to do X may attract a duty of care that, when doing X, the defendant must act as a reasonable person would. In *Aneco Reinsurance Underwriting Ltd v Johnson & Higgs Ltd*
defendant was legally obliged to take care: it does not speak to the issue of liability for consequences.\textsuperscript{40} Similarly, the content of the standard of care depends on the precise context of the case, and merely tells us what a reasonable person would have done in the circumstances: it also does not speak to the issue of liability for consequences of breach.

If, then, the fact that a common law duty of care is recognised in the context cannot tell us anything in advance about the appropriate scope of liability for consequences, how do courts decide for which consequences of breach the defendant should be liable? Of course, the outer perimeter rule for a cause of action will be known. Currently for the tort of negligence in the U.K. it is the \textit{Wagon Mound v Hughes}\textsuperscript{41} rule that if the consequence is not of a foreseeable type it lies outside the appropriate scope of liability. But not all foreseeable consequences are recoverable: so what other more limiting factors are at play, how do they come to play a role, and are they to be taken as “prescribed” rules of law? What Hart, Honore and Lord Hoffmann do, using their three-step analysis,\textsuperscript{42} is to carve out issues about liability for certain consequences and assert that they are resolved by the type of “causal connection” between breach and consequence that the tort of negligence requires in the circumstances.

For example, in his 2005 Blackstone Lecture Lord Hoffmann stated that the extent of the defendant-valuers liability for breach of its duty of care in \textit{South Australia Asset Management Corp v York Montague} (hereafter “SAAMCO”\textsuperscript{43}) was governed by a more limited “prescribed” causal connection than the “standard criteria” and instead only extended to “the consequences of the client having too little security”.\textsuperscript{44} Lord

\textsuperscript{40} As Lord Hoffmann now concedes: above, fn.30, at p.596.
\textsuperscript{42} Oddly, in parts of “Causation”, above, fn.30 Lord Hoffmann seems to collapse all three stages of Hart and Honore’s analysis into just one question.
\textsuperscript{44} “Causation”, above, fn.30, at p.596.
Hoffmann said this was "because the valuer had not been asked to advise on whether the client should lend. The valuation was to be only one factor which the client would take into account in making his own decision about whether to lend".\(^{45}\) Of course, this statement casts an unsettling light on the outcome of important cases, such as *Smith v Eric S. Bush*\(^{46}\) and *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,\(^{47}\) in which the advisor had also not been asked to advise on whether the client should invest and where the advice was also to be only one factor which the client would take into account in deciding whether to invest.

More importantly, it begs the following questions: what was the origin of this limiting idea, given that the defendant's undertaking to advise in *SAAMCO* had not been explicitly limited in this way (i.e. confined just to advice on the limit of security)? And why was this particular, presumably implicit, factual feature that was discovered in *SAAMCO* elevated to such importance that it provoked the laying down of a rule of law as to the extent of liability for consequences? As we will see, it is not that it is impossible sometimes to distil from the case law a generalised rule of law drawing liability for consequences more tightly than the perimeter rule. But if the analytical construct of "causal connection" is abandoned and all the issues relating to liability for consequences that it attempts to deal with are dealt with together in a single "scope-of-liability-for-consequences-of-breach" step, we will see that such legal rules governing the scope of liability for consequences are few, and that the rationale in which they originate is sufficiently transparent for litigants not to be ambushed by them.

*Convenience and clarity of narrowly restricting causal terminology to the issue of historical involvement*

If we apply Occam's Razor to remove the "causal connection" artefact, and reserve causal terminology for the evaluation of whether the breach was historically involved in the relevant outcome, there would then be a coherent basis for statements such as: "it is settled that...in the law of obligations causation is to be categorised as an issue of fact".\(^{48}\) The resultant two-step analysis would also then illuminate why the decision in *Chester v Afshar* did not mark an abandonment of any orthodox rule of law. Specifically, it reveals that the only controversial issue in the appeal was not historical involvement but the normative one of whether the doctor whose breach was clearly historically involved in producing Miss Chester's syndrome *should* be held legally responsible for it. This

\(^{45}\) *ibid.*

\(^{46}\) [1990] 1 A.C. 831.


is an issue that could be resolved in Miss Chester’s favour without an abandonment of orthodoxy.

Specifically, analysis of the negligence claim in *Chester v Afshar* would reduce to the following steps:

(i) Was the outcome, which Miss Chester complained about, *actionable damage* in the tort of negligence? Yes, it was personal injury.

(ii) Did Mr Afshar owe Miss Chester a *duty* of care? Yes.

(iii) What, in the circumstances, was the *content* of the standard of care of that duty? “What did reasonable care demand of the [defendant] in this particular case? This is not a question of law at all but a question of fact. To solve it the tribunal of fact... can take into account any proposition of good sense which is relevant in the circumstances, but it must beware not to treat it as a proposition of law.”49 Specifically, did the *content* of that duty include a duty to warn of the 1-2 per cent risk of cauda equina syndrome? Yes. Did Mr Afshar *breach* this aspect of his duty? Yes.

(iv) Was the breach “*historically involved*” in Miss Chester’s syndrome? In other words, to use Hart and Honore’s term for historical involvement, was the breach a “causally relevant condition” of the syndrome? Was the syndrome a “consequence” of this breach? Historical involvement is tested for by the but-for enquiry, afforded by the NESS test to check for over-determined outcomes.50 We should confine the term, “cause-in-fact”, to this definable, testable notion of “historical involvement”.

Yes, had she been warned Miss Chester would have had the operation, if at all, at a different time. The *a priori* estimate of the risk she would then have faced is 1-2 per cent, so it would have been more likely than not that, but for the breach, she would not have suffered the syndrome.

(v) Finally, should the law judge that this consequence of the breach is within the *appropriate scope of the defendant’s liability for the infinite stream of consequences* that flowed from his breach of this tort? This is the normative question, formally referred to as “remoteness”, of when and why the law regards the chain of *legal responsibility* to have been severed. Typically, the *normative* concerns that influence courts’ decisions on scope are, unlike the *fact* of historical involvement, ones on which reasonable minds might differ for a variety of moral as well as policy reasons.

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49 Qualcast (Wolverhampton) Ltd v Haynes [1959] A.C. 743 at 759, per Lord Denning.
50 Subject to exceptional rules of law in the case of certain evidentiary gaps, such as those in *Cook v Lewis and Fairchild*: see above, text at fn.11 and 12 and esp. fn.77 below.
These deserve careful open evaluation by courts and care must be taken not to freeze them inappropriately as rules of law. Sometimes, however, these judicial concerns are held sufficiently in common that a rule of law can crystallise. The most well known of these are perimeter rules: a perimeter rule is necessary to set the outer possible rim of liability for consequences for a particular cause of action, for no legal wrong can be allowed to lead to unending liability for the infinite stream of consequences flowing from that breach. The perimeter rule is fixed by law and, as we have seen, at present in the tort of negligence it is the Wagon Mound I/Hughes rule. Miss Chester's syndrome fell inside this perimeter rule because it was a reasonably foreseeable consequence of failure to warn of the risk of the syndrome. But this is not the only rule of law governing the scope of liability for consequences in the tort of negligence. Chester v Afshar highlights additional rules of law drawing the scope of liability more narrowly than the perimeter rule (see below).

II. Appropriate Scope of Liability for Consequences of Breach

Non-liability for consequence falling outside the explicit purpose of the obligation

As we have seen, in the case of statutory obligations it is sometimes possible to discern what the general purpose of a particular obligation is, and thereby to deduce in advance that a consequence, though falling within the perimeter rule, fell outside the appropriate scope of liability for consequences of the breach of that obligation. This is not, however, possible with the common law duty of care, where imposition of the duty means no more than that the defendant was legally obliged to take care: it tells us nothing about the appropriate scope of liability for consequences. It follows that we cannot say whether Miss Chester's syndrome falls within or outside the appropriate scope of liability merely by asserting that it is or is not one of the mischiefs to which the imposition of Mr Afshar's duty was directed.

The non-liability for coincidences "rule" in the tort of negligence

Often the law manifests a normative concern with the deterrence of comparable breaches in the future. This concern underlies the law's remarkable attitude to coincidences. Let me first give a definition of what I mean here by "coincidence" which is a particular type of factual relation between the specific case and the generalised case of breach. Where (a) the defendant's
breach is historically involved in the outcome but (b) the outcome is a type of consequence the incidence of which is not generally increased by the occurrence of the type of breach in issue: the outcome is a "coincidental" consequence of the breach. It is important to appreciate that we cannot simply categorise a type of consequence as a coincidence. Take lightning injuries. When, due to the breach of duty of a lightning rod installer, the rod fails to protect residents of the building from lightning injuries, those results of the breach are not coincidental consequences: the incidence of lightning injuries is generally increased by the type of breach in issue. On the other hand, where the defendant carelessly runs over the claimant and on the way to hospital the claimant's ambulance is struck by lightning and the claimant is killed, the lightning injury to the claimant is a consequence of the breach but it is a coincidental consequence because the incidence of lightning injuries is not generally increased by careless driving.

When the consequence of a breach of care is a coincidence, this provides a sound basis for the law to hold, as a rule of law, that such a consequence was outside the appropriate scope of liability for negligence even if it fell within the perimeter rule of Wagon Mound I/Hughes. Why? In the tort of negligence, burdening the inadvertent tortfeasor with liability for a coincidental consequence can do nothing to generate meaningful deterrence effects of such carelessness in the future. The limits of deterrent potential therefore provides a sound normative reason why most courts in common law jurisdictions judge it appropriate that consequences of breach that are coincidental should lie outside the scope of liability of the defendant in the tort of negligence. But note that the judgment that coincidental consequences are outside the scope of liability is not an inevitable logical result of there being a duty or of what the content of the standard of care required of that duty is: it is a matter of normative judicial evaluation. Note

51 The word "coincidence" is also sometimes used to denote epiphenomena where, despite there being Humean regularity of sequence, there is no historical involvement. In his perceptive judgment at the Supreme Court of New South Wales Court of Appeal stage of the Chappel v Hart litigation, Mahoney J.A. gives a neat example of this.

52 The fact that the five o'clock whistle blows in a factory in Sydney and the workers in a factory in Melbourne invariably cease work ordinarily will not mean that the whistle in Sydney is the cause of the cessation of work in Melbourne. The "tie" is absent. (Butterworths Unreported Judgments BC9606391, December 24, 1996; available on www.austlii.edu.au).

53 Though on the specific occasion of the conduct in this case, that conduct happened to raise the risk of the injury from 0 to 100 per cent (assuming the consequence was not an over-determined outcome but rather one in relation to which the conduct bore a but-for relation on this occasion).

54 This definition captures the sense in which "coincidence" is used in Chester, above, fn.4, at [13], [93] and [94]. For example, to take the example cited by Lord Walker of Gestingthorpe (at [94]), D carelessly speeds along a road and this happens to bring the vehicle to a position where a tree falls on the vehicle injuring a passenger. It is well settled that speeding is careless and it is foreseeable that trees sometimes fall onto vehicles passing along a road. But although in this freakish event the speeding was historically involved in the injury to the passenger in this case . . . it was a but-for factor that took the risk of the injury to the passenger from 0 to 100 per cent. . . in general speeding does not increase the risk of trees falling on vehicles.
also that we now have, using our two-step approach of factual historical involvement and normative scope analysis, a simple and coherent explanation of the differing results for the two lightning cases in the tort of negligence, namely a difference hinging on whether the consequence of the breach was a coincidental consequence. It does away with the artifact of something called a “causal connection” being “severed” by lightning in the ambulance case and the complexity of having to construct a different “causal connection” to justify liability on the lightning rod installer.

What is more, by exposing the normative nature of the issue that coincidences present, the two-step approach illuminates why it is that the law usually shifts its attitude to coincidences where the tort is an advertent, intentional tort such as deceit. Recall that in Smith New Court the defendant’s deceit had been historically involved in the claimant’s suffering a loss associated with a second fraud. If we assume that the investor would, but-for the breach, have invested in companies similarly prone to frauds unrelated to the defendant, this loss due to the second fraud was a coincidental consequence: the incidence of such loss is not generally increased by the type of breach in issue; misleading those who invest in companies about the value of shares in Company X does not generally increase the incidence of investment losses associated with internal unrelated company frauds. But in the case of intentional torts such as deceit the normative concern with deterrence now may be judged to support the extension of the scope of liability to encompass consequences of breach that are merely coincidental. As Lord Steyn made clear, a policy of imposing more extensive liability on an intentional wrongdoer serves a deterrent purpose in discouraging fraud. His Lordship also cites a second normative consideration supporting this attitude to liability for coincidences: the relative moral turpitude of the fraudster against the innocence of the claimant.

(a) Professor Honore’s note on Chappel v Hart

In Chester v Afsfar, four Law Lords considered the decision of the High Court of Australia in Chappel v Hart, which had similar, though not identical facts to the instant case. In a case note to the Australian case Professor Honore had argued that while the surgeon’s failure to warn was a but-for factor in relation to the patient’s injury, it was not a “cause” and there was no “causal connection” to the consequence because it was a coincidental consequence. Professor Honore then gave a normative argument to support the overriding of “causal considerations” and the imposition of liability “despite the absence of causal connection”.

56 ibid., at p.8.

Both Lord Steyn and Lord Hope of Craighead were influenced by Honoré’s analysis to conclude that Miss Chester could not succeed within “conventional causation principles” and from which an unorthodox departure was required in order to achieve liability.

But Professor Honoré’s statement that the surgeon’s failure to warn, though a but-for factor, was not a “cause” is mere assertion and merely follows from his reliance on the “causal connection” artefact. Elsewhere in the law, such as in Smith New Court the Lords have described a tortious breach as a “cause” even though the consequence may well have been coincidental, for example if we assume that, but for the breach, the investor would have invested in other companies equally prone to unrelated internal company fraud. Moreover Honoré’s statement obscures the normative reasons why the law may have, as under English law it does, a different attitude to liability for coincidences in the tort of negligence than in the tort of deceit.

(b) Was Miss Chester’s syndrome, a coincidental consequence?

If then the general approach of English courts in the tort of negligence to the normative issue of scope-of-liability-for-consequences is to reject liability for coincidental consequences of breach, was the imposition of liability in Chester v Afshar a radical departure from this approach? No. In medical failure to warn cases such as this the deleterious outcome of the operation is a consequence of the failure to warn, but it is not a coincidental consequence, I now appreciate. Let me explain.

Breaches constituted by failure to warn of a risky outcome in a transaction contemplated by the claimant raise a special issue: such breaches potentially affect the general incidence of participation in that transaction, because a warned person may decide not to enter the transaction, and in so doing such breaches can affect the total incidence of such outcomes even though they do not affect the degree of risk associated with the transaction. Suppose, the risk of death from a cosmetic face-lift procedure is two per cent and that if this fact is undisclosed 1,000 people in a certain community would undergo the operation each year. Twenty patients would die each year. But suppose that, if the two per cent risk were disclosed by surgeons, only 100 people would consent to the operation. The riskiness of the operation would remain the same but the overall incidence of death from it would fall to two deaths per year. So while it is true that a failure to warn of a risky outcome in a transaction contemplated by the claimant does not affect the riskiness

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57 Chester, above, fn.4, at [22], per Lord Steyn and [81], per Lord Hope.
58 I gladly recant my earlier view that it was: Stapleton, “Cause-in-Fact”, above, at fn.8 at p.419. Martin Hogg also concludes that Miss Chester’s syndrome was not a coincidental consequence, though oddly he goes on to state in an otherwise admirable analysis that the but-for test was not satisfied in the case and that the result can be explained by the “scope of the duty”: fn.37 at pp.161–164.
of the transaction, it is not true that such failures do not generally affect
the level of occurrence of that outcome. To see why this is a profoundly
important point, let us first pretend that there is a situation where it was
inevitable that a patient must eventually have the risky operation.

If this were so, the overall incidence of outcome would not be affected
by breach: everyone in the claimant’s position would have to undergo
the transaction. If a reasonable person in the defendant’s position would
have warned of the inescapable risk of the inevitable transaction and the
law imposed a legal duty to act with such care in the circumstances,
that imposition of duty could not be rationalised on the basis of the
law’s concern with physical integrity and deterrence of injury thereto.
The only coherent way to explain the imposition of the duty would be
that it protected the claimant’s autonomy, in the sense of her interest in
being fully informed of the inescapable risk she would inevitably face,
and in deciding when and where to undergo it. This is an interest not
traditionally protected by the tort of negligence. In short, if the relevant
risk were truly inescapable, we would not be able to explain why the law
would impose the obligation to warn unless we resorted to such a radical
unorthodox proposition: that this was to protect an interest not previously
protected by the tort of negligence in England.

In some jurisdictions, such as Israel,59 the patient’s interest in being
fully informed simpliciter is legally protected by other areas of doctrine
so that, even where the patient would have gone ahead with the operation
at the same time and place if he had been warned, a “modest solatium”60
is awarded for its breach. But in English law it remains true that, if it
were inevitable that a patient must eventually have a risky operation, the
recovery of substantial damages in Chester v Afshar would have marked a
radical departure from orthodoxy, because it would have both recognised
a new interest protected by the tort of negligence, namely mere autonomy
in being fully informed, and decoupled the quantum of damages awarded
from the interest protected.

But it is simply a mistake ever to say that it is inevitable that a patient
must eventually have a risky operation. It is never true, even where the
surgery is loosely described as “non-elective”, that eventually the patient
was bound to consent to it and run its risk, because

“Even when his or her own life depends on receiving medical
treatment, an adult of sound mind is entitled to refuse it. This

59Da’aka v Karmel Hospital (1999) 53 (iv) P.D. 526 discussed by Gilead in “Israel” in The

60In Da’aka it was about €4,000. Compare Chester, above, fn.4, at [34], per Lord Hoffmann, who
considered this possibility.
reflects the autonomy of each individual and the right of self
determination.”

Since warned patients may choose never to have the operation, they can affect the rate of the risk eventuating just as those warned of the two per cent risk of death from the cosmetic face-lift procedure can affect the overall incidence of death from that procedure. In medical failure to warn cases, then, the deleterious outcome of breaches are not coincidental outcomes, as had been the case in the case of lightning striking the ambulance, because here breaches of the obligation to warn patients will tend to increase the incidence of the medical risk occurring. It follows that the no-deterrence-potential objection to the imposition of liability that applies to coincidental consequences of negligence does not apply to such non-coincidental consequences. This point is also easily demonstrated by cases of a failure-to-warn of a generic risk in a product such as a side-effect of a pharmaceutical: the warned consumer may choose not to use that product, so while the riskiness of the product would remain the same, the overall incidence of that side-effect eventuating would be affected by whether or not consumers are warned.

This perspective allows us to avoid having to base medical failure to warn obligations on some radical basis such as the protection of the autonomy interest in being fully informed. It means that there is room for the obligation to warn to be seen as grounded in the deterrence of outcomes injurious to physical integrity, which of course has long been an interest uncontroversially protected by the tort of negligence. We might be glad that such duties also indirectly protect our autonomy interest in being fully informed, but we need not revise our list of interests protected by this tort in order to justify the obligation to warn: the interest of the claimant to be fully informed can be seen as an aspect of her interest in her physical integrity because she can act on that information to avoid the risk. She is the person in whose hands the law places the relevant reasonableness or cost-benefit calculation: she is the party best able to weigh the risk of the transaction against the personal benefits to her of

61 St. George’s Healthcare NHS Trust v S [1999] Fam. 26 at [43] per Judge L.J.; in earlier proceedings Butler-Sloss L.J. said that the claimant, a pregnant woman, had “a deep-seated aversion to medical intervention”.

62 Even if such a decision might seem irrational: In Davis v Wyeth Laboratories, 399 F.2d 121 (9th Cir. 1968) the Ninth Circuit held that the manufacturer of the Sabin polio vaccine should have warned the patient that the vaccine, even when properly administered, carried a one-in-one-million chance of infecting the patient with polio. This warning was held to be legally required even though this level of risk was much lower than the general risk of polio from not taking the vaccine (at pp.129-130). As explained by the Fifth Circuit in a similar polio vaccine case, in such public vaccination contexts, the patient is entitled to adequate information so that he can, given his superior knowledge of his situation, “balance the risks and benefits of a given medication himself. . . the manufacturer cannot make this choice for its ultimate consumers”: Reyes v Wyeth Laboratories, 498 F.2d 1264 at 1276 (5th Cir. 1974).

taking that risk. The law seeks to protect the claimant’s physical integrity by ensuring that it is only subjected to risks that are judged reasonable in the circumstances, where that assessment is entrusted to the appropriately informed claimant herself.64

When should non-coincidental consequences of a failure-to-warn be within the appropriate scope of liability in negligence?

If, then, the breach resulted in a consequence to Miss Chester that was non-coincidental, what concerns might the law take into account in judging whether it was within the appropriate scope of Mr Afshar’s liability for the consequences of his breach?

U.K. courts seem to distinguish cases according to whether the outcome was or was not the very outcome about which a warning was required by the content of standard of care. In SAAMCO65 Lord Hoffmann gave a useful example where a recuperating mountaineer, having carelessly been given the all-clear by his doctor, decides to climb a mountain which he would not have done had the doctor fulfilled his duty by warning him of the condition of his weak leg. On the mountain the claimant is injured, not by his leg giving way, but by an avalanche. The failure to warn was a but-for factor of the avalanche injury so that breach of care was “historically involved” in its occurrence. This consequence of breach also falls within the perimeter scope rule: it was a foreseeable risk of failing to warn him of a risk of the leg giving way that he would go on the mountain and avalanches on mountains are foreseeable. Moreover, recognition that the avalanche injury fell within the appropriate scope-of-liability-for-consequences-of-the-breach would not offend the non-liability for coincidences “rule” in the tort of negligence because it was not a coincidental consequence of the breach: in general such warnings (i.e. of legs giving way) can affect the overall rate of the incidence eventuating because it will affect the rate at which patients decide to climb mountains, just as those warned of the two per cent risk of death from the cosmetic face-lift procedure can affect the overall incidence of death from that procedure. Nonetheless, according to Lord Hoffmann the avalanche injury will be judged to fall outside the appropriate-scope-of-liability-for-the-consequences of the doctor’s breach. It seems critical that it was not a failure to warn about the risk of avalanche that constituted the defendant’s breach.

Similarly, this approach provides a more coherent rationale for the no-liability result in SAAMCO. Here due to the carelessness of an adviser

64 See Chester, above, fn.4: at [18], per Lord Steyn; at [28], per Lord Hoffmann; at [54]-[55] and [86], per Lord Hope; and at [92], per Lord Walker. See also the astute commentary by M. Jones, “A Risky Business” (2005) 13 Tort L. Rev. 40.
the claimant bought an investment, X, and while he was locked into that
investment, the general market in that class of investment suffered from
a market-wide fall: the Lords held that the claimant could not recover the
market loss. Elsewhere\(^66\) I have argued that where, but for the breach,
the evidence shows that the claimant would not have made investment
X but would have invested the fund in another investment in the same
market, the result in SAAMCO can be simply explained on the basis
that the claimant has not suffered a loss that he would not otherwise
have suffered: he has not suffered “damage” to his normal expectancies
because, but for the breach, he would have suffered the market-fall loss
on his fund anyway.

But where the claimant can show that, but for the breach, he would have
kept his fund out of the relevant market and kept it in gilts, non-recovery
in SAAMCO can be explained on the basis of the above “avalanche
principle”, even though he has been “damaged” relative to where he would
have been but for the breach:

(i) It is true that the valuer’s careless valuation was a but-for factor
of the loss associated with the market fall so it was “historically
involved” in its occurrence.

(ii) This consequence of breach also falls within the perimeter rule:
it was a foreseeable risk of the careless valuation that once the
claimant had made the investment the investment might fall: it
is generally foreseeable that such investments can fall in value.

(iii) Moreover, recognition that the market-fall loss fell within the
appropriate scope-of-liability-for-consequences-of-the-breach
would not here offend the no-liability for coincidences “rule”
in the tort of negligence because the market-fall loss was not a
coincidental consequence of the breach because careless valuations
luring investors into a market sector in which they would
not otherwise invest at all, can affect the overall incidence of
the risk eventuating (the rate at which the market-fall loss is
suffered by such investors) because it can affect the rate at
which such investors decide to enter that market sector at all.

(iv) Finally, if the avalanche principle is followed, the market-fall
loss will be judged to fall outside the appropriate scope of
liability for the consequences of the doctor’s breach: it was
not a failure to warn about the risk of market-fall loss that
constituted the defendant’s breach in SAAMCO.\(^67\)

\(^{66}\)Stapleton, “Cause-in-Fact”, above, at fn.8 at p.401.

\(^{67}\)That these issues concerning consequences are fundamentally normative can be seen from the fact
that shifting to another tort can produce a different attitude to the scope question. Thus, once again if we
take the English law of deceit we see that where the risk that eventuates (i.e. the second fraud by third
party) is not that which should have been warned about (i.e. the information fraudulently concealed by
the defendant) such a consequence has been held to be within the appropriate scope of liability of that
In short, it seems that in the tort of negligence in England (and I would assume Scots law to be similar), as in many other jurisdictions, courts judge that, where the non-coincidental consequence of a negligent failure to warn (such as the avalanche injury) is not the one about which the warning should have been given (i.e. the risk of the leg giving way on the mountain), such a consequence of breach is outside the appropriate scope of liability in negligence. In contrast, in cases such as *Chester v Afshar*, the non-coincidental consequence of the breach of the duty to warn is exactly the one about which the warning should have been given. The decision of the House of Lords in *Chester v Afshar* can, therefore, simply be seen as a conventional decision that such a consequence should be judged to be within the appropriate scope of liability in negligence.

Why would the law attach normative significance to this distinguishing feature: that cases can be distinguished according to whether the outcome was or was not the very outcome about which a warning was required by the content of the duty in the particular circumstances? There are a number of sound, though not unanswerable, reasons to support this normative distinction.

Where the non-coincidental consequence of a negligent failure to warn is not the one about which the warning should have been given, a no-liability result (i.e. a finding that the consequence was outside the appropriate scope of liability) might be justified by considering the reasons why a reasonable person would not have warned of the risk of that outcome. Often, this is because there is no difference in knowledge between the parties: the patient is as aware as the doctor that avalanches occur; the professional investor is as aware as the adviser that markets can fall. These are just life risks for which, it might be thought, there is no reason to prefer the claimant to the defendant. Even where the defendant has more knowledge of the risk that eventuated, it may be the case that a reasonable person would not have warned of that risk because, for example, it seemed such a remote possibility and warning of all risks would be counter-productive because it would undermine the force of warnings of much more serious risks such as the risk about which the law imposes a duty to warn. We must be careful not to think that the fact that the reasonable person would not have warned of the risk of the outcome that eventuated (e.g. the avalanche) is somehow logically determinative of the scope-of-liability-for-consequences issue: that is the bootstraps fallacy we saw earlier. But it may be that the reasons why the reasonable person would not have warned of the risk of the consequence that actually eventuated persuade the court that this consequence should fall outside the

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68See *Chester*, above, fn.4, at [19], *per* Lord Steyn; at [56], [62], [87] and [88], *per* Lord Hope; and at [93]-[94], *per* Lord Walker.

69See text above at fnn.36 and 40.
scope of liability (for the defendant’s failure to warn of the risk about which the law imposed the duty to warn). For example, if a defendant were to be liable for non-coincidental consequences of a negligent failure to warn where that consequence was not one about which warning should have been given, this would generate an indirect incentive for such parties in the future to give such warnings, undermining the rationale behind why a reasonable person would not have given that warning, such as undermining the force of warnings of more serious risks.

Where the non-coincidental consequence of a negligent failure to warn is exactly the one about which the warning should have been given, a liability (i.e. inside appropriate scope) result can be justified on the basis of at least three arguments, each of which might apply with at least some force to non-medical contexts such as product warnings and financial advice.\(^7^0\) First, a liability result avoids proof problems for the claimant. In general proof problems for the claimant do not trigger special concern from the law but they can do so when, for example,\(^7^1\) they tend to bring the law into disrespect. If the claimant had to prove that, if warned, she would never have had the operation this tends to encourage self-serving testimony and this can bring the law into disrepute\(^7^2\) as embarrassingly as requiring nervous shock claimants to testify to the degree of their “ties of love and affection” to the injured relative.\(^7^3\)

Secondly, a liability result bolsters what would otherwise in practice be the trivial incentives to discharge the obligation to warn. We must be careful here not to fall into the error of thinking that, unless Mr Afshar is held liable for this consequence of his failure to warn, the obligation to warn element in the content of surgeons’ standard of care would never

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\(^7^0\) In “Causation”, above, fn.30, at p.602, Lord Hoffmann wonders how far the majority decision in Chester, will be applied. He asks:

“If the plumber does not warn you that, however carefully he does necessary work on your bathroom pipes, there may be an accident which brings down the ceiling in the drawing room below, is he taken to have insured you against the risk?”

Presumably the majority could now point out that under the two-stage orthodox basis that can be used to explain their decision, to succeed the homeowner would need prove that had he been given such a warning he would, at least, have delayed having the work done. This would be considerably more difficult to establish than that a patient warned of a risk in contemplated surgery would delay.

\(^7^1\) See also the exceptional rules in Cook v Lewis and Fairchild: above, at fn.11 and 12.

\(^7^2\) Chester, above, fn.4, at [101], per Lord Walker. Eminent U.S. scholars have described the hypothetical enquiry as to how an informed patient would have reacted as “the kind of investigation that...seriously compromise[s] the judicial process” because it is “not practically justiciable” but a mere “guessing game”, and conclude that we should avoid “the silliness of litigating an issue which all know to be a mirage. The law cannot lie with impunity without exacting a heavy price”; Twerski and Cohen, “Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation” [1988] Univ. Ill. L. Rev. 607 at 608, 609, 665.

be enforced: for surgeons would still be liable for the few cases where the claimant could prove that, if warned, she would never have had the operation. But as Lord Walker noted, "many cases" would fall outside such a clear criterion, and so unless the law determines that such non-coincidental consequences are within the scope of liability for failure to warn, most of the potential deterrent incentives of the obligation would, in practice, be drained away.

Third, liability for such consequences of breach of the duty to warn enhances public confidence in the relevant market. This is especially important in the health care field, but may also be arguable in certain financial sectors such as personal retirement planning.\footnote{75}

III. Conclusion

Shrouding normative issues in causal terminology leads judges to present their judgments, such as those in Chester v Afshar, as if they were being forced to carve out exceptional unorthodox rules of "causation". This produces confusion and obfuscation. For example, it throws into doubt claims based on statutes which require, presumably an orthodox, proof of "causation".\footnote{76} Most of such problems can be avoided if we confine causal language to the factual issue of historical involvement. Such a reform would have revealed the issue in Chester v Afshar for the merely conventional issue it was: the normative question about when and why non-coincidental consequences of a breach of an obligation to warn should fall within the appropriate scope of liability for consequences of breach in the tort of negligence.

\textit{Jane Stapleton.}\footnote{77}

\footnote{\textit{Chester}, above, fn.4, at [101].


\textit{For example the Fatal Accidents Act 1976, s.1(1) (discussed by Lord Phillips of Worth Matravers M.R. in \textit{Gregg v Scot} [2005] UKHL 2; [2005] 2 A.C. 176 at [179]–[183]); the Consumer Protection Act 1987, s.2 (1); and proceedings under the Civil Liability (Contribution) Act 1978.}

\textit{But not all. First, there will still be cases where the law creates exceptional rules to allow claimants to leap evidentiary gaps that would otherwise prevent proof of historical involvement. It is best to describe these rules of law as "rules of proof of causation" not as "rules of causation". Secondly, we must still be alert to the distinction between a rule about actionable damage and one about proof of causation. For example, in \textit{Barker v Corus (UK) Plc} [2006] UKHL 20, Lord Hoffmann formulated the "gist" of the action where the \textit{Fairchild} principle applies as "the damage which the defendant should be regarded as having caused is the creation of such a risk or chance" (at [35]). This formulation requires "rewriting" \textit{Fairchild} (Lord Rodger at [71]), prevents the use of \textit{Fairchild} in Fatal Accidents Act claims and renders precarious the authority of \textit{Hotson v East Berkshire H.A.} [1987] A.C. 750. But it also makes Lord Hoffmann's own characterisation of the \textit{Fairchild} principle as "an exceptional and less demanding test for the necessary causal link between the defendant's conduct and the damage" (at [11]) difficult to understand. Once the 'gist' damage is reformulated as risk, no departure from orthodoxy is needed to establish a causal link to it.}

\footnote{\textit{University of Texas; Australian National University.}

\textit{Causation; Clinical negligence; Duty to warn; Legal methodology; Surgical procedures}}

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