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First Blood – Developments in personal injury litigation in the UK
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INTRODUCTION

1. Another good year or so for claimants. I intend to spend most of this talk on two areas:
   a. I shall first consider Mr Justice Burton's judgment last year in the blood case telling us all what the Product Liability Directive means.
   b. Later I want to spend a little time looking at the recent and very important House of Lords decision on causation in *Fairchild*.

2. I shall also say a few things about the tension between the Human Rights Convention and Act and the immunities from suit enjoyed in particular by public authorities.

3. Finally and crucially: what about funding arrangements?

PRODUCT LIABILITY
A & Others v. National Blood Authority

4. This is the Hepatitis C litigation, wherein claimants complained of infection with the hepatitis C virus through blood transfusions or other blood products. The judgment[1] of Mr Justice Burton is a wide examination of the English law of product liability. It has not been appealed.

5. The Product Liability Directive 1985/374 came into effect on 25th July 1985 after a very lengthy process of drafting, lobbying, discussion and negotiation, including intergovernmental and parliamentary discussion. The UK[2] implemented the Directive by passing the Consumer Protection Act 1987 (the CPA), which came into effect on 1st March 1988.

6. The claimant's cause of action under the CPA is made out where:
   a. Damage
   b. is caused
   c. to the claimant
   d. by a defect
   e. in a product
   f. taken[3] to have been produced by the defendant.

[1] Reported as *A & Others v NBA* [2001] 3 All E.R. 289; [2001] Lloyd's Rep Med 187. I shall refer to the reported judgment by paragraph number thus: Para
[2] One of the early states to do so
[3] i.e. the producer or the own brander or the importer into the E.U.

7. Section 4 (1) (e) of the CPA provides that a defendant may escape liability by showing:

> "that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control;"

8. Most[4] of the claimants in the Hepatitis Litigation relied on the CPA cause of action and it is that cause of action, which is the subject of Mr Justice Burton's judgment in *A & Others v NBA*.

9. **CPA versus Directive.** There are significant differences between the wording not merely of Article 7(e) and section 4(1)(e) CPA but also between Article 6 and section 3 in the definition of defect. The differences between Article 7(e) and section 4(1)(e) were considered by the ECJ in the enforcement proceedings brought by the Commission against the UK[5]. As the generic pleadings developed a pattern emerged of the claimants sticking resolutely to the wording of the Directive, while the defendant stuck to the wording of the CPA. By the time of the trial, however it was accepted on both sides that the dominant provision was the Directive and that insofar as the CPA's wording differed from the wording of the Directive, the CPA should not be construed differently from the Directive. As Burton J. said:
"..and consequently the practical course was to go straight to the fount, the Directive itself"[6]

10. The clash of the Statutes, feared by the Commission and an issue on the generic pleadings[7] did not in fact take place, although a great deal of time was spent analysing *Commission v UK*, in at least three language versions.

11. The two fundamental generic issues were:
    a. Is the infection of blood with hepatitis C virus a defect within the meaning of Article 6?
    b. If so, was the state of scientific and technical knowledge such that the existence of the defect could not to be discovered as provided by Article 7(e)?

12. Article 6 (1) provides:
> "A product is defective when it does not provide the safety which a person is entitled to expect, taking all the circumstances into account, including:
> i. the presentation of the product;
> ii. the use to which it could reasonably be expected that the product would be put;
> iii. the time when the product was put into circulation"

13. The main points of common ground were[8]:
    a. That liability under the CPA is "defect-based" not "fault-based" (Recitals 2 and 6 of the Directive).

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[4] There are/were a small number relying on clinical negligence
[5] *Commission v UK* [1997] All ER (EC) 481
[6] @ Para. 2
[7] despite the terms of Section 1 (1) CPA
[8] see Para. 31, where Burton J lists in detail a number of points of common ground.

b. That the question to be resolved is the degree or level of safety or safeness which persons generally are entitled to expect.
c. The expectation is that of the public at large.
d. The expectation is not the *actual* expectation of persons generally, but what they are *entitled* to expect. "Legitimate expectation" became the common formulation of the expectation, which was consistent with other language versions of the Directive, e.g. "*..la sécurité à laquelle on peut légitimement s'attendre…*"
e. The court decides what the public is entitled to expect.

14. Against that common background:
    a. The claimants' primary case on defect was that:
        i. The legitimate expectation of people generally throughout the relevant period[9] was that transfused blood would not infect patients with hepatitis C.
        ii. The conduct of the producer is irrelevant and questions of avoidability of the defect, practicability of its avoidance and economic feasibility thereof are all irrelevant.
    b. The defendant's case on defect was that:
        i. The risk of infection with hepatitis C was known to the treating doctors.
        ii. Avoidability or unavoidability is a circumstance for the purpose of Article 6.
        iii. The legitimate expectation of people generally was not that blood would be 100% clean but that all legitimately expectable (reasonably available) precautions had been taken.
        iv. It would therefore be necessary to investigate whether the producers had taken all legitimately expectable steps to avoid the risk of the product being defective.
    c. The claimants' fall back case on defect, in consequence, was:
        i. That the defendant's case is contrary to the intention of the Directive as revealed by the *travaux préparatoires*, the Recitals and the observations of the Advocate General and the ECJ in *Commission v UK*, requiring as it did an investigation of fault in all but name.
        ii. That nevertheless, the investigation required by the defendant's case in fact reveals that throughout the relevant period the producers had failed to take all legitimately expectable steps to avoid the risk of the product being defective:
            1. From 1st March 1988 in failing to perform routine surrogate testing[10] of blood donors.
            2. From 1st January 1990 in failing to perform anti-hepatitis C Elisa testing[11].

[9] 1st March 1988 to date, 01/03/88 being the date when the CPA came into force

[10] The HepC virus was not identified until 1988 though the existence of another Hepatitis virus additional to HepA and HepB was appreciated; it was called Non-A non-B hepatitis (NANBH). The risk of post-transfusion infection with NANBH could sometimes be avoided through screening blood donors for surrogate markers thus: 1. A raised liver enzyme level (ALT) in the blood, possibly indicating NANBH infection. 2. Past exposure to HepB (as revealed by Anti-HBc in the blood), a possible life-style indicator of risk of exposure to NANBH as well. These tests (ALT and Anti-HBc) were used in several countries. Even by using both surrogate markers only partial efficacy in excluding infected blood donations is achieved; Burton J found that in the late 1980's surrogate testing would have revealed 40% of blood infected with HepC. Surrogate testing was never used for screening blood donors in England.

15. Article 7 (e) provides:

> "The producer shall not be liable as a result of this Directive if he proves…..that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered".

a. The defendant's case on Article 7(e) was that in the then state of scientific and technical knowledge, the defect in the particular product could not be discovered, given the shortcomings of both surrogate testing and anti-hepatitis C Elisa 1st generation tests. In other words, the defect has to be discoverable in the blood in the bag in question.
b. The claimants' case on Article 7(e) was that the defence is not available once the risk of the product being defective was known (which had been the case since the 1970's), whether or not the defect can be discovered in a particular product. In other words, the existence of the defect in the population of products in general has to be undiscoverable for the defence to arise.

16. Burton J set out a number of the recitals to the Directive[12] and observed that "…the Directive can and must be construed by reference to its recitals and indeed to its legislative purpose, insofar as it can be gleaned otherwise than from the recitals." Having acknowledged that it was also proper to look at the *travaux préparatoires* (with caution) to seek the legislative purpose, he went on to direct himself that "…some guidance can be obtained from other languages in which the Directive was published, all of which are of equal weight, the more so if some appear clear and congruent; and to some extent also from the way in which a Directive has been implemented or applied in other Community countries"[13].

17. As well as *Commission v UK*, Burton J considered two English decisions[14] under the CPA, one Dutch decision[15] under the equivalent Dutch statute and relied on the important decision[16] of the German Bundesgerichtshof (BGH) (the Federal Supreme Court) under the German equivalent of the CPA. This case concerned a young claimant injured by an exploding mineral water bottle[17] resulting from a very fine hairline crack, not discovered despite what was found to be a technical and supervisory procedure in the defendant's factory in accordance with the very latest state of technology. Both the Court of Appeal of Hamm and the BGH had experienced little difficulty in concluding that the bottle was a defective product under Article 6 of the Directive, categorising the bottle as an *ausreisser*, as a

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[11] The Hepatitis C virus was identified in 1988 and the development of a screening test was undertaken. The first version of the test (Ortho Elisa) became commercially available in late 1989 and was soon used for routine screening of blood donors in Japan and France. Other countries soon followed. Routine screening of blood for HepC was introduced throughout England and Wales on 1st September 1991.

[12] Para. 14

[13] Para. 15

[14] *Iman Abouzaid v. Mothercare (UK) Ltd* (Court of Appeal, unreported, 21st December 2000); *Richardson v. LRC Products Ltd* [2000] Lloyd's Rep Med 280

[15] cited by the judge in Para. 44 iii. as *Scholten v. The Foundation Sanquin of Blood Supply* (a judgment of the County Court of Amsterdam dated 3rd February 1999).

[16] Bundesgerichtshof 6th Civil Division, 9th May 1995, VIZR 158/94

[17] It should be recorded that, despite its absence from the lists of authorities in both the Lloyd's Rep Med and the All ER reports, *Donoghue v. Stevenson* [1932] AC 562 was referred to in argument on at least 10 occasions !

rogue product or sub-standard product. The battlefield in the German courts was Article 7(e) and the young claimant was the victor in the BGH, whose conclusion is summarised by Burton J[18] thus:

> "What the BGH was primarily saying is that if the risks are known, unavoidability of the defect in the particular product is no answer."

The BGH felt able to come to this conclusion without referring the question to the ECJ. The conclusion of the BGH is echoed[19] (albeit *obiter*) by Ian Kennedy J in *Richardson*[20]:

> "It is argued by the defendants that section 4 of the Act would have come to their aid if my conclusion had been against them. I do not think that this is so unless the case had shown that there was a defect of whose possible existence the leading edge of available scientific knowledge was ignorant. The test provided by the statute is not what the defendants knew but what they could have known if they had consulted those who might be expected to know the state of research and all available literature sources. This provision is, to my mind, not apt to protect a defendant in the case of a defect of a known character merely because there is no test which is able to reveal its existence in every case."

18. In addition to those judicial decisions under the Directive, the judge considered a number of other authorities[21] and academic literature from a number of countries[22].

19. Burton J's conclusions on Article 6 may be summarised thus:
    a. The words *all the circumstances* are not exclusive; neither are they unlimited. They are not to be subjected to a restricted construction *eiusdem generis* to the specific examples given in Article 6. Having regard to other language versions, in particular the French where "*notamment*" (≅ "notably") is used rather than "including", the specific examples given in Article 6 are intended to be the most significant circumstances. *All the circumstances* are to be construed as all *relevant* circumstances.
    b. *Avoidability* (i.e. the defendant's case on Article 6) is not one of the *circumstances* to be taken into account within Article 6[23]. It is not a relevant circumstance, being out with the purpose of the Directive[24], which was to relieve consumers not merely of the need to prove fault or negligence but also of the need to show that the producer had taken all legitimately expectable steps. Furthermore, had *avoidability* been relevant, it would have been a significant circumstance departing from the purpose of the Directive and as such would have been mentioned specifically in Article 6.
    c. The first step is to identify the harmful characteristic, which caused the injury. The next step is to conclude whether the product is standard or non-standard. If the respect in which it differs from the series includes the harmful characteristic, then for the purpose of Article 6 it is non-standard. [The judge preferred this approach to the approach in the United States[25] of categorising

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[18] after a close analysis of the decision in Para. 53 iii of the judgment
[19] Ian Kennedy J cleaves to the CPA in the course of his judgment and does not mention the Directive at all. While he was referred to *Commission v UK* and the Article 7(e)/Section 4 (1)(e) linguistic discrepancy, he was not apparently referred to the BGH decision.
[20] @ 285
[21] From Australia, ECJ, England, France and USA
[22] Summarised in Para. 17
[23] Para. 63
[24] Having regard, in particular, to the recitals of the Directive, recitals 2 and 6 being most apposite.
[25] See the American Law Institute's Third Restatement of the Law of Torts 1998, Cap 1, Section 2 Categories of Product Defect

product defects as design, manufacturing or labelling[26] defects, which approach has commonly been adopted by academic writers. The judge saw[27] no reason to adopt this approach (he was not invited to do so by either of the parties) and observed both that the Directive made no attempt to categorise defects and that the attempt to fit any particular situation into one of these "boxes", in fact gave no assistance in carrying out the task of deciding under Article 6 whether the product is defective.]

d. In the case of non-standard products it will be relevant to consider whether the public at large accepted the non-standard nature of the product, but that is not the end of the matter as the court has to decide the question what is the *legitimate* expectation as to safety of the product, which may be higher or lower than the public expectation.
e. If the unsafe product is standard for the purpose of Article 6, then the judge acknowledged that the process may be more difficult[28], though questions of *avoidability* would remain irrelevant and social acceptability would only arise through knowledge of the unsafeness[29].
f. The judge proceeded to hold:
   i. that blood infected with hepatitis C was non-standard[30]
   ii. that the public had not taken it to be socially acceptable for non-standard units of blood to infect patients with hepatitis C[31], the knowledge of the medical profession being irrelevant to that consideration[32]
   iii. that the public at large were entitled to expect that the blood transfused to them would be free from infection.[33]
   iv. that the blood, which infected each of the claimants, was defective for the purpose of Article 6.
g. Burton J went on to address the defendant's case on defect and having heard a large body of factual and expert evidence, having made a number of findings of fact, having taken into account:
   i. all the *circumstances* on the defendant's construction of Article 6,
   ii. the fact that the precautions of the introduction of surrogate testing and earlier introduction of routine screening were not taken

   he came to the conclusion[34] that "such blood so infected on and after 1 March 1988 did not provide the safety which persons generally are entitled to expect"

20. Burton J's conclusions[35] on Article 7 (e) may be summarised thus:
    a. Article 7(e) derogates from the purpose of the Directive and should be construed strictly for that reason[36]

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[26] Instructions and warnings
[27] Paras. 39 to 41
[28] Para. 73
[29] Para. 65 ii
[30] Para. 73
[31] Para. 65 ii
[32] Para. 80
[33] Para. 80
[34] Para. 173
[35] Paras. 74 to 77
[36] Para. 75. Note that in the Danish Kidney case(Case C-203/99, *Henning Veedfeld v Arhus Amtskommune*) the ECJ said much the same in relation to Article 7 (a) treating it as a given but going through a similar thought process (see paragraph 15 of the judgment).

b. The *existence of the defect* means the existence of the generic defect, not the defect in the particular product.[37]
c. Article 7 (e) protects the producer in respect of the unknown generic defect; its purpose is to protect the producer against liability for the "*inconnu*" not to provide a defence in the case of damage caused by a known but undetectable generic defect.[38]
d. Accordingly non-standard products may qualify under Article 7(e) once; "However once the problem is *known* by virtue of accessible information, then the non-standard product can no longer qualify for protection under Article 7(e)."[39]
e. Throughout the relevant period the generic defect of blood sometimes being infected with hepatitis C[40] was well known and the defendant could not therefore establish a defence under Article 7 (e).

21. The main points of general application to emerge from the judgment seem to me to be the following:
    a. The irrelevance of the non-commercial status of NHS producers.
    b. The question whether body parts, tissue and other human derivatives are products within the meaning of the Directive remains to be decided.
    c. In approaching a CPA claim go straight to the Directive for the substantive law and do not worry too much about the wording of the CPA.
    d. Article 6 concerns the "Legitimate expectation".
    e. Of the "Public at large"; not e.g. that of Doctors on behalf of Patients
    f. "All the circumstances" do not extend to questions of avoidability, practicality or the producer's production processes.
    g. To apply Article 6 first categorise the product as standard or non-standard.
    h. The use of "Boxes", i.e. design defects, manufacturing defects and labelling defects, has been rejected.
    i. The Court defines the public's expectation. It is for the court to decide whether the product has not provided the safety which was the legitimate expectation of the public at large.
    j. The Art 7(e) defence concerns generic defects and is restricted to defects that are not and cannot be known about.
    k. There are interesting observations on the role of expert evidence in CPA cases[41].
    l. Note that in relation to *avoidability*, what is sauce for the goose producer is also sauce for the consumer gander[42].

22. Finally I would emphasize the need for claimants to define their defect with care so as to avoid causation difficulties under Article 4 of the Directive:

    "Article 4
    The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage"

    One of the skirmishes[43] during the trial concerned the proper definition of defect of particular relevance to the period March 1988 to January 1990 and surrogate

[37] Para. 74 iii
[38] Para. 76
[39] Para. 77
[40] or NANB
[41] Para. 66 ii
[42] Para. 70, Para. 72

testing, which would have revealed less than 50% of the blood infected with HepC.

23. The claimants' definition of the defect was the viral infection of the blood. The defendant contended for the defect being defined as the "Unscreenedness" of the blood; i.e. the fact that it was not subjected to routine screening testing first surrogate then Ortho Elisa. It can be seen that on the defendant's definition, the claimants could have had problems in proving (balance of probabilities) that the damage (infection) was caused by the failure to screen the blood, when screening would still have let over 50% of the infected blood through.

X, Y, Z & Others v Schering & Others

24. This is the Combined Oral Contraceptive ("COC") litigation where claimants complained of suffering various cardio-vascular injuries resulting from taking the third generation COC ("COC3"). The injuries were collectively described as Venous-thromboembolism (VTE). The judgment[44] of Mr Justice Mackay addresses the first generic issue in the litigation, which it was agreed was determinative of the case if decided against the claimants. That issue was whether the COC3 carried a higher risk of VTE than earlier generations of COCs. Having heard a large body of epidemiological evidence, Mackay J decided the issue in favour of the defendants and therefore dismissed the actions.

25. The judgment does not in terms tell us precisely how the claimants formulated the defect alleged under Article 6 of the Directive and the CPA, but I understand it to be twofold, possibly threefold:
    a. That COC3 had an increased risk of VTE (compared to previous COCs)
    b. That there was no warning to that effect given by the producers.
    c. That COC3 carries no benefit over previous COCs.

26. The increase in the risk being at the heart of the definition of defect, the claimants accepted[45] that unless the risk was more than doubled they would not be able to prove that the damage (the VTE) was caused by the defect (the increased risk) as required by Article 4 of the Directive.

27. The judge found[46] that there is not as a matter of probability an increased relative risk of VTE associated with taking COC3. This is a decision on its own facts, dictated by the way the claimants formulated their case on defect.

28. The judgment in *A & Others v NBA* is not referred to by Mackay J, whose judgment in my view says nothing to weaken or diminish the principles laid down by Burton J.

HRA & IMMUNITY FROM SUIT

29. It will be remembered how the decision of the European Court of Human Rights in *Osman v UK*[47] was perceived to put an end to immunities from suit and strike

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[43] Para 46, Para 49, Para 174
[44] handed down on 29/07/02; not yet reported so far as I know
[45] Para 21 of the judgment.
[46] Para 339
[47] (2000) 29 E.H.R.R. 245

outs by public authorities at an early stage of proceedings. Lord Hoffmann expressed[48] the view that:

> "The whole English jurisprudence on the liability of public authorities for failure to deliver public services is open to attack on the grounds that it violates the right to a hearing before a tribunal"

30. Then came *Z v UK*[49] the decision of the ECtHR on the appeal from the decision of the House of Lords in *X v Bedfordshire*[50]. This restored the position so far as pre-trial strike out is concerned. The court came to the view that the application of the *Caparo* principle that it has to be fair just and reasonable for a duty of care to be imposed does not amount to the conferring of an immunity on a public authority. Therefore there was no breach of Article 6(1) (right of access to a tribunal). The court held that there had been breaches of Article 3 (inhuman degrading treatment) and, interestingly, went on to hold that there had been a breach of Article 13 (right to an effective remedy in respect of breaches of Convention rights). The Human Rights Act does not give effect to Article 13, though it was conceded by the UK government that in future victims of violations of Article 3 would be able to claim damages under the HRA.

31. So if the immunity contended for is one against liability for a violation of a Convention right, the immunity can be sidestepped by claiming under the HRA[51]. There can be little doubt that the imminent arrival of the HRA had some impact on the abolition of advocate's immunity in *Arthur JS Hall & Co v Simons*[52].

32. Recently, in *Kane v New Forest DC*[53], the Court of Appeal rejected the submission that a planning authority has blanket immunity from claims for negligence and distinguished *Stovin v Wise*[54] so as to permit the claimant to sue a planning authority for granting planning permission which included and led to the construction and putting into use of a dangerous footpath/highway junction, the pedestrian claimant having been knocked down by a motorist, unsighted by the lack of sightlines.

CAUSATION

Fairchild v Glenhaven Funeral Services Ltd (HL(E))[55]

33. At the outset Lord Bingham says[56] this:

> "The essential question underlying the appeals may be accurately expressed in this way. If
> (1) C was employed at different times and for differing periods by both A and B, and
> (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and

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[48] Rt Hon Lord Hoffmann, *Human Rights and the House of Lords* (1999) 62 MLR 159.
[49] (2002) 34 EHRR 3
[50] [1995] 2AC 633
[51] see the full discussion of these problems in *Human Rights and Civil Practice* Leigh-Ann Mulchay @ 337 *et seq* and @ 669 *et seq* as to immunities.
[52] [2002]1AC 615
[53] [2002] 1 WLR 312
[54] [1996] AC 923
[55] [2002] 3 WLR 89
[56] @ 92, para 2

(3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and
(4) C is found to be suffering from a mesothelioma, and
(5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but
(6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together,
is C entitled to recover damages against either A or B or against both A and B?"

34. A mesothelioma is a malignant tumour, usually of the pleura, sometimes of the peritoneum. In the absence of occupational exposure to asbestosis it is very rare[57] indeed; in the presence of such exposure it becomes a great deal more common[58]. The greater the quantity of dust and fibre inhaled the greater the risk, but the condition may be caused by a single fibre, or a few fibres, or many fibres. The condition once caused is not aggravated by further exposure. There is no way of identifying, even on a balance of probabilities, the source of the fibre or fibres which initiated the genetic process which culminated in the malignant tumour.

35. In a case such as this should there be a variation or relaxation of the general principle requiring the claimant to demonstrate the causal connection between breach of duty and damage? Lord Bingham observes[59]:

> "The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another. Are these such cases? A and B owed C a duty to protect C against a risk of a particular and very serious kind. They failed to perform that duty. As a result the risk eventuated and C suffered the very harm against which it was the duty of A and B to protect him. Had there been only one tortfeasor, C would have been entitled to recover, but because the duty owed to him was broken by two tortfeasors and not only one, he is held to be entitled to recover against neither, because of his inability to prove what is scientifically unprovable. If the mechanical application of generally accepted rules leads to such a result, there must be room to question the appropriateness of such an approach in such a case."

36. Having reviewed the authorities (English, Scottish, common law from elsewhere and beyond), Lord Bingham concludes[60]:

> "Where those conditions are satisfied, it seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him. I consider that this conclusion is fortified by the wider jurisprudence reviewed above. Policy considerations weigh in favour of such a conclusion. It is a conclusion which follows even if either A or B is not before the court."

37. Lord Nicholls delivered a concurring speech, but sounded a warning[61] that:

> "…considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold 'but for' test. The reason must be sufficiently weighty to justify depriving the defendant of the protection this test normally and rightly affords him, and

[57] afflicting about 1 person per million per year
[58] 1,000 greater than in the general population, with about 1,500 cases reported annually.
[59] @96, para 9
[60] @120, para 34
[61] @122, para 43

> it must be plain and obvious that this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific."

38. That warning is echoed by Lord Rodger (@ 170, para 169), who proceeds to suggest certain criteria for allowing the "but for" principle to be relaxed and therefore restraining undue relaxation of it.

39. Lord Hoffmann states[62] the principle shortly. He thinks "it is sufficient, both on principle and authority, that the breach of duty contributed substantially to the risk that the claimant would contract the disease". Later he lists[63] the five factors in the cases in question, which he contends justify making a defendant liable for an injury because he created a significant risk of that injury. The five factors can be summarised (more generally) thus:
    i. The duty in question is specifically intended to protect people against being unnecessarily exposed to the risk of a particular disease
    ii. The duty is intended to create a right to compensation for injury connected with its breach
    iii. The greater the exposure, the greater the risk of contracting the disease
    iv. In the case of more than one exposure to the risk, medical science cannot prove which exposure is more likely than not to have produced the contraction of the disease.
    v. The person has contracted the disease against which he should have been protected.

40. The authority of the House of Lords' decision in *McGhee v. National Coal Board*[64] has been rehabilitated, the disapproval of it expressed by Lord Bridge in *Wilsher v Essex Area Health Authority*[65] being disapproved of in its turn.

41. It remains to be seen how far the urgings to caution by Lord Nicholls and Lord Rodger will restrict the ambit of the decision in *Fairchild*. For me it is important as restoring *McGhee* and being a principled relaxation of the requirement that claimants have to prove causation on the "but for" standard and I am sure that we can all think of old cases where claimants were defeated by causation problems, which *Fairchild* would now allow them to surmount.

Chester v Afshar[66]

42. In this medical negligence case the claimant alleged that the defendant neurosurgeon negligently failed to advise her fully as to the risks attached to the proposed procedure (to relieve her chronic disabling back pain) and performed the procedure negligently. Had she been more fully advised, she would have postponed the operation to take a second and possibly a third opinion; she could not say that she would never have returned for surgery. As it was she underwent the operation and one of the risks in question (cauda equina syndrome resulting in pain and neurological deficit) eventuated.

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[62] @ 124, para 47
[63] @126, para 61
[64] [1973] 1 WLR 1
[65] [1988] AC 1074 @ 1090D
[66] [2002] EWCA Civ 724

43. The judge at first instance held that the neurosurgeon had not been negligent in performing the operation but had not advised the claimant as fully as he should have done of the risks, with the result that she underwent the operation on that occasion and suffered the complication she did; it made no difference on the question of causation that she could not say that the negligence exposed her to a risk , which she would never have exposed herself to if properly advised.

44. On appeal the Court of Appeal upheld this decision, applying the majority decision of the High Court of Australia in *Chappel v Hart*[67]. A crucial difference with *Chappel* is that there the patient would have postponed the operation with a view to seeking further advice and going to a more experienced surgeon. In *Chester* the most that the patient said was that she would seek another opinion or two. The Court of Appeal rejected the appellant's argument that so far as the duty to advise of risks was concerned, the purpose of the duty was not to preserve the patient from the risks but to save her from running the risks without knowing of them so that the patient can only recover for the damage flowing from the materialisation of the risks if she proves that properly advised she would not have run that risk. It was sufficient for the Court of Appeal that properly advised the claimant would not have undergone the operation on that particular day.

DAMAGES

45. In *Warriner v Warriner*[68] the Court of Appeal allowed an interlocutory appeal from a case management decision, which had permitted a claimant to adduce accountancy evidence to support an argument that the claim was exceptional and that therefore the Lord Chancellor's discount rate of 2½% should be departed from. The case is interesting as showing how reluctant the courts are likely to be when invited to depart from the 2½% rate.

46. There have been several recent decisions[69] on the question what is "same damage" for the purpose of seeking a contribution under the Civil Liability (Contribution) Act 1978. The cases concerned respectively a share purchase agreement and an accountant's advice (*Eastgate*), a dilatory building contractor and an architect's certificate (*Royal Brompton*) and fire damage to a building site, insurance cover and the position of the contractors, building owner and architect (*Co-op Retail*). All a long way from personal injuries but "same damage" issues could well arise in complex personal injury litigation, for example:
    a. In cases of serial, several Tortfeasors. An example would be one set of injuries inflicted in a RTA by the driver followed by further, different damage, inflicted in the ambulance.
    b. In cases where the claimant has significantly different causes of action against the Tortfeasors, such as clinical negligence against doctors and a CPA claim against drug producers.

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[67] (1999) Lloyd's Rep Med 223
[68] [2002] 1 WLR 1703
[69] *Eastgate Group Ltd v Lindsey Mordern Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642; *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 wlr 1397; *Co-op Retail Services Ltd v Taylor Young Ltd* [2002] UKHL 17, [2002] 1WLR 1419.

This triad of cases demonstrates how the apparently simple provisions of the 1978 Act can be used to surprising effect. If you are considering or facing contribution proceedings, think carefully about "same damage".

FUNDING ARRANGEMENTS

47. In *Callery v Gray*[70] the House of Lords has affirmed the decision of the Court of Appeal which had allowed the claimant (funded by a CFA) in a straightforward RTA claim which settled early and quickly to recover both his after the event insurance premium and an uplift reduced from 60% to 40% in the County Court and then to 20% in the Court of Appeal.

48. The House of Lords declared that the practical development of this new regime should be left to the Court of Appeal.

49. In *Sarwar v Alam*[71] the Court of Appeal considered the interesting question whether a claimant should be able to recover his ATE insurance premium when he in fact could have used his BTE cover albeit with the implications as to choice of legal representative. The Court allowed him to recover his ATE premium, but observed that in simple cases worth less than about £5,000 claimants should be referred to their BTE insurer "without further ado".

CONCLUSION

50. As I said, a good year or so for claimants though funding arrangements are a worry and we should hear very soon what is to happen to clinical negligence litigation.

[70] [2002] 1 WLR 2000
[71] [2002] 1 WLR 125