

**CONTEMPORARY PERSPECTIVES ON FACTUAL
CAUSATION IN THE SOUTH AFRICAN LAW OF DELICT:
A STUDY WITH REFERENCE TO MEDICAL NEGLIGENCE**

by

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Summary

This purpose of this dissertation is to determine the ambit of the current requirements for the proof of factual causation in the South African law of delict, and to consider the implications thereof with reference to medical negligence. Proceeding from the premise that South African courts have employed the *conditio sine qua non* as the sole test for factual causation for at least the past forty years, this study commences with a review of selected older South African case law which evidences judicial recognition of alternative, less stringent tests for factual causation. It is concluded that South African courts have in the past employed versions of the material contribution test as well as hybrid tests in assessing factual causation to the benefit of plaintiffs who had proven negligence and injury, but were confronted with difficulty or impossibility in the proof of causation. The South African case law selection is concluded with the Constitutional Court's judgment in *Lee v Minister of Correctional Services* 2013 (2) SA 144 which, it will be argued, represents a significant departure from the prior common law position regarding factual causation. In an attempt to gain some perspective on what the said departure from the traditional test for factual causation might entail and what repercussions it may have, a study is made of selected case law from the United Kingdom pertaining to the application of modified tests for factual causation. It is concluded that the Constitutional Court in fact employed a material contribution to risk test for factual causation in *Lee v Minister of Correctional Services* 2013 (2) SA 144 and the reception of this judgment is considered in the light of academic commentary and perspectives gleaned from the United Kingdom. The discussion culminates in an opinion that the current common law position regarding the test for factual causation has not been defined clearly by the courts although it has certainly been relaxed into a less stringent formulation. The prevailing position is considered with reference to the Constitution and the possible reliance by organs of state on section 36 thereof is contemplated as a possible mechanism to resist positive findings of causation. Finally it is submitted that the contemporary formulation of the test for factual causation represents perhaps the most plaintiff-friendly delictual disposition in South African legal history, with the result that medical negligence is likely to be proved with greater ease in future.

Key terms: factual causation, medical negligence, *conditio sine qua non*, but for test, material contribution test, material increase in risk test, proof of causation, causal uncertainty, indeterminate causation, causal analysis, causal nexus, common law development.

Declaration

I declare that this dissertation, which I hereby submit for the degree LLM (Public Law) at the university of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

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Chapter One Introduction

1 1 Background: Factual causation and the *Conditio Sine Qua Non*

In terms of the South African common law, only causal negligence can give rise to liability. In order to be successful in a claim for damages the element of factual causation, in addition to the other delictual elements, therefore needs to be proven by demonstrating that the negligent conduct caused the injury or harm sustained.¹ It is settled law that factual causation is determined by the application of the *conditio sine qua non* or but-for test.² In terms of this test negligent conduct is hypothetically eliminated from the facts and an inquiry is made as to whether the harm caused would have ensued but for the negligent conduct.³ If it is found to be probable that the harm would have eventuated in the absence of the negligent conduct, factual causation is not demonstrated and liability for the negligent conduct does not attach. This test is generally applied to determine the causative effect of a negligent commission. In cases where the negligence takes the form of an omission, the inquiry may be more complex.⁴

In order to ascertain the causality of a negligent omission it would usually be necessary to eliminate or “think away” the negligence and superimpose hypothetical

¹ Factual causation is, of course, not the only causal requirement. Once factual causation has been established legal causation needs to be demonstrated in addition thereto, thus the so-called “two pronged” inquiry. See in this regard *inter alia Muller v Mutual and Federal Insurance Co Ltd* 1994 (2) SA 425 (C). This dissertation does not however deal with legal causation or remoteness of damage and no discussion will be advanced in this regard.

² Boberg PQR *The Law of Delict Vol. 1: Aquilian Liability* (1984) 380, Loubser & Midgley (Eds.) *The Law of Delict in South Africa* (2009) 72, Neethling, Potgieter & Visser *Law of Delict* (2010) 6th Ed 180. See also Joubert *The Law of South Africa* 8 Part 1 at 151 and Macintosh JC and Norman-Scoble C (1958) *Negligence in Delict* at 59 for an earlier perspective. In this dissertation the terms *conditio sine qua non* and but-for test will be used interchangeably.

³ See the review of South African case law in Chapter Two below.

⁴ This distinction is best articulated in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680, see discussion at 2 7 below.

reasonable (i.e. non-negligent) conduct into the facts of the case.⁵ If the harm is found to be likely to have occurred even under non-negligent circumstances, then the negligent omission is found not to have a causal relationship to the harm suffered. If on the other hand, the inquiry reveals that the harm would probably not have ensued had reasonable conduct been brought to bear on the circumstances, a causal nexus will have been established between the negligent omission and the harm suffered.

Until recently,⁶ our courts have applied the but-for test as the sole test for factual causation with the result that a plaintiff who failed to establish a causal link between the injury sustained and the defendant's negligence would not have been successful in his claim.⁷ Over the years this approach to the proof of factual causation has become ever more controversial due to allegations that its application often causes injustice to be visited on plaintiffs as the standard of proof of the causal nexus demanded by the test is thought to be too stringent. The but-for test is criticised particularly in situations where a plaintiff has successfully demonstrated both negligence and harm but has failed to prove a sufficient connection between the two and is therefore left without recourse.

The object of the element of causation is *inter alia* to limit the scope of liability in the law of delict, for it is believed that without the causative hurdle liability would attach too easily and thus too frequently.⁸ However, in circumstances where the failure to demonstrate factual causation is the result of, *inter alia*, scientific uncertainty or the fact that the defendant alone possesses direct knowledge concerning the negligent

⁵ *Ibid.*

⁶ See discussion on *Lee v Minister of Correctional Services* 2013 (2) SA 144 at 2 10 *infra*.

⁷ It is trite that the but for test was applied as the sole test for factual causation at least since the decision in *Minister of Police v Skosana* 1977 (1) SA 31. See in this regard Boberg in n 2 above as well as Price 'Factual Causation After *Lee*' 2014 Vol 13.3 *South African Law Journal* 491 discussed at 4 2 below.

⁸ See in this regard Boberg at 439 as well as Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007) at 509.

conduct, the conclusion of the but-for test that no causal nexus is present is often thought to be inequitable.⁹

It has furthermore long since been acknowledged that the but-for test may be incapable, *inter alia*, of determining causation in cases where two causes were operative simultaneously,¹⁰ as a traditional application of the test will always reveal that there was no connection between negligence and harm in such circumstances. This is due to the fact that the elimination of one of the causal agents would not alter the outcome, as the other agent would ensure that the injurious result remains constant.

Considerations such as these have troubled courts the world over and many jurisdictions have developed modified tests for causation in an attempt to ameliorate the perceived exclusionary nature of the causal requirement of a delictual claim.¹¹ Such developments to the law of delict have often taken the form of exceptions to the general application of the but-for test, which may, in theory at least, only be invoked in circumstances where the plaintiff's claim is complicated by an overly burdensome causal requirement where he has clearly suffered harm in negligent circumstances.¹²

The reaction of South African courts has until recently been more restrained and our courts have applied the traditional but-for test with exacting precision for many years. The conviction that this has resulted in an overly burdensome challenge to the proof of plaintiffs' claims has motivated some South African commentators and

⁹ For a discussion on the shortcomings of the but-for test see in general Boberg at 380 and for a detailed discussion on international perspectives on causal challenges see Khoury L *Uncertain Causation in Medical Liability* (2006) and Goldberg R (Ed) *Perspectives on Causation* (2011).

¹⁰ *Ibid.*

¹¹ See n 9 above as well as the discussion on United Kingdom case law below in Chapter 3. For a broader perspective see Oliphant, Ken (2011) "Uncertain Factual Causation in the Third Restatement: Some Comparative Notes," *William Mitchell Law Review*: 3.3, Article 2.

¹² *Ibid* see specifically the discussion on the United Kingdom cases of *McGhee v National Coal Board* [1972] 3 All ER 1008 at 3 3 below, and *Fairchild v Glenhaven Funeral Services* [2002] 3 All ER 305 at 3 4 below.

practitioners to advocate for causal reform by way of the introduction of legal mechanisms that may assist a plaintiff in demonstrating causation.¹³

The perceived inequitable results of the but-for test are often countenanced in medical negligence claims where plaintiffs have suffered substantial injury in egregiously negligent circumstances but are unable to prove a causal link and are therefore denied the benefit of compensation.¹⁴ Whilst certain medical negligence cases present slighter causal challenges, as where the incorrect drugs are administered or incorrect surgery is performed, it is at times impossible to prove a causal link due to the limitations of medical science and the variability of patient prognosis and epidemiological data in evidence.

1 2 Research question and methodology

This dissertation seeks to determine whether the traditional common law test for factual causation has been altered by recent judgments of the Constitutional Court and then attempts to circumscribe the current requirements for the proof of factual causation in South Africa.

It is submitted that, although the principles remained largely undeveloped, South African courts had in earlier years applied less exacting tests for causation than the but-for test. These less demanding tests, however, fell out of use and the but for test was applied strictly for many years until the Constitutional Court's decision in *Lee v Minister of Correctional Services*.¹⁵ In order to gauge the extent to which the court in *Lee* applied the common law as it stood at the time, or alternatively, the extent to which it adapted the common law, the common law positions before and after the judgment are discussed. The position in the United Kingdom is also considered in the light of the manner in which that jurisdiction has dealt with causal indetermination.

¹³ See in general Van den Heever P *The application of the doctrine of a loss of a chance to recover in medical law* (2007) and Carstens P and Van den Heever P *Res ipsa loquitur and medical negligence: a comparative survey* (2011).

¹⁴ See notes 9 and 11 above.

¹⁵ 2013 (2) SA 144 (CC) referred to herein after as "*Lee*".

In doing so the following research methodology has been implemented: first, the historical development of factual causation is considered by way of a review of South African case law. Decisions are selected which evidence the application, or contemplation, of tests for factual causation other than the strict application of the but-for test in order to demonstrate that the test for factual causation was applied less formalistically in earlier years. A brief and selected review of the law in the United Kingdom relating to factual causation is then conducted by way of a discussion of the relevant decisions of the House of Lords and Supreme Court of the United Kingdom. The review of the United Kingdom law does not purport to represent a comparative analysis between the two jurisdictions, but rather seeks to demonstrate the advantages and pitfalls of the application of a relaxed test for causation in a jurisdiction that has applied such tests for some time.

The jurisdiction of the United Kingdom was selected due to the fact that South African courts have in the past turned to said jurisdiction for guidance when faced with causal difficulties.¹⁶ Moreover, the decisions regarding factual causation emanating from United Kingdom tribunals have been seminal to the development of the same branch of law in other commonwealth countries such as Canada and Australia.¹⁷

After the case law reviews of South Africa and the United Kingdom are concluded, the implications of recent South African case law is discussed and the recent judgments are examined in the light of the manner in which they applied the common law and are then critically analysed with reference to the writings of academic commentators. Analogies are also sought to be drawn with the position in the United Kingdom. Finally, the study is concluded with commentary on the contemporary characteristics of factual causation in South Africa and the influence of the Constitution.

¹⁶ This will become apparent from the analysis of South African case law in Chapter Two, see also *Michael v Linksfeld Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA).

¹⁷ See in general Khoury L *Uncertain Causation in Medical Liability* (2006). For a detailed and up to date analysis of factual causation in Canadian law see Cheifetz D “Factual Causation in Negligence after Clements” (2013) 41 *The Advocates’ Quarterly* 179.

Primary sources of law thus comprise firstly, the common law as discussed through the South African case law review and, secondly Constitutional perspectives, which are incorporated in the conclusion. Secondary sources of law include textbooks, journal articles and foreign case law.

Chapter Two The Historical Development of South African Common Law with reference to Factual Causation in Delictual Claims: Selected Cases

2 1 Introduction

This chapter illustrates the application and development of the common law test for factual causation with reference to the decisions of Southern African courts in the period between 1957 and 2015. The cases under review are analysed with reference, first, to the relevant facts and, second, to the court's judgment on the merits, after which a short discussion is provided on each judgment.

The cases under review have been specifically selected based on the manner in which the court approached the element of factual causation and, it is submitted, will serve to definitively demonstrate the fact that the but-for test has not always been the sole test applied by courts in determining the proof of causation. It is submitted further that the more recent decisions in *Goliath v MEC for Health, Eastern Cape*¹ and *Lee v Minister of Correctional Services*² represent the most significant developments to the South African common law relating to factual causation in at least forty years.³

2 2 *Silva's Fishing Corporation (Pty) Ltd v Maweza 1957 (2) SA 256 (AD)*

2 2 1 Facts

During June of 1954 the fishing vessel *Antoinette*, which was owned by the appellant, set out from Cape Town harbour heading for Stompneus Bay from where it, along with other vessels owned by the appellant, was to go on daily fishing expeditions.

¹ 2015 (2) SA 97 (SCA).

² 2013 (2) SA 144 (CC).

³ Arguably since the decision in *Minister of Police v Skosana* 1977 (1) SA 31 (A).

On 29 June 1954 the *Antoinette* departed from its base at Stompneus Bay for that day's fishing activities. Later that afternoon when the vessel was returning to base its only engine failed and, despite the Captain's efforts, the engine could not be coaxed back into working order. The *Antoinette* drifted at sea for nine days before finally being wrecked in a storm just outside of Lamberts Bay. The appellant had been informed of the *Antoinette's* emergency on several occasions. Only the Captain survived the ordeal, all other crew members having drowned.

The widow of one of the drowned crew members instituted action against the appellant claiming damages flowing from the appellant's alleged failure in its duty of care owed to the crew of the *Antoinette* in that, despite having been made aware of the *Antoinette's* predicament, the appellant (in its capacity as the owner of the vessel) had failed to take any reasonable steps to secure the crew's rescue. The trial court decided in favour of the respondent, having determined the appellant's omission to amount to negligence for which the appellant could be held liable.

In a nutshell, the case made by the appellant was that, in proving that the loss suffered by the respondent was the result of the wrongful act of the appellant it was, in the circumstances, necessary to prove that the appellant owed a duty of care to the crew of the *Antoinette*, thereby obliging it to take positive steps to effect its rescue.⁴ More specifically, counsel for the appellant argued that the sole duty owed by the appellant to the crew was to ensure that the "vessel on which they embarked was seaworthy and that its engine was not defective".⁵

The appellant's case was that its duty of care did not extend beyond the provision of a seaworthy vessel and did not compel it to interpose where subsequent misfortune was visited upon the vessel, not even in the event of it being made aware of such adverse events. The appellant thus sought to divorce itself from the fate of its vessel from the

⁴ After some deliberations it was accepted by all parties as well as the court that the action brought by Mrs Maweza was one framed in delict. There had been certain allegations by the appellant to the effect that the relationship between it and the crew of the *Antoinette* had been contractual in nature and that the respondent had brought its claim incorrectly, such allegations were dismissed by the court. See in this regard *Silva's Fishing Corporation (Pty) Ltd v Maweza* 262 at D.

⁵ *Id* 257 at F.

point in time that the vessel left Cape Town harbour with a working engine and suitable equipment. It is based on this construction of its obligations owed to the crew members of the *Antoinette* that the appellant alleged that its subsequent omission to rescue them amounted to a mere omission, devoid of prior conduct which would have obliged it to act positively.

Any failure on the part of the appellant to act in light of newfound information, it was contended, would thus result in a mere omission on the part of the appellant from which no liability could attach in terms of the *Lex Aquilia*.⁶

2 2 2 Judgment

In the judgment of the majority,⁷ the court per Schreiner JA, assessed the merits of the case in two stages; first by determining the question as to whether the appellant owed a duty to the crew members of the *Antoinette* and, second by determining whether, should such a duty be found to have existed, it would have included an “obligation to rescue”.⁸

The court made quick work of the appellant’s allegations regarding its limited, “discharged” duty of care and proceeded on the common sense approach that, considering the fact that the crew members, the Captain and the owner of the vessel were all “taking part...in a profit making enterprise”,⁹ the appellant’s duty of care would arise irrespective of whether or not it had engaged the crew contractually or otherwise.¹⁰ Thus having established the existence of a duty of care on the part of the appellant the court turned to the second stage of its assessment of the merits.

⁶ *Id* 260 at G.

⁷ The minority judgment, per Steyn JA, concurred with the majority’s judgment but based its conclusion on different grounds *Id* page 264 at D.

⁸ *Id* 261 at G.

⁹ *Id* 262 at C.

¹⁰ See also the court’s analysis of the *Aquilian* position regarding the need for a duty of care in order for liability for an omission to arise and Mr Justice van den Heever’s musings on “noxious activity”, *Id* 261 at A – G.

Schreiner JA pointed out that engine failure on the open seas and the dangers associated therewith were risks that went hand in glove with the business of the appellant and that it therefore had not only a moral duty, but also a legal one to provide its vessels with a means of escaping such perils and/or to facilitate their rescue.

In this case the appellant was, in fact, in a position to attempt to rescue the *Antoinette* by calling upon the other vessels in its fleet, also based at Stompneus Bay, to go to the *Antoinette*'s aid.

The court dismissed the appellant's contention that a duty to act in such a positive way as to effect a rescue could only be prescribed by contract or statute, and held instead that the appellant's duty to rescue was a general one, not subject to specific rules but rather: "simply a duty to act reasonably and such a duty may arise out of the circumstances of the case. It will be up to the court to decide in each case whether the circumstances are such as to give rise to a legal duty."¹¹

In conclusion the court opined that the provision of the vessel by the appellant was "potentially noxious" to the crew and that this gave rise to a legal duty on the part of the appellant to make use of the resources available to it to assist the crew in the event of it becoming aware of their distress. As for factual causation the court had this to say:

No doubt what actually drowned Dlamini was the sea; it was the wreck of the boat on the rocks that cast him into the sea and it was the storm that caused the wreck. But if the allegations in the declaration be accepted there was in addition to the operation of the forces of nature the defendant's failure to use the available means of rescue which operated throughout and constituted negligence materially contributing to the result.¹² (emphasis added.)

¹¹ *Id* 263 at D.

¹² *Id* 264 at A (emphasis my own).

The majority of the court thus upheld the decision of the trial court and dismissed the appeal on the basis that the appellant's negligent omission had been wrongful and had caused the respondent's loss.

2 2 3 Discussion

This case is illustrative of the straightforward manner in which our courts dealt with questions of negligence and causation in earlier years. The court's analysis of causation leaves no doubt as to its willingness to have applied a test for factual causation other than the *condition sine qua non*.

2 3 *Kakamas Bestuursraad v Louw 1960 (2) SA 202 (AD)*

2 3 1 Facts

The dispute that gave rise to litigation in *Kakamas* was one regarding the exercise of rights flowing from a servitude.¹³ The respondent had granted the appellant a servitural right to construct a storage dam consisting of two walls on a portion of the Orange River which flowed on his property. When it was discovered that the partial construction of the dam had caused silting and other damage to the servient tenement the respondent successfully instituted action for damages in a provisional division of the high court.¹⁴ The appellant took issue with the court *a quo*'s findings regarding the nature of servitural rights and appealed to the Appellate Division, as it then was.

On appeal the court produced three judgments, two of which, however, concurred on the order to be made.¹⁵ As such the appeal succeeded and the award of damages made by the court *a quo* was reversed.

¹³ For a detailed summary of the facts see the judgment per Schreiner JA, *Id* 209.

¹⁴ *Louw v Kakamas Bestuursraad* 1958 (4) SA 768 (GW), Diemont J sitting as the trial court.

¹⁵ The minority judgment was handed down by Schreiner JA (with whom Ramsbottom JA concurred), judgment for the majority was handed down by Hoexter JA (with whom Malan JA concurred) and the final judgment was handed down by Rumpff AJA, as he then was, who concurred with the order made by Hoexter JA.

The facts of the case are somewhat complex and do not, for current purposes, require detailed discussion. It is important to note, however, that the analysis of negligence and causation *in casu* was informed by the underlying servitude and the rights and obligations stemming therefrom as will be illustrated below.

It is submitted that the difference in opinion that distinguishes the majority judgment from that of the minority¹⁶ did thus not involve considerations of the common law position regarding negligence and causation, but rather entailed technical points relative to the legal disposition of rights and duties under a servitude.¹⁷

What makes *Kakamas* relevant to this dissertation, however, is the court's application of the common law principles of negligence, as they then stood, as well as its approval of the English case of *Bonnington Castings Ltd v Wardlaw*,¹⁸ which appear from the judgment of Schreiner JA.

2 3 2 Judgment

The majority of the court held that general principles of *Aquilian* liability had to defer to the terms of the servituted rights that had been bestowed and it is submitted that the majority applied a modified, less onerous Aquilian standard.¹⁹ As a backdrop to the majority's deliberations, the following aspects regarding the nature of servitudes need to be mentioned by way of the legal context within which the dispute was adjudicated.

It is settled law that the grant of a servitude necessarily gives rise to comprehensive, far-reaching rights over the servient tenement.²⁰ This is necessarily so for the

¹⁶ See discussion under "judgment" below.

¹⁷ This being said, the judgment per Rumpff AJA, as he then was, did take issue with the fact that the respondent's evidence had not demonstrated with sufficient certainty that additional sluices would have resulted in the dam remaining open past a certain period of time; see *Id* 235 at G.

¹⁸ 1956 (1) A.E.R. 615.

¹⁹ *Id* 230 at H.

²⁰ Roman Dutch principles regarding servitudes are still relevant to our law and many of these can be traced back to the old masters and the contents of the Digests. A servitude *simpliciter* does not demarcate the portion of the servient tenement that may be sued but the holder of a servitude cannot

alternative would yield a right too often un-exercisable and thus contrary to its very purpose. The grant of servitutory rights is meant to be robust so as to allow the holder thereof to make use of the servient tenement, or relevant portion thereof, largely as though he were the owner thereof.²¹

By this is meant not only that the servitude holder should enjoy comprehensive rights in terms of physical access and beneficial enjoyment of the servient tenement, but also that the reasonable consequences of such use by the holder should not be such as to prevent the exercise of the servitude.²² The ability of the servient owner to claim damages from the servitude holder in respect of damages flowing from the reasonable use of the servitude amounts to a consequence prohibiting the exercise of servitutory rights and renders the very granting thereof a nullity *de facto*. Similarly a duty on the servitude holder to avoid inflicting damage on the servient tenement *per se* would stand in contradiction to the servitutory rights bestowed.²³

The only onus brought to bear on a servitude holder is that she should act to limit any damages caused by the reasonable exercise of her rights; the servitude should be exercised *civiliter modo*.²⁴

claim to pass through the house or vineyard of the servient owner if he could equally well go by another route. If, however, the route has been fixed by an agreed stipulation between the parties, the servient owner will have no recourse in the event of the dominant owner's use of the stipulated route resulting in harm or inconvenience to the former. It is thus clear that the servient owner drastically diminishes his rights to his own property by granting servitutory rights and that the law seeks to protect the rights of the dominant owner.

²¹ The learned judge cited in this regard *Voet*, 8.4.16 and *de Groot*, 2.35.13.

²² *West Witwatersrand Areas Ltd v Roos* 1936 AD at 72.

²³ If this were the case the servitude holder, through her lawful conduct in exercising her servitutory rights, would become liable for damages as a result of unlawful conduct.

²⁴ It is interesting that Schreiner JA, at page 217 F, opined that the term *civiliter modo* is "commonly referred to as negligence". The learned judge then goes on to cite *Gluck* and *van Leeuwen* in stating that "*a servitude must be exercised with as much consideration as possible towards the servient property*" and "*...must be exercised properly and with the least possible damage or inconvenience to the res serviens*". It is patently clear from these definitions that, when dealing with parties to a servitude, the standard for negligence is relaxed; this, it is submitted, must necessarily be so as a result of the rights stemming from a servitude.

The majority of the court found that, in the circumstances, the appellant's actions, although having caused harm, had not fallen outside the ambit of the rights to which it was entitled in terms of the servitude.²⁵ Specifically it was held that the number of sluices built into the dam wall (which the respondent claimed were too few), as well as the appellant's failure to consult an engineer, did not render it liable for the consequent damages as it had exercised its servitutorial rights *civiliter modo*. To have consulted an engineer or to have modified the construction of the dam walls in order to avoid damage, the majority held, would have placed too high a burden on the servitude holder and would have rendered the exercise of the servitutorial rights too onerous to be practical.²⁶

In his assessment of the causal evidence regarding the number of sluices built into the dam wall,²⁷ Schreiner JA makes use of language that had until very recently fallen out of use in the context of the proof of factual causation. Although it was agreed that the Orange River was prone to silting, it was common cause that there was a negative correlation between the number of sluices built into a dam wall and the extent of silting likely to take place.

The extent of such a negative correlation between silting and the number of sluices could, of course, not be demonstrated with any precision but Schreiner JA did not abandon the claimant on this account.²⁸ The learned judge's analysis of the facts lead him to use phrases such as "...had there been a large number of sluices open...this must have had a substantial effect on the amount of silt deposited above the wall during that period"²⁹, and, "...there were not enough sluices and their absence considerably increased the danger of damage being done to the plaintiff by silt."³⁰

It does not take much imagination to see from Schreiner JA's reasoning that he was maneuvering towards a finding of factual causation based on a standard less onerous

²⁵ *Id* 231 at A.

²⁶ This finding agreed with the judgment per Schreiner JA, see *Id* 220 and 230.

²⁷ See particularly in this regard *Bonnington Castings Ltd v Wardlaw*, *Id* 219 D to 220 G.

²⁸ As, it is submitted, a judge is likely to do today.

²⁹ *Kakamas Bestuursraad v Louw* 219 at H.

³⁰ *Id* 219 – 220.

than a *sine qua non*-based demonstration of a causal nexus. The learned judge went on to say:

*“Excesses of nature like flooding and silting may do damage without human assistance, but sometimes one man’s actions may make the position worse for another. Whether that has happened or whether the human intervention must be regarded as an irrelevancy, since it could not have contributed materially to the causing of the damage, will often be a question of degree, to be decided upon a broad estimate of the probabilities.”*³¹

Under these circumstances Schreiner JA held that the “prime question”³² that the court was tasked with deciding was whether the respondent’s pumpsite had been blocked by deposits of silt that had in whole, or in part, arisen due to the appellant’s negligent construction of the dam wall. This was the pertinent question, Schreiner JA held, as notwithstanding the Orange River’s latent propensity to produce silt, if this latency had probably been made worse by the appellant’s negligence, he would “*at least in some measure be liable*”.³³

The second alleged cause of the respondent’s damage in *Kakamas* related to the fact that the appellant had not built both walls of the servitural dam simultaneously, a failure which it was alleged had served to exacerbate the silting. Again, Schreiner JA held that such failure had “*contributed materially*”³⁴ to the damage suffered by the respondent. Although the experts could not accurately state to what extent damages would have been mitigated had the two dam walls been constructed simultaneously, their agreement that simultaneous construction would have decreased the amount of silting which took place satisfied Schreiner JA that the damages so caused could “*translate into a timetable*”.³⁵

³¹ *Id* 220 at C-D.

³² *Id* 220 at F.

³³ *Ibid*. This statement in itself is a departure from the so called “all or nothing rule” so staunchly adhered to in contemporary judicial analysis of negligence/causation.

³⁴ *Id* 221 at A.

³⁵ *Id* 221 at C.

From this statement it is axiomatic that the learned judge found an action for damages to be sustainable in circumstances where the delictual element of factual causation was found to be proven on account of a negligent omission having materially increased the likelihood that harm would occur (under circumstances where such harm had in fact become manifest).

It was in support of this finding that Schreiner JA cited the English case of *Bonnington Castings Ltd v Wardlaw*³⁶ approvingly and held as follows:

*“That decision [in Bonnington Castings] illustrates the principle that a plaintiff can hold a defendant liable whose negligence has materially contributed to a totality of loss resulting partly also from the acts of other persons or from the forces of nature, even though no precise allocation of portions of the loss to the contributing factors can be made.”*³⁷

And it was exactly that principle that the learned judge applied in finding that the evidence demonstrated that, had the dam walls contained more sluices, the damage sustained would have been postponed. Accordingly Schreiner JA applied a species of estimated contingency and ordered that the damages awarded by the court *a quo* be decreased to reflect an apportionment befitting this finding.³⁸

As discussed above, the majority of the court found that the nature of servitural rights effectively meant that a servient owner could only bring an action for damages against the dominant owner under very limited circumstances; specifically the element of foreseeable damage, usually of great importance in *Aquilian* liability, appears to have been relaxed in the context of servitural rights.³⁹ The facts of *Kakamas* and, especially the fact that the parties had not stipulated specific terms of the servitude, coupled with the fact that neither party had foreseen the extent of silting that occurred, in the opinion of the majority, supported a finding that the appellant had acted within his servitural rights and accordingly, the appeal was upheld.

³⁶ 1956 (1) A.E.R. 615.

³⁷ *Kakamas Bestuursraad v Louw* 222 at B.

³⁸ *Id* 223 – 224.

³⁹ *Id* 205 at F and 229 at B.

Despite the finding of the majority, it did not disagree with the common law principles of negligence and causation expounded by Schreiner JA; its disagreement lay with the role played by the underlying servitude.

2 3 3 Discussion

Although the subject matter of this case, at first glance, appears to be irrelevant to considerations of factual causation with relation to medical negligence claims, it is, in fact, highly instructive. The nature of the servitural rights in question drew the court's analysis of factual causation into a more removed spectrum of analysis than would normally be observed in cases with less involved factual considerations. In other words, as in the case of medical negligence claims, the subject matter of *Kakamas* meant that the application of the test for factual causation was complicated by considerations specious to a certain field of law.

Notwithstanding the benefit derived from considering the court's application of the test for factual causation under trying circumstances, the court's application of the test for factual causation demonstrates, beyond question, the fact that our courts have not always applied the but-for test in determining factual causation.

2 4 *Portwood v Svamvur 1970 (4) SA 8 (RAD)*

2 4 1 Facts

This case, from the Rhodesian Appellate Division, was an appeal against a successful action for damages instituted by a man who had been severely bitten by one of his neighbours' dogs. The appellant's dog, a Doberman, was known to be a biter. Due to the number of times the dog had previously bitten people the appellant was in the habit of keeping it muzzled.

In the court *a quo* the respondent had instituted action based on two claims set in the alternative.⁴⁰ The trial court dismissed the first claim, founded on the *actio de*

⁴⁰ 1970 (4) SA 8 (RAD) page 10 at G.

pauperie, while the second claim, an *Aquilian* action for damages, was successful. It was thus against the judgment made in terms of the *Aquilian* action that the appeal was noted.

In terms of the *Aquilian* action the respondent had, quite simply, alleged that the appellant had been negligent in allowing the dog to roam free unmuzzled when he was aware that it had a “fierce and vicious nature with a tendency to attack people”.⁴¹ There was, however, a complicating factor; in attempting to jump over a wire fence the dog had gotten its hind legs stuck in mesh. It was in this ungainly position that the respondent found the dog and proceeded to attempt to free it by manually elevating its front legs. The dog had thus far been docile whilst the respondent had attempted to untangle it but, when its front paws were lifted from the ground it attacked the respondent in a savage and sustained manner.

The trial court heard expert evidence to the effect that the majority of dogs would have bitten a person attempting to free them had they been tangled in the same fashion. In granting judgment in favour of the respondent the trial judge found the appellant to have been negligent in allowing the dog to roam free without a muzzle and held further that it was foreseeable that the dog might end up tangled in a fence and that someone might attempt to free it and be bitten.⁴²

It was argued on behalf of the appellant that the *causa causans* of the respondent’s injuries was not, in fact, the dogs vicious nature but rather the fact that it had become tangled in the fence in the awkward manner in which it had. The appellant, it was argued, could not have foreseen such entanglement and no liability for the respondent’s injuries could thus attach.⁴³

⁴¹ *Ibid.*

⁴² *Svamvur v Portwood* 1970 (1) SA 144 (R).

⁴³ *Id* 12 at G.

2 4 2 Judgment

On appeal the court's point of departure was its general finding that the appellant, in the knowledge that his dog was prone to biting people, had a duty to the public at large to ensure that the dog was kept in such a way so as to ensure that it did not attack innocent people.⁴⁴ Proceeding from this underlying duty the court's assessment of various causal arguments put forth by the appellant is what makes this case noteworthy.

Unlike the court *a quo*, the appeal court found itself unable to conclude that the dog's nature did not impact on the severity of its attack on the respondent.⁴⁵ The court accepted the expert testimony to the effect that any normal dog would have been likely to bite under the same circumstances, but considered that a dog with an especially vicious temperament would cause greater injury to its victim. Indeed having regard to the sustained attack suffered by the respondent the court concluded that the dog's actions were not those of a normal dog, despite the fact that it had become entangled in the fence.⁴⁶

This being said, however, the court was nonetheless unable to find that the dog's vicious nature was a *sine qua non* of the respondent's injuries, as a normal dog may also have attacked him under the same circumstances.⁴⁷ The learned judge accepted that liability could not "generally" attach in delict without it having been shown that an act or omission was a *sine qua non* of the injury or harm sustained.⁴⁸

Despite the rigidity of the *sine qua non* test for causation and the fact that its application had become widely accepted, the learned judge opined that he did not believe that the tests of causation could be circumscribed by rules and exceptions to the extent that was widely suggested.⁴⁹ Instead the judge indicated his approval of the

⁴⁴ *Portwood v Svamvur* 12 at B.

⁴⁵ *Id* 13 at C.

⁴⁶ *Id* 13 at D.

⁴⁷ *Id* 14 at A.

⁴⁸ *Id* 14 at C.

⁴⁹ *Id* 14 at H.

often repeated ideal that causation should not be assessed scientifically or philosophically but should rather be subjected to robust, common sense analysis on a case by case basis.⁵⁰

In concluding his findings on factual causation and before moving on to consider remoteness, the learned judge found as follows:

“I am satisfied, on taking a jurymen’s view of the case, that the dog’s savage nature did play a part in its biting the plaintiff and I am not deterred from maintaining this view by the fact that such ingenuity as I may possess cannot assist me to arrive at the same conclusion by employing any of the accepted tests beloved by lawyers”⁵¹

The court then turned to consider whether the dog’s specific nature had had enough of an impact on the outcome to give rise to the appellant’s liability for the respondent’s injuries.

In this regard the learned judge held that, in cases where injury or harm has been occasioned by the operation of multiple causes, liability in delict will only attach where the negligent act or omission can be said to have been a “material factor” in causing such injury or harm.⁵² The court cited the English case of *Bonnington Castings Ltd v Wardlaw*⁵³ with approval and specifically made reference to the following extract from Lord Reid’s judgment in that case:

“What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can

⁵⁰ *Id* 15 at A.

⁵¹ *Id* 15 at F.

⁵² *Id* 15 at G.

⁵³ 1956 AC 613.

be something too large to come within the de minimis principle but yet too small to be material”⁵⁴

In casu, the learned judge deemed the dog’s savage nature and the fact that such nature “converted what was a probability of being bitten into a certainty of being bitten”⁵⁵ to have contributed materially to the injury sustained by the respondent.

On the question of foreseeability the court held that it was not required for the respondent to have demonstrated that the appellant should have foreseen the exact occurrence, which brought about the respondent’s injury (i.e. the dog becoming entangled in the fence).⁵⁶ All that stood to be demonstrated was that the appellant should have foreseen the “general nature of the harm that might result from negligently allowing his savage dog to be at large unmuzzled”.⁵⁷ In other words the dog’s attack on the respondent was merely “a variant of the foreseeable”⁵⁸ and occurred within the risk that had been created by the appellant when he negligently failed to keep his dog muzzled and on his own property.⁵⁹ The appeal was dismissed.

2 4 3 Discussion

Portwood is a fine example of Southern African precedent in terms of which a court refused to let its sense of justice be overpowered by strict application of causal analysis. The court applied a form of risk-based compensation in holding the appellant liable based on considerations of common sense and what it deemed just under the circumstances.

⁵⁴ 1956 AC 621.

⁵⁵ *Portwood v Svamvur* 16.

⁵⁶ *Id* 16 at H.

⁵⁷ *Id* 17.

⁵⁸ *Ibid* page 18 at B – a quote from Lord Denning in the case of *Roe v Minister of Health* (1954) All ER 131.

⁵⁹ *Ibid* page 18 at B.

2 5 *Da Silva and Another v Coutinho 1971 (3) SA 123 (AD)*

2 5 1 Facts

During 1965 the appellants (plaintiffs in the court *a quo*), a married couple, were the victims of a motor vehicle accident when the vehicle in which they were travelling collided with another car, owned by the respondent and driven by his son. The appellants were severely injured and, in due course, instructed an attorney to institute an action for damages. Judgment for the majority of the court was handed down per Jansen JA.

The Motor Vehicle Insurance Act, 29 of 1942 (“the Act”) was the legislation that prescribed the duties and obligations of owners of motor vehicles at the time when the *da Silva*’s filed suit. Most pertinently, the Act required that owners insured their vehicles against accidents and the consequent cost of compensating victims for their injuries (in instances where the insured driver was found to have caused the accident). In terms of the Act the relationship between insurer, vehicle-owner and driver was regulated; the object being for the insurer to indemnify the owner or driver as against a claim that may arise from the use of the vehicle, subject to certain conditions.

In casu, the appellants, wishing to institute action against the respondent’s insurance company, were unable to identify the company that had insured the respondent’s motor vehicle. The respondent for his part failed to provide them with a declaration setting out the details of his policy and the insurance company that had issued it.⁶⁰ The appellants’ attorneys had such a difficult time tracing the respondent’s insurer that the relevant period of prescription elapsed before they were able to do so. Consequently two claims for damages, set in the alternative, were eventually brought on behalf of the appellants; the first claim presumed that the respondent’s motor vehicle had been uninsured and sought damages from the driver on grounds that his negligence had caused the appellants’ injuries.

⁶⁰ An insured was required to be in possession of such a declaration presumably to avoid the exact situation that the appellants found themselves in presently; section 22(2) of the Act having been the operative provision.

The alternative claim was brought against the respondent and, on the presumption that his motor vehicle had been insured, alleged that he had negligently breached his statutory duties in terms of the Act in failing to provide the appellants with information relating to his insurance policy, which information would have allowed them to sue the insurer for damages as contemplated by the Act.

The appellants alleged that the respondent's aforesaid negligent breach of his statutory duty rendered them incapable of instituting the necessary action against his insurance company in order to claim damages, and accordingly, sought to hold him liable to compensate the appellants in this regard.

During pre-trial proceedings the appellants were made aware of the identity of the respondent's insurer and thus had no choice but to abandon the first part of their claim. The action in the court *a quo*, as well as the appeal therefore, continued based solely on what had originally been the appellants' alternative claim. The judge *a quo* found himself unable to come to the assistance of the appellants as, in his opinion, the Act precluded the action for damages that they had instituted.

2 5 2 Judgment

On appeal, however, the court found that the legislature had intended no such preclusion of an injured party's ability to institute action at common law where necessary, and proceeded to determine the appeal on the merits.⁶¹

⁶¹ It should be noted that a significant point of contention both in the High Court and in the Appellate Division, was the question as to whether the legislative provisions of the Act meant that a claimant was precluded for suing the owner of a vehicle for damages resulting from an accident, and whether he was obliged to institute proceedings against the insurer. Discussion on this point has not been included in the summary of this case as it is not relevant to the topic of this dissertation and, moreover, would amount to an analysis of the provisions of an Act now repealed. The portion of the judgment that deals with this point can be found at *Da Silva v Coutinho* 1971 (3) SA 123 (AD) from page 134 at D to page 139 at H.

In dealing with the merits of the case the learned judge of appeal pointed out that the elements to be proved by a party who bases his action on an alleged breach of a statutory duty, as set out by Prof. McKerron,⁶² were that:⁶³

- i. The statute was intended to give a right of action;
- ii. He was one of the persons for whose benefit the duty was imposed;
- iii. The damage was of the kind contemplated by the statute;
- iv. The defendant's conduct constituted a breach of the duty; and
- v. The breach caused or materially contributed to the damage.
(emphasis added)

It should be noted, however, that the distinction between an action based on negligence in the ordinary sense and, that based on the breach of a statutory duty on the other hand, was not alleged or argued by counsel for either of the parties.

The elements of the proof of the latter appear to have enjoyed more academic support, at the time at least, and are somewhat different to those applicable to a "normal" delictual claim for damages based on the negligence of an ordinary individual (most strikingly due to the fact that proof of negligence does not seem to be a requirement). This distinction is, however, of no material import to the discussion of this case as the learned judge applied the usual test for negligence to the facts notwithstanding the above.⁶⁴

⁶² *The Law of Delict*, 6th Ed, page 257 at n. 3.

⁶³ *Da Silva v Coutinho* 140 at F.

⁶⁴ *Id* 144 at D.

The learned judge furthermore specifically commented on the manner in which the causation requirement of the present action, as set out above, had been formulated.⁶⁵ In this regard the English case of *Bonnington Castings Ltd v Wardlaw*⁶⁶ was specifically cited for having held that “where the breach is not the sole cause of the damage, any contribution which does not come within the *de minimus non curat lex* rule is to be regarded as material”.⁶⁷

As the abovementioned conclusion could only be reached subject to the court finding that the respondent had, *in casu*, been in breach of a provision of the Act the learned judge proceeded to analyse the evidence relating to the respondent’s actions with regard to his safekeeping of the insurance declaration and his failure to provide his insurance details to the appellants. Having considered all the evidence relating to the respondent’s actions, the learned judge found that the respondent had indeed been in breach of his statutory duty in that he had failed to exercise the degree of care, which had been required by the Act.⁶⁸

The judge based this conclusion on his finding that the appellants had suffered damages and, in circumstances where the respondent’s failure to produce the declaration of his insurance policy constituted a breach of the provisions of the Act, such breach “at least materially contributed to that damage”.⁶⁹

In reaching the conclusion that the respondent had been in statutory breach, the court recognised the fact that the elements of the claim as per Prof. McKerron had been proven and, on that basis at least, the appellants’ case should succeed. However, due to the fact that Prof. McKerron’s test had seemingly not been applied to any extent by the courts before, coupled with the fact that it only cited English cases in its support,

⁶⁵ I.e. requirement (*v supra*) which does not singularly require that the claimant prove that the tortfeasor’s breach has caused his damages, but also contemplates the possibility that such breach may have materially contributed to the resultant damage.

⁶⁶ 1956 A.C. 613.

⁶⁷ *Da Silva v Coutinho* 141 at A.

⁶⁸ *Id* 144 at A.

⁶⁹ *Id* 141 at C.

the learned judge decided to assume⁷⁰ that it remained for the appellants to prove the elements of negligence,⁷¹ causality and remoteness in order to succeed with their appeal.

In the light of the respondent's obstinate refusal to cooperate with the appellants and his failure to provide them with the information they required in order to prosecute their third party action for damages against the respondent's insurer, the court found that the respondent had indeed been negligent in that he had foreseen the damage that could have been visited on the appellants in the absence of the information they sought, but omitted to provide it to them nonetheless.

Negligence having been established thus, the learned judge proceeded to turn his attention to the elements of causation and remoteness in terms of the usual principles of the law of delict. It is interesting to note in this regard that the court indicated that there were, at the time, three tests for causation competing to be accepted as the correct and sole test to be applied by South African courts.⁷² Although the learned judge refrained from deciding which test was to be preferred he briefly considered the merits of the case in the context of each of the tests for causation that were in vogue at the time, viz. the but-for test, the foreseeability test and the direct consequences test.⁷³ Irrespective of which test the learned judge applied the result remained that causation was proven.

In his examination of the element of causation, the learned judge seems to have encountered little difficulty in extending the respondent's breach of the statutory duty, discussed above, to encompass the concepts of foreseeability and causation generally applied in delictual actions.⁷⁴ The court ultimately held that the respondent's breach had been a *conditio sine qua non* of the appellants' loss as the respondent "should

⁷⁰ In favour of the respondent.

⁷¹ In other words not merely negligence in terms of upholding a statutory duty, but also negligence involving the foreseeability of harm that could be done to third parties if such duty was not satisfactorily observed.

⁷² *Da Silva v Coutinho* 147 at F.

⁷³ *Id* 147 at G to 148 at E.

⁷⁴ *Id* 147 at H.

reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person (i.e. the third party in this case) exposed to a risk of harm by such conduct”⁷⁵ (emphasis added).

In assessing the element of causation, the court also had to deal with the appellants’ inability to identify the respondent’s insurer for reasons other than the respondent’s own failure to provide details in this regard. The policeman who had attended the scene of the accident had erred in taking down the insurance information from a token on the respondent’s vehicle and an employee of the respondent’s insurer had failed to perform her duties as she should have, all of which it was argued on behalf of the respondent, muddied the causal inquiry in such a way that the respondent’s action could not accurately be described as the cause of the appellants’ loss.⁷⁶

The learned judge, however, found himself unable to separate the respondent’s actions from the appellants’ loss, notwithstanding the actions of the policeman and the insurer’s employee. The court again looked favourably on the work of Prof. McKerron⁷⁷ and deemed the errors of the abovementioned third parties to have been “a risk inherent in the situation created by the respondent”.⁷⁸ The majority of the court therefore found the respondent to have negligently caused the appellants’ loss and ordered that he pay their damages consequent to the motor vehicle accident.

2 5 3 Discussion

It is submitted that the analysis employed by the court in evaluating causation is significant in that it displays the common sense manner in which our law of delict has been applied in isolated cases. The court was willing to come to the appellants’ assistance even in the light of competing legislation and applied the test for causation in a manner that cannot be said to have demanded a formalistic or quantitative

⁷⁵ *Id* 148 at A.

⁷⁶ *Id* 148 at B.

⁷⁷ n 62 *supra*.

⁷⁸ *Id* 148 at C.

demonstration of the fact that the respondent's actions had been the direct cause of the appellants' injury.

2 6 *Minister of Police v Skosana 1977 (1) SA 31 (A)*

2 6 1 Facts

In the court *a quo* the respondent instituted action against the Minister of Police, in terms of which action she sought to hold the Minister vicariously liable for the death of her husband, the breadwinner of her family, based on the alleged negligent actions of two policemen.

The events leading up to the policemen's alleged negligence were as follows; the respondent's husband, Timothy, had been driving a motor vehicle whilst under the influence of alcohol. Presumably as a result of his intoxication the vehicle in which Timothy was travelling was driven into a ditch where the police subsequently found it. Whilst the policemen who discovered the wrecked car arranged for the passengers who had been travelling with Timothy to be taken to hospital by ambulance, they transported Timothy to a police charge office by police van.

On arriving at the charge office, Timothy was taken to see the district surgeon who drew blood and performed a general examination. The district surgeon did not identify any signs of serious injury and Timothy was sent to a cell where he spent the night. At 07:45am the next morning when Timothy's cell was opened he complained of intense abdominal pain and asked to be taken to the doctor. It was, however, only at 09:45am that Timothy was eventually taken to the district surgeon where he was examined. The district surgeon informed the policeman who had accompanied Timothy to the consultation room that the patient needed to be taken to hospital and directed that the policeman arrange for ambulance transportation.

Timothy waited a further two hours after his consultation with the district surgeon before an ambulance finally arrived. Upon his admission to hospital Timothy was found to be in a serious condition and was taken for a laparotomy, the general

anaesthetic proved too much for Timothy to withstand under the circumstances and he died postoperatively.

It was the respondent's case that the police officers that had been on duty when Timothy complained of abdominal pain ("the police officers") had acted negligently in that they failed to react with reasonable expediency to Timothy's medical condition, which they should have realised was urgent. The respondent led medical testimony in the court *a quo* on the basis of which it was argued that Timothy would have survived his injuries and the laparotomy procedure had he been taken to hospital sooner. It was accordingly alleged that the responsible police officer's failure to take Timothy to see the district surgeon within a reasonable time, coupled with their lack of expediency in arranging transportation to the hospital, had resulted in Timothy's demise.

2 6 2 Judgment

Corbett JA, as he then was, handed down judgment for the majority. In considering the actions of the responsible police officers, Corbett JA agreed with the minority's finding that the police officers had been negligent⁷⁹ as:

- i. Reasonable police officers would have been alive to the urgency of Timothy's medical condition when they opened his cell at 07:45am the morning after his arrest, would have realised that he required immediate medical attention and would have taken steps to ensure he received medical attention without delay;⁸⁰
- ii. An earlier medical consultation would have resulted in a doctor arriving at the same conclusion as the district surgeon who assessed Timothy at 09:45am (i.e. that Timothy should have been taken to hospital immediately);⁸¹

⁷⁹ *Minister of Police v Skosana* 34 at C.

⁸⁰ *Id* 33 at H and 34 at B.

⁸¹ *Id* 33 at H.

- iii. Reasonable police officers would have foreseen that any delay in bringing Timothy to a doctor or arranging for his transfer to hospital might reasonably have resulted in his death;⁸² and
- iv. In the circumstances the responsible police officers had allowed an avoidable and substantial delay to occur in facilitating Timothy's medical consultation and transportation to hospital.⁸³

Having established negligence, Corbett JA proceeded to enunciate the nature and formulation of the "two rather distinct problems"⁸⁴ of causation. Factual causation, it was held, relates to "the question as to whether the negligent act or omission in question caused or materially contributed to...the harm giving rise to the claim."⁸⁵ In support of this construction of factual causation the learned judge cited the cases of *Silva's Fishing Corporation (Pty) Ltd v Maweza*⁸⁶ and *Kakamas Bestuursraad v Louw*.⁸⁷ Corbett JA defined legal causation as being an inquiry as to whether or not the damage or loss was linked sufficiently closely or directly to the proven negligence for liability to attach.⁸⁸

Of note is the learned judge's statement that, *in casu*, the case would be determined by the court's finding regarding factual causation as, should the policemen's negligence be found to be the factual cause of Timothy's death, it could not then be said that their causal negligence was too remote at law for liability to ensue.⁸⁹ In elaborating on the manner in which factual causation is assessed in our law, Corbett JA confirmed that, generally, the but-for test was applied. Both the majority and the

⁸² *Id* 34 at A.

⁸³ *Id* 34 at B.

⁸⁴ *Id* 34 at E.

⁸⁵ *Id* 34 at F.

⁸⁶ 1957 (2) SA 256 (AD).

⁸⁷ 1960 (2) SA 202 (AD).

⁸⁸ *Minister of Police v Skosana* 34 at G.

⁸⁹ *Id* 35 at A.

minority, however, agreed that there may be exceptions to this rule and cited the case of *Portswood v Svamvur*⁹⁰ in support of this conclusion.

Acknowledging that the “prime cause of death”⁹¹ in this case had been the injuries Timothy sustained in the motor vehicle accident (and the consequent peritonitis), Corbett JA’s formulation of the test for factual causation may conveniently be paraphrased as follows: on the understanding that the policemen’s negligence had either caused or materially contributed to Timothy’s death, would Timothy have survived but for the policemen’s negligence?⁹² Only if this inquiry could be answered in the affirmative would the element of factual causation be proven.⁹³

The court proceeded to apply the facts of the case to the parameters of the causal inquiry, as formulated above, and determined that the policemen’s negligence had caused Timothy to arrive at hospital much later than he would have in non-negligent circumstances.⁹⁴ Significantly, the court recognised that there was no direct evidence at its disposal based on which to hypothesise the likely sequence of events that would have taken place in the hospital, had Timothy arrived there timeously.⁹⁵

Such lack of evidence notwithstanding, the court determined that there was a likelihood that, in non-negligent circumstances, Timothy would have been operated on some five hours earlier than he, in fact, had.⁹⁶ Turing next to the crucial question as to whether Timothy would have survived the operation had it been performed at a “non-negligent” time, the court was against confronted by a dearth of evidence on the subject.⁹⁷

⁹⁰ *Id* 35 at C.

⁹¹ *Id* 35 at D.

⁹² *Id* 35 at E.

⁹³ In this regard the learned judge also cited the English cases of *Bonnington Castings Ltd v Wardlaw* 1956 AC 613 and *Barnett v Chelsea and Kensington Hospital Management Committee* (1969) 1 QB 428 as a reminder that the onus in terms of this inquiry was on the respondent to establish this proposition on a balance of probabilities.

⁹⁴ *Ibid* page 36 at E.

⁹⁵ *Minister of Police v Skosana* 36 at G.

⁹⁶ *Id* 36 at H.

⁹⁷ *Ibid*.

Despite the absence of direct evidence to support the inference, the court came to the conclusion that it was satisfied that there existed sufficient peripheral expert evidence based on which to conclude that Timothy would have survived had he undergone surgery under non-negligent circumstances.⁹⁸

In his final comments in passing judgment Corbett JA made the following statement:

*“Viewing all the evidence and adopting a common sense approach, it seems to me that if the operation had been performed five hours earlier than it was, the probabilities are that the result would have been different and that the deceased would have survived.”*⁹⁹

2 6 3 Discussion

When revisited, this case which has long been cited as a *locus classicus* of the *sine qua non* test for factual causation,¹⁰⁰ reveals what some might consider to be a surprisingly accommodating analysis of causation.

The court’s comment, that in cases where a person has died and the test for factual causation is determined in the affirmative legal causation cannot preclude liability from attaching, is significant. It is submitted that this aspect, common to medical negligence claims, alludes to one of the reasons that the application of the two-pronged test for causation is often applied in an overlapping manner.¹⁰¹

⁹⁸ *Ibid.*

⁹⁹ *Id* 37 at A.

¹⁰⁰ See, for example, Boberg, *The Law of Delict*, Vol 1, Juta (1984) at 380, and Carstens & Pearmain, *Foundational Principles of South African Medical Law*, Lexis Nexis (2007) at 509.

¹⁰¹ See in general the discussion below relating to the case of *MEC for the Department of Health (KZN) v Denise Franks* 2011 JDR 0536 (SCA).

2 7 *International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680*

2 7 1 Facts

The International Shipping Company (Pty) Ltd (“International”), the appellant in this matter, traded amongst other things as financiers and it is in this capacity that they pursued the present litigation. During the late 1970s International had commenced providing finance facilities to the Deals Group of companies (“Deals”), which it continued to do until the latter was liquidated in 1981.

International’s dividend in the liquidation did not cover the amount owing to it and it sustained a loss of R383 492. The respondent, Mr CF Bentley, was the chartered accountant who had been responsible for drawing the financial statements and auditor’s report based on which International had decided to advance the abovementioned facilities to Deals in the first place. It was alleged that these statements had induced International to extend the line of credit and elect not to call in its debt when Deals was known to be of dubious financial integrity.

International’s claim against the respondent was set in the alternative and was comprised, first, of a claim for damages for fraudulent misrepresentation, and second, of a claim for damages based on economic loss caused by negligent misstatement. The alleged misrepresentation and misstatement both referred to the auditor’s report and financial statements (“the financial statements”) that had been drawn by the respondent.

It was accepted that, at common law, International had to prove the following in order to succeed:¹⁰²

- i. That the financial statements in question were in fact materially false and misleading;

¹⁰² *International Shipping Co v Bentley* 684 at H.

- ii. That in reporting on the financial statements as he did the respondent acted fraudulently;
- iii. Or, alternatively to (ii), that in so reporting the respondent acted unlawfully and negligently *vis-à-vis* International; and
- iv. That the respondent's fraud, or negligence, caused International's eventual loss.

Substantial evidence had been led in the court *a quo* regarding the deficiencies of the financial statements, which were clearly replete with augmented forecasts, understated debts and liabilities and other features inconsistent with accepted accounting practices.¹⁰³

The judge *a quo* had, after careful consideration of the proven facts, found himself unable to come to the conclusion that the respondent had acted fraudulently and therefore continued his deliberations solely on the basis of negligence, which he found to have been present in the actions and/or omissions of the respondent. International's case was non-suited in the court *a quo* when the trial judge held that the necessary causal nexus between the respondent's proven negligence and International's loss did not exist at law.

272 Judgment

On appeal, the court, per Corbett CJ, assessed the merits of International's case in terms of elements (i) – (iv) above. The court was, again, seized with analysing considerable evidence regarding the question as to whether the financial statements that had been prepared by the respondent were “materially false and misleading”.¹⁰⁴

It is not necessary, for current purposes, to consider the court's findings in relation to the financial statements in any detail save to state that Corbett CJ did not accept that

¹⁰³ *Id* 688 from G.

¹⁰⁴ See n 3 above.

all the information contained in the financial statements was in turn either materially false or misleading.¹⁰⁵ Specifically, the question as to whether International had, in fact, been misled by the financial statements was complicated by the fact that it had borne knowledge of several practices of the respondent which conduced to the lack of integrity of the financial data in question.¹⁰⁶

Suffice it to say that the court was convinced of only certain elements regarding International's contentions that the financial statements had been materially false and misleading, but seemed to accept that this contention had been sufficiently proven to justify deliberation on the remaining elements of International's case.¹⁰⁷

Turning next to the question of fault,¹⁰⁸ Corbett CJ concurred with the trial judge's conclusion that, whilst the respondent's drawing of the financial statements had not been proven to have been fraudulent, certain of his actions in doing so had amounted to negligence.¹⁰⁹ The court's finding of negligence was formulated on the basis that the respondent had failed to perform his duties with the requisite degree of diligence and that, had he done so, International would have become aware of certain of Deals' financial "defects".¹¹⁰

Finally, the court examined the element of causation, which was the final remaining element to be proved in order for International's appeal to succeed. It was argued on behalf of International that:

- i. First, the respondent's negligent actions in drafting defective financial statements had led to International persisting in its provision of financial facilities to Deals;

¹⁰⁵ *Id* see in general pages 685 to 693.

¹⁰⁶ *Id* 689 at B and F.

¹⁰⁷ *Id* 693 at F.

¹⁰⁸ The court similarly held that the respondent's actions in drawing the statements had been unlawful in that they had been in breach of a duty owed to International, *Id* 694 at G.

¹⁰⁹ *Id* 694 at C.

¹¹⁰ *Id* 694 at A.

- ii. Second, that in the absence of the respondent's negligence, International would have become aware of Deals' true financial position and would accordingly have elected to discontinue the line of credit advanced to Deals and that it would thus have proceeded to realise the debt owing to it;
- iii. In conclusion, it was International's case that it would not have suffered the loss that it had incurred¹¹¹ had the respondent not acted negligently and, that the aforesaid loss was therefore "directly traceable to respondent's negligent report on the financial statements"¹¹²

It should be noted that the court *a quo*, with which Corbett JA concurred, came to the conclusion that International would have decided to discontinue the provision of financial facilities, and that it would have elected to realise the debt owing to it, in the absence of direct evidence to this effect.¹¹³ In arriving at this conclusion the trial judge considered an exhibit that was admitted by International in which the respondent's financial figures were set in comparative terms with reference to corrected figures, which had been calculated by an independent accountant, after the fact.

In considering the abovementioned comparative figures the trial judge concluded that there was a "substantial probability" that, had International been in a position to assess Deals' true financial position, it would have taken steps both to terminate the financial facilities extended to Deals, and to realise its debt.¹¹⁴

Corbett CJ was in agreement with the court *a quo*'s finding that International had successfully proven all of its allegations regarding causation save for the last, and most important, being that International would not have suffered loss had it not relied

¹¹¹ Being the remainder of the debt owed to it by Deals, which was not realised by way of the dividend International received from the winding up of the insolvent estate.

¹¹² *Id* 694 at I.

¹¹³ *Id* 695 at F.

¹¹⁴ *Id* 695 at I.

on the respondent's financial statements (and that such loss had therefore been caused by the respondent's negligence).¹¹⁵

In his assessment of causation, Corbett CJ confirmed the well established two-pronged test of factual and legal causation.¹¹⁶ The learned judge held that the respondent's negligence in drafting the financial statements "unquestionably constituted a *causa sine qua non*"¹¹⁷ of International's loss. In support of this conclusion Corbett CJ again repeated his agreement with the trial judge's finding that International would have discontinued its financing of Deals and recovered its debt had it been informed of Deals' true financial position. It is in this regard that Corbett CJ confirmed the application of the hypothetical substitution test in instances of negligent omissions. In order to determine the causative effect of an omission it is necessary to determine hypothetically what reasonable, non-negligent conduct would have entailed under the circumstances and to compare such hypothesised conduct with the actual negligent conduct. If the injury would have ensued in any event, causation will not have been proven.

In the end, however, International's appeal was dismissed on the basis that it had failed to prove legal causation or, put differently, that the loss sustained, although factually caused by the respondent's negligence, was deemed to be too remote to attract legal liability.¹¹⁸

2 7 3 Discussion

This case is noteworthy for its meticulous and realistic approach to factual causation. In applying the but-for test to the facts of the case the court was confronted with the challenge of determining what the appellant would have done in non-negligent circumstances with reference to the inherent variability of financial policy and decision making.

¹¹⁵ *Id* 695 at E to 696 at E.

¹¹⁶ *Id* 700 at E.

¹¹⁷ *Id* 701 at H.

¹¹⁸ *Id* 703 at I.

At the time when the events described above unfolded, South Africa was experiencing turbulent times. Indeed, one of Deals' explanations for its poor financial performance had been the impact that the Soweto riots had had on its trading operations and the country's economy.¹¹⁹ The Deals Group was comprised of several constituent companies which had diversified interests in various trading areas.

When one considers Deals' internal structure, coupled with the prevailing market and economic volatility that characterised the relevant time period, it becomes apparent that any creditor would have been confronted with major uncertainties in attempting to forecast and assess Deals' viability and/or future prospects. Such financial forecasts are at the best of times educated guesses as no accountant or statistician can divine the future; even the best efforts at forecasts can be thwarted by unforeseen and unexpected events. These variables wreak havoc on the causal inquiry.

It is also worth mentioning that Deals had managed to stay afloat for some three years after International commenced financing it and before it was liquidated. With the benefit of hindsight it can now be said that Deals was not a viable company during this time but that it had, nonetheless, managed to honour its obligations to some extent for three years. This serves to illustrate that even where financial statements are drawn properly, based on accurate information, the decisions that may be made with reference to such information are expressions of risk analysis which, when implemented responsibly or conservatively, may not prove to have been "warranted" in fact.

Had the court confined itself to an overly formalistic approach in determining factual causation, it could easily have cited the inherent mutability associated with the financial industry as a basis for concluding that the appellant had failed to demonstrate a factual nexus between negligence and loss. It was, after all, accepted that International's representatives had, in fact, made some dubious decisions in continuing to finance Deals.

¹¹⁹ *Id* 686 at H.

The inference drawn by the court in its finding that International would have acted differently had it been informed of Deals' true financial position was, however, of sound common sense and, it is submitted, fair under the circumstances.

2 8 *The MEC for the Department of Health (KZN) v Franks 2011 JDR 0536 (SCA)*^{120 121}

2 8 1 Facts

This was an appeal against a judgment of the Pietermaritzburg High Court, the facts and surrounding circumstances of this case are numerous and complex and only a brief summary is provided here. During August 2000 Ms. Franks, the plaintiff *a quo*, was en route to Durban when the motor vehicle in which she was travelling struck a pedestrian near the Mooi River Toll Plaza. Ms. Franks who was sitting in the front passenger seat sustained serious injuries, including a skull fracture, and the pedestrian ("the deceased") was killed.

Emergency services deployed a toll route inspector as well as two paramedics, the latter being in the employ of the appellant ("the MEC"), to the scene of the accident. After having stabilised the respondent the paramedics transported her by ambulance to a hospital in Pietermaritzburg for further treatment. The exact nature of the treatment provided by the paramedics at the scene of the accident was in dispute.

There were several other substantial disputes before the court *a quo*, several of which were the result of directly contradictory evidence provided by different witnesses. The aforesaid contradictory evidence went to the heart of the case and involved not only disputes of fact but also disputes of expert opinion.

¹²⁰2011 JDR 0536 (SCA) (*Franks SCA*). The SCA judgment under discussion was taken from the court's website: www.justice.gov.za/sca/judgments/judgem_sca.htm last accessed on 8 August 2015.

¹²¹ See also in this regard; Carstens, P "Contamination with HIV on the scene of an accident due to the negligence of paramedical professionals: challenges for determining legal liability – *Franks v MEC for the Department of Health, Kwazulu-Natal*" 2010 Journal of Contemporary Roman Dutch Law (THRHR), Vol 73 no 4, 665 – 672. Take note that this article was published prior to the determination of the appeal presently under discussion.

Prior to the accident Ms. Franks had been in good health and had been in a faithful, monogamous marriage for some 20 years. Shortly after the accident Ms. Franks was diagnosed with HIV and it was her contention that her infection had been caused by the negligence of the paramedics who tended to her at the scene of the accident.

At the heart of the dispute before the court were the questions as to whether, first, the paramedics had acted negligently and in such a manner so as to have failed to exclude the possibility of Ms. Franks being infected with HIV at the accident scene and, second, whether the deceased had been HIV positive and, if so, whether the virus could have been transferred to Ms. Franks by the negligent acts of the paramedics.

Evidence led on behalf of Ms. Franks, and which was not disputed by experts for the MEC, indicated that her infection with HIV occurred approximately around the time that the accident had occurred. It should be noted that in addition to the treatment she had received at the hands of the paramedics, the respondent had also:

- i. Undergone dental surgery for a tooth extraction two days prior to the accident;
- ii. Undergone a hysterectomy five months before the accident;
- iii. Received treatment at the Medi Clinic in Pietermaritzburg where she was taken by ambulance subsequent to the accident; and
- iv. Received further treatment at another hospital in Johannesburg following her discharge from the Pietermaritzburg Medi Clinic.

All of the abovementioned events occurred within a specified period of time within which it was determined that Ms. Franks had been infected with HIV.

Conflicting testimony and a lack of direct evidence meant that the trial judge was faced with significant challenges in deliberating on, inter alia, the elements of negligence and factual causation. The court *a quo* provided a thorough analysis of the testimony of various witnesses and qualified its acceptance of the versions of

testimony that it found to be more probable.¹²² On an overview of all the facts and surrounding circumstances the trial judge concluded, by way of a series of inferences, that the paramedics had acted negligently and that the most probable source of Ms. Franks' infection with HIV had been their negligent actions.

The High Court accordingly held the MEC liable for Ms. Franks' damages, having found that the paramedics in his employ had negligently caused Ms. Franks to become infected with HIV.

2 8 2 Judgment

In its judgment, the Supreme Court of Appeal, per Snyders JA, was exceedingly critical of the conclusions reached by the court *a quo* and, more specifically, of the basis on which the trial judge drew the inferences he had in reaching said conclusions.¹²³ As a point of departure in assessing the merits of the appeal, the court indicated that counsel for both parties had agreed that the respondent's case could not succeed lest it was proven that the deceased had been HIV positive.¹²⁴

As no direct factual proof had been introduced as evidence in the trial court, the respondent's counsel sought to demonstrate that the deceased had indeed been infected with HIV with reference to four circumstantial facts based on which it was contended that the court should infer that the deceased had been HIV positive.

The circumstantial evidence led in support of an inference that the deceased had been HIV positive was that:

- i. A notebook was found on the person of the deceased and this notebook contained the contact details of an organisation called "AID for AIDS" which details had been recorded twice;

¹²² *Franks v the MEC for the Department of Health* (KZN) 2010 JDR 0043 (WC) ("*Franks HC*") at paras 47 to 51.

¹²³ *Franks SCA* at para 9.

¹²⁴ *Id* at para 6.

- ii. The incidence of HIV infection in the province was high;
- iii. The collision, and resultant treatment that the respondent received, was the only occasion on which she could have been infected with HIV; and
- iv. The evidence of the sequence of events at the scene of the collision (including evidence that the paramedics had tended to the deceased before treating the respondent) established the opportunity for the respondent to have become infected with HIV.¹²⁵

The court took issue with the trial judge's conclusion that the respondent had succeeded in demonstrating, *prima facie*, that the deceased "may have been infected with HIV" and stated that said conclusion did not satisfy the relevant civil burden of proof.¹²⁶

Snyders JA pointed out that the trial judge had incorrectly stated that the deceased's notebook had contained the contact details for various HIV/AIDS helplines when it had, in fact, contained the details of only one such helpline that had been recorded twice on different pages of the notebook. Snyders JA was similarly critical of the trial judge's reference to an opinion expressed by an expert virologist regarding what could be inferred from the inscriptions in the deceased's notebook. The court held that the virologist's testimony regarding what could be inferred from this information was inadmissible.¹²⁷

Furthermore, Snyders JA indicated that the court *a quo* could not have expected the appellant to have led evidence in order to "eliminate" certain inferences as doing so would have meant that the onus would have been shifted to the appellant.¹²⁸ Instead, Snyders JA stated that it was the respondent who had been obliged to present sufficient evidence in support of the inferences which it was seeking the court to draw. Specifically, the learned judge was of the opinion that the respondent should

¹²⁵ *Id* at para 6.

¹²⁶ *Id* at para 9.

¹²⁷ *Id* at para 9.

¹²⁸ *Ibid.*

have examined the deceased's father (who testified at the trial) regarding the deceased's "...marital status... morality, health and activities".¹²⁹

The court's criticism extended to the respondent's failure to have followed up on the helpline numbers contained in the deceased's notebook and rejected the contention that it was unlikely that the deceased had recorded the helpline numbers on grounds of an academic interest in the subject.¹³⁰ In conclusion, Snyders JA held that the trial judge's conclusion that the circumstances gave rise to a reasonable inference that the deceased had been HIV positive, was untenable.

Snyders JA moreover declined to make any inferences based on the high incidence of HIV in the province at the time. The learned judge opined that although the incidence of infection, which was amongst the highest in the world and had been estimated to be in the region of 30 percent of the population was, relatively speaking, high it did not motivate sufficiently for a conclusion that the deceased was HIV positive.¹³¹ On the contrary, Snyders JA expressed the opinion that the abovementioned statistic seemed to point to a conclusion that the deceased had not been infected with HIV, and concluded that the incidence of HIV infection did not assist the court in drawing any inferences under the circumstances.¹³²

The learned judge turned next to consider the alternative events, which could possibly have caused the respondent's infection. The court accepted the expert testimony that had been led indicating that, in light of the window period¹³³ following infection with HIV, it appeared likely that the respondent had been infected around the time that the accident occurred and the paramedics treated her. It follows from what was stated above that this demarcation of a time period within which the infection occurred meant that it was technically possible that the respondent could have been infected

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Id* at para 13.

¹³² *Ibid.*

¹³³ A person who has been infected with HIV will test negative for the infection for a certain period of time before tests are able to positively report infection. Given the technology available at the time the accident took place, the window period was estimated to be four to six weeks.

whilst undergoing treatment not provided by the paramedics at the scene of the accident.

Snyders JA accepted that the respondent's husband, who had tested negative for HIV several times in the years subsequent to his wife having tested positive, had not been the source of the infection. The treatment that the respondent received at the hospital in Johannesburg subsequent to the accident was also excluded as the source of her infection as none of the treatment she had undergone there had been found to carry any risk of infection.

The court, however, disagreed with the trial court's exclusion of the dental surgery that the respondent had undergone prior to the accident, and the treatment she had received at the Pietermaritzburg Medi Clinic thereafter, as possible causes of her infection.¹³⁴ The learned judge reached this conclusion in spite of:

- i. The fact that the dentist who had performed the tooth extraction on the respondent had tested negative for HIV several years after the fact;¹³⁵
- ii. The fact that experts for both the appellant and the respondent had discounted the possibility that the dental extraction had been the cause of the respondent's infection;¹³⁶
- iii. The testimony of a neurosurgeon who practiced at the Medi Clinic in Pietermaritzburg; in terms of this testimony the court was assured that the respondent had not received any treatment that was in any way likely to have exposed her to infection during her hospitalisation in Pietermaritzburg;¹³⁷

¹³⁴ *Id* at para 15.

¹³⁵ *Franks HC* at para 4.

¹³⁶ *Id* at para 42.

¹³⁷ The witness qualified his opinion with reference to the respondent's medical records as well as based on the standard practice observed in the hospital's intensive care unit.

- iv. The fact that the abovementioned neurosurgeon had informed the court that, whilst treating the respondent in Pietermaritzburg, a nurse had sustained a needle prick injury that required both the nurse and the respondent to be tested for HIV and that both test results had come back negative;¹³⁸

Snyders JA found the evidence relating to the dental surgery and the treatment that the respondent had undergone in Pietermaritzburg to have been vague and “unrelated to the specific occasion of the respondent’s treatment and given by persons who were not present when she was treated.”¹³⁹ The learned judge held further that, even on the assumption that the deceased had been HIV positive, it had not been demonstrated by the conflicting expert evidence that the virus could have survived outside of the deceased’s body for a sufficient length of time to have infected the respondent.¹⁴⁰ In conclusion the court found the trial judge’s preference of certain testimony to have been unfounded on the basis that there was nothing to distinguish the preferred version of events from that to the contrary.¹⁴¹

In reaching this conclusion the court chose to interfere¹⁴² with credibility findings that had been made by the trial judge relating to witness testimony as to whether or not the paramedics had attended to the deceased before treating the respondent. The testimony of one of the respondent’s companions who had been travelling with her and who testified that she had seen the paramedics work on the deceased first was thus rejected by the court, which determined that the paramedics’ version of events to the contrary was more credible and should therefore be accepted. In the result, Snyders JA upheld the appeal with costs, including the costs of two counsel.

¹³⁸ *Franks HC* at para 42.

¹³⁹ *Franks SCA* at para 15.

¹⁴⁰ *Ibid.*

¹⁴¹ *Id* at paras 16 - 25.

¹⁴² *Id* at para 17.

2 8 3 Discussion

It is submitted that this judgment is an example of how the test for factual causation has been applied inflexibly by our courts, and to the detriment of plaintiffs. Whilst the respondent was unwise to have pleaded the deceased's HIV positive status as a fact, and would have done well to have led more focused evidence regarding, inter alia, the deceased's character and the incidence of the virus, the court's analysis of causation was, respectfully, misdirected.

Early in its judgment, the court expressed the view that the trial judge's finding that the deceased was HIV positive did "not satisfy the civil burden of proof".¹⁴³ Whilst the trial judge's reasoning considered the evidence before the court as a whole, the Supreme Court of Appeal appears to have conducted a fragmented analysis thereof. Specifically, the court's assessment of the question as to whether or not the deceased was HIV positive is at odds with what courts have previously held in regard to the use of statistical evidence.

The opinion expressed by the Supreme Court of Appeal in *Minister of Correctional Services v Lee*¹⁴⁴ with regard to the impact statistics and epidemiology should have on a court's assessment of the facts is worth mentioning despite the fact that the court's judgment was overturned by the Constitutional Court.¹⁴⁵ In *Lee*'s case the court stated that, whilst considerations of statistics and epidemiology comment on the characteristics of a population as a whole, they do little to inform the court as to "who the infected individuals are".¹⁴⁶ Nugent JA furthermore cautioned against a court making a conclusion in relation to an individual based on such evidence and articulated the need for a trier of fact to determine, on a balance of probabilities, whether or not a specific person was or was not infected.¹⁴⁷

¹⁴³ See n 7 above.

¹⁴⁴ 2012 (3) SA 617 at 628 D which is discussed in detail herein below at 2 10.

¹⁴⁵ The SCA's judgment was in any event not overturned in relation to the court's analysis of statistical and epidemiological information.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

In cases where the court is faced with factual uncertainty and/or is confronted with multiple causes that may have given rise to the harm suffered by a claimant, it may draw an inference in determining which facts or causes it deems to have been the most probable under the circumstances. In this regard it is trite that, in civil cases, a claimant need not demonstrate that the inference it seeks the court to draw is the only reasonable inference; all that the court needs to be convinced of is that the inference proffered is “the most readily apparent and acceptable inference from a number of possible inferences.”¹⁴⁸

It is furthermore settled law that a court should not analyse individual facts and circumstances in isolation but should do so taking into account all facts and circumstances cumulatively.¹⁴⁹ With regard to the proof of the element of negligence specifically, our courts have accepted that a piecemeal process of reasoning is inappropriate in arriving at a conclusion as to whether or not negligence has been proven.¹⁵⁰ Put in other words, the court should concern itself with a singular inquiry, namely, whether or not, having regard to all the evidence, the claimant has proved negligence on a balance of probabilities.¹⁵¹

In casu, and with reference to the process of inferential reasoning adopted by the trial judge, the court commented: “To have expected the appellant to have produced evidence to eliminate some inferences was tantamount to placing an onus of proof on the appellant”.¹⁵² This statement, with respect, stands to be criticised.

¹⁴⁸ *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA), see also *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A), *Govan v Skidmore* 1952 (1) SA 732 (N), *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA). A detailed discussion of *Goliath* is provided below at 2.9.

¹⁴⁹ *R v de Villiers* 1944 AD 493 at 508 – 9.

¹⁵⁰ *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C. More specifically, the court warned against a process of reasoning whereby negligence is first inferred from an occurrence, after which the court proceeds to determine whether the defendant had rebutted such inference.

¹⁵¹ *Ibid.* See also in this regard *Van Wyk v Lewis* 1924 (AD) 438 at 445.

¹⁵² *Franks SCA* at para 9.

A defendant who fails to lead evidence to rebut what a plaintiff has sought to establish on the evidence does so at his own peril as, in the absence of evidence to the contrary, a court will be liable to draw an inference in the plaintiff's favour.¹⁵³ It is submitted that this is especially so in cases where a defendant who stands accused of negligence holds the only direct evidence of the events which, in fact, unfolded.¹⁵⁴ Moreover, it is submitted that the court's comment quoted above comes dangerously close to blurring the distinction between the onus of proof on the one hand, and the duty to adduce evidence on the other.¹⁵⁵

The shortcomings of Ms. Franks' pleaded case notwithstanding, it is submitted that the court may have come to a different conclusion regarding the mechanism by which Ms. Franks came to be infected with HIV had it considered all the evidence as a whole. The court's analysis of the evidence that was lead before the court *a quo* should have included the character evidence regarding Ms. Franks herself, coupled with the fact that she had tested negative for the virus before and directly subsequent to the accident.¹⁵⁶ At the very least the court should have articulated its criticism of the trial judge's findings in a more principled manner and with reference to the relevant delictual elements.

It is submitted that, on a common sense approach¹⁵⁷ at least, there exists at least an argument for a finding that Ms. Franks possibly contracted the virus at the scene of the accident.

¹⁵³ *Van Wyk v Lewis* at 445, see also *Goliath v MEC for Health, Eastern Cape* at para 11.

¹⁵⁴ This is often the situation in cases of medical negligence where a plaintiff was under general anaesthesia when the alleged negligent event occurred.

¹⁵⁵ See in this regard *Goliath v MEC for Health, Eastern Cape* at para 18.

¹⁵⁶ The court's analysis of the evidence before the trial judge was starkly devoid of any considerations regarding the evidence adduced in respect of Franks herself.

¹⁵⁷ See *Portwood v Svamvur* 1974 (4) SA (RAD) and *Minister of Safety and Security v Van Duivenboden* 2002 (6) 431 (SCA).

2 9 *Goliath v MEC for Health, Eastern Cape 2015 (2) SA 97 (SCA)*

This case came before the Supreme Court of Appeal with the leave of the trial judge who had non-suited Ms. Goliath as a result of his finding that the application of the maxim *res ipsa loquitur* (“the maxim”) had been excluded from our law by the judgment in *Van Wyk v Lewis*¹⁵⁸ and the operation of the doctrine of *stare decisis*.

The Centre for Law and Medicine of the University of Pretoria was accepted as an *amicus curiae* before the Supreme Court of Appeal, filed heads of argument and briefed counsel to address the court from the bar.

2 9 1 Facts

Ms. Goliath underwent a routine hysterectomy at the Dora Nginza Hospital (“DNH”) in Port Elizabeth during April 2011. The procedure was uncomplicated and Ms. Goliath was discharged in the ordinary course of events.

She returned to DNH just over a month later complaining of severe pain, a wound abscess was diagnosed and the relevant surgery scheduled. The abscess, however, burst before the surgery was performed and Ms. Goliath was subsequently discharged from hospital without having received any treatment.

Approximately two weeks later Ms. Goliath returned to DNH once more. On this occasion her complaints were of hard swelling in her abdominal scar. She was, however, informed that nothing was wrong and sent home.

On 5 July 2011 Ms. Goliath was admitted to the Settlers Hospital in Grahamstown after having been unwilling to return to DNH. Upon her admission to Settlers Hospital, Ms. Goliath’s symptoms included abdominal pain and distention, wound infection and draining of the wound sinus. As her symptoms would not subside Ms. Goliath was referred to a surgeon who performed a laparotomy on the suspicion of a deep foreign body in the wound. During the laparotomy procedure a septic gauze

¹⁵⁸ 1924 AD 428.

swab was removed from Ms. Goliath's abdomen. In the result Ms. Goliath instituted action against the MEC for Health in the Eastern Cape ("the MEC"), in his official capacity as the person responsible for the actions of all the hospital staff employed at public hospitals in that province.

In essence, Ms. Goliath's claim alleged that the hospital staff (including doctors, nurses and other medical staff, referred to collectively hereinafter as "the hospital staff") that had assisted in performing the hysterectomy at DNH had acted negligently in that they had failed to ensure that all the surgical swabs used during the course of that procedure were removed and accounted for before her abdomen was closed.¹⁵⁹

Ms. Goliath alleged that the aforesaid failure(s) on the part of the hospital staff at DNH had been negligent and that such negligence had caused the complications that had necessitated the laparotomy procedure.¹⁶⁰ The MEC's plea was to the effect that the treatment that Ms. Goliath received at DNH was in keeping with a reasonable standard of care and that the hospital staff had not acted negligently. Significantly, however, no witnesses were called to testify on behalf of the MEC.

The trial court held that Ms. Goliath had failed to discharge the onus to establish negligence on the part of the hospital staff in relation to the retention of a swab in her abdomen, found that this onus could not be discharged by way of the application of *res ipsa loquitur* and, therefore, dismissed the claim with costs.

292 Judgment

The Supreme Court of Appeal, per Ponnar JA, was quick to confirm that the onus of proof rests on the plaintiff.¹⁶¹ With reference to the applicability of *res ipsa loquitur*, Ponnar JA was at pains to articulate the fact that the maxim did not amount to a

¹⁵⁹ *Goliath* at para 3.

¹⁶⁰ *Ibid.*

¹⁶¹ *Id* at para 8.

presumption of law, but rather represented a permissible inference that may be drawn where the evidence permits it.¹⁶²

Having established that the maxim amounted to no more than an inference that stood to be drawn in the ordinary course of legal analysis, the court stressed the fact that negligence could not be surmised based solely on the fact that medical treatment had given rise to an adverse event: “For to hold a doctor negligent simply because something had gone wrong, would be to impermissibly reason backwards from effect to cause.”¹⁶³

In this regard, Ponnau JA, emphasised the oft-cited dictum of Holmes JA in *Sardi v Standard and General Insurance Co Ltd*¹⁶⁴, which held that there is only one enquiry before a court in its assessment of negligence, namely whether or not the plaintiff, on a balance of probabilities, has discharged the onus of proving negligence.¹⁶⁵ This enquiry should be assessed with reference to all the evidence before a court and a trier of fact should refrain from “piecemeal” reasoning relating to the question of negligence.¹⁶⁶

The court concluded that in all cases, including those where *res ipsa loquitur* applies, a court should simply enquire at the conclusion of the case whether or not the plaintiff had discharged the onus with regard to the proof of negligence.¹⁶⁷ Having thus circumscribed the application of *res ipsa loquitur* the court pondered whether the term’s continued existence in legal terminology was advisable.¹⁶⁸

¹⁶² *Id* at para 10.

¹⁶³ *Id* at para 9 in which the court cited the case of *Medi-Clinic Ltd v Vermeulen* 2015 (1) SA 241 (SCA).

¹⁶⁴ 1977 (3) SA 776 (A).

¹⁶⁵ *Id* at 780 C-H.

¹⁶⁶ *Ibid*. Such piecemeal analysis refers to the unfavourable approach sometimes adopted by courts whereby negligence is first inferred from the facts, accepted prima facie, and the court then turns to consider whether or not a defendant had rebutted said inference.

¹⁶⁷ *Goliath* at para 12.

¹⁶⁸ *Ibid*. The court presumably commented thus due to the fact that it had relegated the maxim of *res ipsa loquitur* to no more than an inference that may be drawn in the normal course of legal reasoning.

Ponnan JA held that Ms. Goliath's case should be approached with reference to the reality that a surgical swab had, in fact, been left in her abdomen pursuant to the hysterectomy procedure she underwent at DNH.¹⁶⁹ On this formulation the MEC's liability therefore depended on the question as to whether or not it could be said that the swab had been left behind due to the negligence of the hospital staff.¹⁷⁰ The court considered the expert testimony led on behalf of Ms. Goliath to the effect that the retention of a swab during a surgical procedure was an occurrence that should never come to pass due to the preventability of such an incident, coupled with the serious consequences thereof.¹⁷¹

The court furthermore accepted testimony regarding the rigid precautions that are ordinarily observed in order to prevent the retention of a surgical artifact postoperatively and, the fact that these precautions reduced the risk of retention to such an extent that "it should not happen ever."¹⁷² By contrast, Ponnan JA noted the glaring absence of any testimony led on behalf of the MEC.

The court distinguished the facts of Goliath's case from those that confronted the court in *Van Wyk v Lewis*.¹⁷³ In *Van Wyk* the plaintiff had endured a life threatening procedure that had to be performed at great speed in an attempt to keep the patient alive. The medical staff that assisted were identified and negligence was only alleged against the surgeon, and formulated on the basis that he had allowed an experienced nurse to perform the swab count at the end of the procedure unsupervised. The court in *Van Wyk* was unwilling to find the surgeon negligent for having left the task of counting the swabs to an experienced theatre nurse, which task she should have been able to perform competently. The court did not have occasion to consider the negligence of the nurse in question, as she had not been cited as a defendant to the action.¹⁷⁴

¹⁶⁹ *Id* at para 13.

¹⁷⁰ The court did not expressly discuss the question of factual causation but it must be accepted in these circumstances that negligent conduct must necessarily have been causal if proven.

¹⁷¹ *Id* at para 14.

¹⁷² *Ibid.*

¹⁷³ 1924 (AD) 438.

¹⁷⁴ *Van Wyk v Lewis* 449 – 450.

In Ms. Goliath's case, however, the procedure that was performed was routine and there would have been no great haste in completing the operation. Furthermore, the identities of the theatre staff, and specifically the person who had been in charge of the swab count, were unknown to the plaintiff. Ms. Goliath had also cited the MEC as the responsible party for all the hospital staff and had not confined her allegations of negligence to the surgeon alone.¹⁷⁵

Ponnan JA held that the circumstances in which an inference may be drawn would need to be considered with reference to the merits of the evidence before the court in each case.¹⁷⁶ The court would thus not consider only the evidence led by the plaintiff in light of the inferences that it is requested to draw, but would also have regard to the "explanations" put forward by the defendant in response, which submissions also form part of the evidence before the court.¹⁷⁷

In casu, the MEC had forgone the opportunity to lead any witness testimony or other relevant evidence despite the fact that the factual occurrences in question were within the exclusive and direct knowledge of the hospital staff (on account of Ms. Goliath having been under general anaesthesia and therefore unaware of what had occurred in theatre).¹⁷⁸ As a result, the court concluded that the MEC had run the risk of an inference being drawn adverse to his interests.¹⁷⁹

Ponnan JA held that the trial judge had allowed himself to become fixated on the question of the applicability of *res ipsa loquitur* and had therefore failed to consider all the evidence before him in determining whether or not the plaintiff had demonstrated the hospital staff's negligence on a balance of probabilities.¹⁸⁰ The court held that this misdirection on the part of the trial court had resulted in a "blurring"

¹⁷⁵ *Goliath* at para 16.

¹⁷⁶ *Id* at para 17.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Id* at 19.

¹⁸⁰ *Id* at para 18.

between the onus of proof on the one hand, and the obligation to adduce evidence on the other.¹⁸¹

The court held that there had been sufficient evidence before the trial judge at the conclusion of the case to justify an inference of negligence in connection to the actions of the hospital staff at DNH in performing the hysterectomy procedure on Ms. Goliath.¹⁸² Ponnan JA stressed that a plaintiff in a civil case was not required to prove that the inference she seeks the court to draw is the only reasonable inference in the circumstances, but that she need merely show that “the inference is the most readily apparent and acceptable inference from a number of possible inferences.”¹⁸³

Ponnan JA held that the appeal should succeed on the basis that Ms. Goliath had been found to have discharged the onus of proof in relation to the allegation of negligence on a balance of probabilities, and with reference to all the evidence before the court.¹⁸⁴

2 9 3 Discussion

Although this case did not deal directly with factual causation as such, the nature of the negligence meant that causation would flow naturally once negligent conduct was established, for it could hardly be said that the retained gauze, whether left behind negligently or otherwise, had not caused Ms. Goliath to undergo a laparotomy.

The Supreme Court of Appeal’s judgment is significant due to the manner in which it declined to elevate *res ipsa loquitur* to an abstract, decontextualised legal presumption, but simultaneously retained the benefit of the maxim both to courts and to claimants. In doing so the court made a noteworthy contribution to refine and sophisticate the South African common law with regard to the drawing of inferences.

¹⁸¹ *Ibid.*

¹⁸² *Id* at 19.

¹⁸³ *Ibid.* In this regard the court cited with approval the cases of *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) and *Cooper & Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA).

¹⁸⁴ *Ibid.*

2 10 *Lee v Minister OF Correctional Services 2013 (2) SA 144 (CC)*¹⁸⁵

2 10 1 Facts¹⁸⁶

Mr Dudley Lee was detained in Pollsmoor prison (“Pollsmoor”) during 1999 pending the conclusion of a trial in the Regional Court in terms of which he stood accused of several charges including counterfeiting, fraud and money laundering. In total Mr Lee spent some four and a half years in Pollsmoor. The trial was eventually concluded and Mr Lee was acquitted of all charges and released from prison.

Subsequent to his release Mr Lee instituted action against the Minister of Correctional Services alleging that he had contracted tuberculosis (“TB”) whilst incarcerated at Pollsmoor as the result of the negligent conduct of the correctional services staff who were responsible for the control and management of Pollsmoor, and for whose actions the Minister was vicariously liable (“the prison staff”).¹⁸⁷

The gravamen of Mr Lee’s case was that, in circumstances where they were aware both of extreme overcrowding as well as a high incidence of TB within the prison population, the prison staff had negligently failed to take reasonable precautions to prevent the transmission of TB and that he had, in fact, contracted TB as a result of such negligence.

Whilst Mr Lee spent most of his time at Pollsmoor in a cell meant for a single prisoner, he usually shared this space with at least one, and sometimes two other prisoners. Mr Lee was also at times housed in a communal cell, which housed a number of prisoners. During 2003 Mr Lee, admittedly aware of the risk of being infected with TB, started losing weight and suffered from severe coughing. Of his own volition he requested that a sputum test be done in order to determine whether he had contracted TB, the test was performed but came back negative. Mr Lee’s

¹⁸⁵ 2013 (2) SA 144 (“*Lee CC*”).

¹⁸⁶ A comprehensive summary of the facts is provided in the judgment of the court *a quo*: *Lee v Minister of Correctional Services* 2011 (6) SA 564 (“*Lee HC*”).

¹⁸⁷ The terms “prison staff” and “the Minister” will be used interchangeably to denote the Minister of Correctional Services as the official liable for the actions of the employees at Pollsmoor.

symptoms, however, persisted and led him to request a second sputum test; this too rendered a negative result. It was only when Mr Lee had to undergo surgery for a hernia repair that x-rays taken for purposes of this procedure inadvertently revealed that he had contracted TB.

On his return to Pollsmoor following the operation, Mr Lee was taken to the prison hospital where he was kept with a “floating population” of eight to nine other prisoners. Another sputum test was ordered and this time it came back positive for the bacteria. Mr Lee was returned to his cell, in the general prison postulation, the day after these test results were obtained and on the same day that his TB treatment was commenced. This case is significant in relation to the proof of causation in the medical context as it was complicated by the nature of TB and the manner in which the disease presents and may be controlled.

TB is an airborne disease and can be transmitted by the inhalation of the infectious bacteria. The mechanism of infection and contagion is such that a person who has become infected does not always develop the active form of the disease, which can remain dormant for some time. A person is only contagious when they suffer from the active disease and will continue to be contagious until the bacteria are brought under control by medical intervention. Due to the possibility of dormancy, a sputum test that reveals a negative result does not necessarily rule out infection. The disease is prone to spread in unventilated areas and, naturally, spreads at a greater rate in circumstances where people are subjected to overcrowding, all of which conditions were prevalent at Pollsmoor.

The trial court found in Mr Lee’s favour and placed much emphasis on the fact that Mr Lee was a ward of the state, highlighting the positive constitutional duties that the state owes to prisoners, including the right to healthcare. Regarding causation, the trial judge determined that Mr Lee had contracted TB whilst in prison, not elsewhere or before being detained, and determined that the prison authorities had been negligent in failing to implement a reasonable system to prevent the transmission of TB amongst inmates. It is on this basis that the trial judge held the Minister liable for Mr Lee’s injury; no analysis regarding the proof of causation was undertaken.

In an attempt to distinguish the approach of the Supreme Court of Appeal from that adopted by the Constitutional Court (which overturned the Supreme Court of Appeal's judgment) more clearly, summaries of *Lee's* case in both courts will now be presented.

2 10 2 *Minister of Correctional Services v Lee*¹⁸⁸ - Supreme Court of Appeal

The Supreme Court of Appeal, per Nugent JA, accepted that, theoretically, the treatment and effective management of TB was uncomplicated.¹⁸⁹ Effective treatment was found to entail screening for the presence of the disease so that infected individuals would be diagnosed, the separation of contagious prisoners from the general population and the administration of treatment in the form of antibiotic drugs for a period of approximately six months.¹⁹⁰

The court noted, however, that despite the rather deceptive simplicity of what is required in terms of the management of TB, this could only be achieved in a resource rich environment, which includes sufficient prison staff.¹⁹¹ It was alleged on behalf of the prison staff that they had performed their duties in full knowledge of the high risk that prisoners faced of contracting TB and evidence was led in an attempt to demonstrate that the prison staff and management had implemented suitable procedures in order to manage TB in the prison. In rebuttal of this evidence, which was in any event compromised by an admission made by the same witness at a later stage,¹⁹² two prison doctors were called to testify on behalf of Mr Lee.

¹⁸⁸ 2012 (3) SA 617 (SCA) ("*Lee SCA*").

¹⁸⁹ *Id* at 621 D.

¹⁹⁰ *Ibid.*

¹⁹¹ *Id* at 621 E.

¹⁹² The Minister called a qualified nurse, Mr Gertse, who worked at Pollsmoor when Mr Lee was imprisoned there. Mr Gertse, however, subsequently admitted that much of the preventative procedures and systems that he had testified to were, in fact, not applied and often existed only in theory. See in this regard *Lee HC* at 589 H.

Both of the abovementioned doctors testified that the medical care provided in Pollsmoor at the time of Mr Lee's incarceration was woefully inadequate.¹⁹³ In fact, in their attempts to improve the standard of health care at Pollsmoor, both doctors had run foul of the prison authorities.

The Supreme Court of Appeal concurred with the trial judge's preference of the testimony of the doctors called to testify by Mr Lee, not only due to the lack of credibility of the Minister's witness, but also based on the following observations:

- i. The evidence provided by all three of the abovementioned witness was consistent in indicating that the screening process implemented by the prison staff to screen incoming prisoners was perfunctory and wholly ineffective.¹⁹⁴ Such screening appears to have been of little consequence in any event as prisoners were housed in communal cells overnight directly thereafter, these communal cells housed both prisoners who were suspected of having TB as well as those who were not;¹⁹⁵
- ii. The prison authorities had returned Mr Lee to the general prison population, and to a communal cell, subsequent to the result of the x-rays taken of Mr Lee when he went for his hernia repair, all of which was to the knowledge of the prison staff. Even after the prison sputum test came back positive the prison staff persisted in allowing Mr Lee to inhabit a communal cell despite the fact that they were aware that he was contagious, and would be for approximately two further weeks;¹⁹⁶
- iii. The prison staff had allowed Mr Lee to be transported to and from court in overcrowded transport vehicles and allowed him to remain in overcrowded holding cells in the court building despite being aware of the fact that he was contagious and therefore likely to infect other prisoners.¹⁹⁷

¹⁹³ See *Lee HC* 584 at F to 590 at C.

¹⁹⁴ *Lee SCA* 622 at H.

¹⁹⁵ *Id* 622 at I to 623 at C.

¹⁹⁶ *Id* 623 at F.

¹⁹⁷ *Id* at G.

The court did not consider these incidents to have been exceptions to the manner in which TB was generally managed in Pollsmoor, and accepted that the circumstances of Mr Lee's incarceration and treatment were representative of the manner in which the prison was run generally.¹⁹⁸

In assessing the merits of the case Nugent JA formulated the test for negligence as being: "a legal duty in the circumstances to conform to the standard of the reasonable person, conduct that falls short of that standard, and loss consequent upon that conduct."¹⁹⁹ The court found little difficulty in concurring with the trial judge's finding that the prison authorities had acted negligently *vis-à-vis* Mr Lee in that they had failed to implement reasonable precautions to prevent the transmission of TB.²⁰⁰

The court furthermore dismissed the arguments advanced on behalf of the Minister to the effect that the recognition of a private action for damages such as that brought by Mr Lee would impose an inordinate burden on the state²⁰¹ or that such an action would give rise to indeterminate liability.²⁰² The court reasoned that a delictual remedy could, per definition, not be overly onerous as all that was required for the state to escape such liability was reasonable conduct. The issue of indeterminate liability was excluded on the basis that such liability could only arise in connection with pure economic loss and not in relation to claims for personal injury where the extent of the damage suffered could easily be circumscribed.²⁰³

Based on the evidence before it, the court stressed that any systems that may have been in place to manage TB were not applied consistently and were in many respects simply absent.²⁰⁴ On this basis alone the prison authorities could not escape a finding of negligence.

¹⁹⁸ *Id* at H.

¹⁹⁹ *Id* 624 at A.

²⁰⁰ *Id* at C.

²⁰¹ *Id* at F.

²⁰² *Id* 625 at B.

²⁰³ *Id* at F.

²⁰⁴ *Id* 626 at C.

Having established negligent conduct, the court proceeded to consider the element of causation indicating that, in order to succeed with a claim for damages: “the plaintiff must establish that it is probable that the negligent conduct caused the harm.”²⁰⁵

The court drew a distinction between the test for causation in the case of positive conduct on the one hand, and that for conduct by omission on the other.²⁰⁶ Whilst the test for causation relating to positive conduct was found to entail the hypothetical deletion of the negligent conduct, the causative nature of an omission, the court held, is tested by the insertion of hypothetical non-negligent conduct into the factual matrix.

In applying the abovementioned causal test for an omission to the facts, Nugent JA found the trial judge to have erred in concluding her causal analysis at the finding that Mr Lee had become infected with TB whilst incarcerated at Pollsmoor under negligent circumstances.²⁰⁷ This was due to the fact that the trial judge had not completed her assessment of the requirements of the causal test by failing to superimpose hypothetical non-negligent conduct onto the facts of the case in order to determine whether or not Mr Lee was still likely to have contracted TB under such non-negligent circumstances. As Nugent JA put it: “Proof alone that reasonable precautions were not taken to avoid foreseeable harm, and that the harm occurred, does not establish that the former caused the latter.”²⁰⁸

It was based on this hypothetical analysis of what was likely to have occurred under non-negligent circumstances that the court arrived at its conclusion that the prison staff’s negligence had not been causal in relation to Mr Lee’s infection with TB.²⁰⁹ The court came to this conclusion largely as a result of the fact that any screening process would have missed a certain amount of infection due to the fact that the disease could be dormant in an individual who would then test negative and be

²⁰⁵ *Id* at D.

²⁰⁶ *Id* at F.

²⁰⁷ *Id* 628 at I.

²⁰⁸ *Id* 629 at A - F.

²⁰⁹ *Id* 631 at D.

allowed into the general prison population.²¹⁰ Based on this consideration, coupled with the resource deficient conditions under which the prison system operates, the court found itself unable to conclude that Mr Lee would not have been infected with TB under reasonable, non-negligent circumstances.

Nugent JA commented *orbiter* that any attempt on Mr Lee's behalf to demonstrate that he would not have been infected under non-negligent circumstances may have stood a chance at success had he known the source of his infection.²¹¹ In the absence of this information, however, the court held that Mr Lee's reliance solely on systemic negligence meant that his claim could not succeed.²¹²

2 10 3 *Lee v Minister of Correctional Services*²¹³ - Constitutional Court

2 10 3 1 The Majority Judgment²¹⁴

In summarising the judgments of the lower courts, the court was quick to indicate that it was of the view that the appeal to the Supreme Court of Appeal had failed on a “narrow factual point on the application of the test for causation”.²¹⁵

With regard to the Supreme Court of Appeal's approach to causation, the court commented that a “reasonableness test” had been applied which had led to the lower court's conclusion that it was insufficient for Mr Lee to prove that reasonable steps had not been taken to avoid foreseeable harm, and that the mere fact that harm had

²¹⁰ *Id* 630 at F. This consideration was afforded further credibility due to the fact that Mr Lee specifically had been alive to the risk of infection, had requested testing and still became infected. The court found that Mr Lee's actions were likely to have been more informed and proactive than those of the average inmate and yet failed to prevent infection nonetheless.

²¹¹ *Id* 631 at D.

²¹² *Id* at F.

²¹³ 2013 (2) SA 144, referred to hereinafter as “*Lee CC*” or simply as “*Lee*”.

²¹⁴ Nkabinde J, with whom Moseneke DCJ, Froneman J, Jafta J and van der Westhuizen J concurred, handed down judgment on behalf of the majority of the court.

²¹⁵ *Lee CC* 147 at C.

occurred under these circumstances did not prove that “the former caused the latter”.²¹⁶

The questions placed before the court for determination were slightly augmented in that certain public interest organisations had been admitted as *amici curiae* (“amici”).²¹⁷ The *amici* introduced two documents, one being a report of the Judicial Inspectorate detailing TB fatalities in prisons and the extent of overcrowding and, the other, a scientific study relating to the increased risk of transmission of TB in prisons.²¹⁸

The *amici*’s submissions to the court were that the Supreme Court of Appeal had applied the test for factual causation in a manner that was inconsistent with a previous judgment of that court,²¹⁹ and secondly, that should the court find the correct application of the test for causation to have denied Mr Lee relief, then the *amici* submitted that the common law should be developed in accordance with the Bill of Rights so as to afford such relief.²²⁰

The court was as one with the Supreme Court of Appeal regarding the elements of wrongfulness and negligence and the fact that they had been proven.²²¹ The essence of the court’s judgment thus concerned the test for causation. Nkabinde J conceded that, although the but-for test had become the causal test that our courts employed most frequently, its application was not “without problems” and that such problems in applying the test often arose with reference to negligence by omission as opposed to negligence by commission.²²²

²¹⁶ *Lee* SCA 629 at A.

²¹⁷ These organisations, which were all represented by Section 27, were The Treatment Action Campaign, Wits Justice Project and the Centre for Applied Legal Studies.

²¹⁸ *Lee* CC 157 at E.

²¹⁹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

²²⁰ *Lee* CC 157 at E.

²²¹ *Id* 160 at E.

²²² *Id* at G.

The court was furthermore in agreement with the Supreme Court of Appeal regarding the appropriate test for factual causation in circumstances of a negligent omission, being the hypothetical substitution of the negligence with reasonable conduct.²²³ It was, however, with reference to the nature and exigencies of the hypothetical substitution test that the majority of the court's opinion diverged from that of the Supreme Court of Appeal.

Nkabinde J reiterated the accepted principle that the distinction between the hypothetical elimination version of the test for factual causation on the one hand, and the hypothetical substitution test on the other does not always stand to be defined by whether a court is analysing a negligent commission or a negligent omission.²²⁴ The learned judge was mindful that the determination of a causal nexus would be “dependent on the facts of a particular case”.²²⁵

The court disagreed with the formulation adopted by the Supreme Court of Appeal to the effect that, in circumstances where the lower court had accepted that Mr Lee had contracted TB whilst incarcerated under negligent circumstances, Mr Lee was required to prove that the implementation of reasonable preventative measures would have done away with any risk of contagion in order to be successful in his claim.²²⁶

Nkabinde J took further issue with the Supreme Court of Appeal's finding that Mr Lee's case failed as a result of the fact that he could not identify the specific source of his infection.²²⁷ The court summarised its disagreement with the Supreme Court of Appeal's findings in two parts:

- i. First, the court rejected the necessity for the hypothetical substitution test despite the fact that the negligence in question took the form of an

²²³ *Id* at 162 C.

²²⁴ *Id* at D.

²²⁵ *Id* at E.

²²⁶ *Id* 163 at A.

²²⁷ *Ibid.*

omission, and cited the common law's flexible approach to factual causation as substantiation of this conclusion;²²⁸ and

- ii. Second, the court held that, even in circumstances where the hypothetical substitution test were to be applied, it did not accept that the application of this test required evidence of the substituted hypothetical alternative. The court stated that the purpose of this test was to evaluate the evidence led by the plaintiff, and not to require further evidence.²²⁹

In concluding her criticism of the Supreme Court of Appeal's decision, Nkabinde J put it thus:

*"I emphasise that our law requires neither the inflexible application of a substitution exercise in the application of the but-for test, nor the inflexible kind of logic used by the Supreme Court of Appeal in its application of that test. In addition, the wrong done to Mr Lee is not treated as a mere omission."*²³⁰

The majority of the court identified a further reason why the hypothetical substitution version of the test for factual causation should be applied cautiously.²³¹ It considered that the exercise of hypothetical substitution involved "an evaluation of normative considerations"²³² and held that the factual determination of the first prong of the test for causation should not entail social and policy considerations as these aspects stood to be considered in terms of legal causation. To introduce such considerations into the factual prong of the inquiry, the court opined, would be to disorientate the distinction between factual and legal causation.²³³

²²⁸ *Id at C.*

²²⁹ *Ibid.*

²³⁰ *Id at G.*

²³¹ *Id* 166 at E.

²³² *Ibid.*

²³³ *Id at F.*

Based on the abovementioned criticisms and considerations, the majority of the court found the High Court to have been justified in determining the question of causation by simply inquiring whether, on a balance of probabilities, the actual conditions of Mr Lee's imprisonment were more likely to have caused his infection with TB than would have been the case under hypothetical non-negligent circumstances.²³⁴ The law of causation was found not to "require proof equivalent to a control sample in scientific investigation."²³⁵

Nkabinde J came to this conclusion despite having accepted that reasonable precautions to prevent the transmission of TB on the part of the prison staff might not have resulted in the risk of contagion being done away with completely.²³⁶ In this regard the learned judge held that specified contagion could be deemed less likely under reasonable circumstances if it is accepted that such reasonable conduct would have reduced the risk of general contagion.²³⁷ Put differently, the court held that the test for factual causation would be satisfied where the evidence demonstrated that Mr Lee's risk of contagion would have been reduced by the implementation of reasonable conduct.²³⁸

Finally, the court turned to consider the question as to whether or not our common law should be developed in order to ensure that litigants would not be left without recourse in circumstances where they have proven negligence and damages, but not causation.²³⁹ Nkabinde J took cognisance of the innovative developments that had been implemented in foreign jurisdictions in order to resolve deficiencies in the law of causation, but held that South Africa's long established flexible approach in this regard rendered further development of the common law unnecessary for the time being.²⁴⁰

²³⁴ *Id* 168 at A.

²³⁵ *Id* at E.

²³⁶ *Id* 169 at B.

²³⁷ *Ibid.*

²³⁸ *Id* at D.

²³⁹ *Id* 173 at C.

²⁴⁰ *Id* at E. The innovations of foreign jurisdictions referred to were discussed in the minority judgment and will be dealt with *infra* at Chapter 3.

2 10 3 2 The Minority Judgment²⁴¹

The decision of the minority of the court, on whose behalf Cameron J handed down judgment, was fundamentally at odds with the judgment of the majority.²⁴² The minority agreed with the decision of the Supreme Court of Appeal in that it found itself unable to conclude, on a balance of probabilities, that the negligent omission of the prison staff to implement reasonable preventative measures had been a *sine qua non* of Mr Lee's infection with TB.²⁴³

Cameron J held that the only conclusion to be reached on the evidence before the court was that the prison staff's negligence had increased the risk of Mr Lee contracting TB.²⁴⁴ The court thus held that, under the current law of factual causation, this legal conclusion was insufficient for Mr Lee's claim to be successful. Significantly, the minority deemed this to be an unsatisfactory result and therefore held that the common law "should be developed to compensate a claimant negligently exposed to risk of harm, who suffers harm."²⁴⁵

The court, however, declined to attempt such development of the common law as it held that the task of doing so should commence in the High Court where a comprehensive analysis of risk-based compensation could be undertaken.²⁴⁶ Moreover, the court found itself unable to undertake the exercise of developing the common law due to the truncated record it had before it.²⁴⁷ The minority therefore held that the case should be remitted to the High Court for determination on the merits by the development of the common law with reference to the judgments of the Supreme Court of Appeal and the Constitutional Court.²⁴⁸

²⁴¹ The minority of the court comprised of Cameron J, Mogoeng CJ, Khampepe J, and Skweyiya J.

²⁴² Cameron J set out crisp grounds based on which he found himself unable to concur with the majority judgment, see *Lee CC* 183 at B –E.

²⁴³ *Id* 174 at G.

²⁴⁴ *Id* at H.

²⁴⁵ *Ibid.*

²⁴⁶ *Id* at I.

²⁴⁷ *Id* 186 at A.

²⁴⁸ *Id* 186 at D.

Cameron J was mindful of the nature of TB, specifically the fact that it could remain dormant, and the consequent difficulties prison authorities would face in controlling the spread of the disease even under non-negligent circumstances.²⁴⁹ In the result, the learned judge concurred with the Supreme Court of Appeal in finding that the implementation of reasonable anti-TB measures by the prison authorities would not have eliminated the risk of infection.²⁵⁰

The minority held further that by necessary implication, and under circumstances where Mr Lee was unable to identify the source of his infection, it was equally probable that Mr Lee could have been infected by a prisoner whose infection with TB the prison staff would not have been able to diagnose, despite the implementation of reasonable preventative measures.²⁵¹ It is this conclusion that resulted in the court's agreement with the Supreme Court of Appeal's finding that, where a claimant bases his claim on systemic negligence, he would have to prove that non-negligent circumstances would have eliminated any risk of infection in order to succeed in his claim.²⁵²

Cameron J thus held that the Supreme Court of Appeal's analysis of factual causation could not be faulted with reference to the current legal position in South Africa.²⁵³ The court found this to be due to the fact that the application of the but-for test is unable to determine factual causation, at least in a manner that does not offend one's sense of justice, in circumstances where the claimant cannot identify the specific source of harm.²⁵⁴ When the but-for test is applied to circumstances in which the source of harm is indeterminate, the claimant can only be successful if he can demonstrate that non-negligent actions would have eradicated all risk of harm. This may result, as it did in Mr Lee's case, in a situation where the claimant had proven negligence and harm but was unable to establish causation.²⁵⁵

²⁴⁹ *Id* 177 at A.

²⁵⁰ *Id* at B.

²⁵¹ *Ibid.*

²⁵² *Id* at E – G and 178 at A.

²⁵³ *Id* 178 at C.

²⁵⁴ *Id* at D.

²⁵⁵ *Ibid.*

The court found that its conclusions regarding the but-for test meant that risk-based recovery was impossible under the current legal dispensation at common law.²⁵⁶ The court's dissatisfaction with this result was not limited to the perceived injustice faced by claimants such as Mr Lee, but also included considerations to the effect that tortfeasors would not be deterred from negligently breaching their duties if the current approach to factual causation were to persist in allowing them to escape liability.²⁵⁷

Cameron J proceeded to analyse the manner in which British courts had responded to causative problems and cited²⁵⁸ with approval the cases of *Fairchild v Glenhaven Funeral Services Ltd & Others*,²⁵⁹ *McGhee v National Coal Board*²⁶⁰ and *Barker v Corus UK Ltd*,²⁶¹ all of which are discussed in Chapter 3 below. The learned judge used these cases to demonstrate how factual causation could be applied in a specified manner in order to ensure fairness for claimants, whilst guarding against an over-relaxation of the causal requirement.²⁶²

The minority would thus have remitted the case to the trial court for determination in terms of the discussion above.²⁶³

2 10 4 Discussion

Due to the importance of this judgment and the central place it has taken in the contemporary South African law of factual causation, the merits of the judgments of both the majority of the court as well as that of the minority, will be discussed in detail in Chapter 4.

²⁵⁶ *Id* at E.

²⁵⁷ *Id* at I.

²⁵⁸ *Id* 179 at D.

²⁵⁹ [2002] 3 All ER 305 (HL).

²⁶⁰ [1972] 3 All ER 1008 (HL).

²⁶¹ [2006] UKHL 20.

²⁶² *Lee CC* 180 at F.

²⁶³ *Id* 186 at D.

2 11 Conclusion

It is submitted that the decisions in *Goliath* and *Lee* were a response to the need for the common law but-for test for factual causation to be adapted in specific exceptional circumstances where the test fails to deliver a just result. By this is not meant that any plaintiff who has been hard done by should be accommodated with a special test to suit his needs, but rather that the law does need to address certain scenarios of general application in which the but-for test is incapable of rendering an acceptable result. The nature of such exceptions and the question as to whether the Constitutional Court succeeded in circumscribing their scope of application will be discussed in chapters four and five.

Before proceeding to discuss the ramifications of the decisions in *Goliath* and *Lee* in order to determine to what extent the law has been developed (and to consider whether such developments are optimal), the next chapter will first pause to consider, in brief, the development and current position on the test for factual causation in the United Kingdom.

Chapter Three Factual Causation in the United Kingdom: A Brief Summary Through the Cases

3 1 Introduction

The application and development of the test for causation in British law has been much more colourful and innovative than that seen in South Africa. As will be illustrated by the case law review below, the House of Lords seems to have gone out of its way time and again in order to ensure a just result for the aggrieved plaintiff.

It is important to note that the test for causation in the United Kingdom was seminally influenced by so called “industrial injury” litigation, most of which concerned employees who had contracted pulmonary cancers and other respiratory diseases due to the alleged negligence of their employers. The human element of these cases may explain a certain predilection towards leniency displayed by British judges in creating exceptions to the traditional rules of the proof of causation in coming to the assistance of plaintiffs. The question is whether the relaxation of rules in the interests of an equitable outcome contributes to the coherency and development of the common law.

It should be noted that the British terms “pursuer” (plaintiff) and “defender” (defendant) are used interchangeably in this chapter.

3 2 *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615

3 2 1 Facts

This case is a *locus classicus* of the application of the material contribution test in British law. The matter came on appeal before the House of Lords after lower courts had held that the onus of proof should be reversed under certain circumstances and, in so doing, found in favour of the respondent. The House of Lords disagreed with the approach adopted by the lower courts but seemed unwilling to allow the respondent to

go without redress when he had clearly suffered harm in circumstances where the appellant had acted negligently.

The respondent was a metal worker who had been in the employ of the appellant for eight years. The type of metal work undertaken by the appellant entailed a process whereby sand had to be grinded or chiseled away from the product being manufactured. Under certain circumstances, such grinding and chiseling released tiny particles of silica dust, which when inhaled continuously over a sufficient length of time may cause pneumoconiosis, a potentially fatal pulmonary disease. In order for the noxious dust to be released, the sand being grinded or chiseled had to be broken into extremely small particles.

Certain of the machinery used in the appellant's workshop resulted in noxious dust being released, whilst other machinery did not. Swing grinders, being machinery that did release noxious dust, were fitted with dust extractors but the appellant had negligently failed to maintain these extractors in working order for certain periods of time. To complicate matters, the respondent operated a pneumatic hammer, which also released noxious dust as it chiseled. At the time there was no way of preventing dust made by the hammer from escaping into the air and no masks had been invented that could prevent people from inhaling the dust. The respondent therefore accepted that the appellant could not be held liable in respect of the dust released by his, or any other, pneumatic hammer used in the workshop. The respondent thus had to prove that the noxious dust that had escaped from the swing grinders had been the cause of his injury.

The House of Lords produced three opinions,¹ all of which concluded that the appeal should be dismissed and all unanimous that the burden of proof should not be reversed. Although the Law Lords had differing opinions regarding the manner in which the material contribution test should be applied, they were in agreement that the respondent had proved that the appellant's negligence had materially contributed to his injury sufficiently for liability to attach.

¹ Handed down by Lord Reid (with whom Viscount Simonds concurred), Lord Tucker and Lord Keith of Avonholm (Lord Somervell of Harrow concurring).

3 2 2 Lord Reid's Opinion²

Lord Reid took cognisance of medical testimony to the effect that the respondent's disease had been caused by the inhalation of noxious dust particles over a number of years. Due to the cumulative nature of the aetiology of the disease, Lord Reid opined that it was caused by the entirety of noxious dust inhaled and held that, in circumstances where the source of the totality of dust inhaled is twofold, it would be impossible to determine which of the two sources had caused the disease.³

In reaching the above conclusion Lord Reid rejected the causal analysis of the lower courts in terms of which an attempt had been made to determine which of the two sources of noxious dust was more probable to have caused the disease. Lord Reid held that the disease had, in fact, been caused by both sources of dust and held that the relevant enquiry under the circumstances was whether or not the dust released by the swing grinders could be said to have materially contributed to the disease.⁴

With regard to what constitutes a material contribution, Lord Reid stated that this must necessarily be a question of degree and opined that, whilst a contribution which falls into the category of *de minimis non curat lex* could not be considered to have contributed materially, he could not foresee how any contribution falling outside the *de minimis* principle would not amount to a material contribution: "I do not see how there can be something too large to come within the *de minimis* principle, but yet too small to be material."⁵

Lord Reid accepted that there was a probability that the majority of the noxious dust inhaled by the respondent emanated from the pneumatic hammers, bearing in mind that the respondent himself operated such a hammer, but deemed that the respondent had "sufficiently proved" that the dust from the swing grinders had made a substantial contribution to his disease.⁶

² *Bonnington Castings v Wardlaw* 616.

³ *Id* 618.

⁴ *Ibid.*

⁵ *Id* 619.

⁶ *Ibid.*

In conclusion, Lord Reid held that the respondent had not merely proved that the dust from the swing grinders may have contributed to the totality of the dust inhaled by him, but that it had, in fact, been proved that dust from the swing grinders did contribute to the respondent's injury in a manner falling outside the *de minimis* exception. This, Lord Reid held, was sufficient for liability to attach to the appellant's negligence and therefore dismissed the appeal.

3 2 3 Lord Tucker's Opinion⁷

Lord Tucker considered the appellant's admission that the dust extractor, responsible for the extraction of dust produced by the swing grinders, had been negligently out of use for a substantial period of time to demonstrate that the contribution made by the swing grinders fell outside the *de minimis* rule. On this consideration alone Lord Tucker found that an inference could be drawn that the dust produced by the swing grinders had been a contributory cause of the respondent's disease.

In this regard Lord Tucker stated that the question as to whether or not a respondent had discharged the onus of proof had to be determined with reference to the proved facts and the inferences that could be drawn therefrom in each individual case. Lord Tucker found Mr Wardlaw to have discharged the onus on him and therefore dismissed the appeal.

3 2 4 Lord Keith's Opinion⁸

Lord Keith summarised the facts relevant to the determination of the appeal in crisp terms and held that the respondent had proved "enough to associate his illness with the fault of the appellants, or at least to establish a prima facie presumption to that effect."⁹

⁷ *Id* 620.

⁸ *Id* 621.

⁹ *Id* 622.

The appellant's argument that the respondent's case should fail on the basis that he had to prove that the dust released by the swing grinders contributed materially to his injury, and that he could not do so as it was impossible to ascribe what amount of inhaled dust came from which machinery, was rejected by Lord Keith. In this regard Lord Keith held that an inference had been justified on the facts proven by the respondent to the effect that the appellant's fault had materially contributed to his injury.

In substantiation of the above finding, Lord Keith opined as follows:

“It was the atmosphere inhaled by the respondent that caused his illness, and it is impossible, in my opinion, to resolve the components of that atmosphere in to particles caused by the fault of the appellants and the particles not caused by the fault of the appellants, as if they were separate and independent factors in his illness.”¹⁰

3 2 5 Discussion

It is clear that the House of Lords considered the but-for test to be an ineffective test in relation to Mr Wardlaw's case as its application would have left him without redress despite the fact that he had suffered harm under negligent circumstances. The fact that there had been two different yet equally noxious sources of dust meant that one of those sources could never have been determined to have been the *sine qua non* of Mr Wardlaw's disease individually. Whenever one of the two causes is hypothetically eliminated, the presence of the other ensures that the outcome remains unchanged.

The House of Lords was unwilling to assist the respondent by reversing the burden of proof and was therefore forced to find an innovative solution, which it did in the form of the material contribution test. The material contribution test therefore enables a plaintiff to demonstrate factual causation on the basis that the defendant's negligence materially contributed to the harm actually suffered by the plaintiff, despite the

¹⁰ *Ibid.*

plaintiff's inability to prove that the defendant's negligence was the sole cause thereof.

3 3 McGhee v National Coal Board [1972] 3 All ER 1008

3 3 1 Facts

This appeal came before the House of Lords after lower courts had non-suited the appellant due to the fact that he could show neither that the respondent's negligence had been a *sine qua non* of his injury, nor that it had materially contributed thereto.

The appellant was employed by the respondent for a substantial period of time and worked at a brickworks owned and operated by the respondent where he was responsible for cleaning brick kilns. The appellant worked under hot conditions and was exposed to large amounts of brick dust. The appellant did not provide shower or other washing facilities for its employees, which meant that the appellant had to cycle home covered in brick dust and sweat before he could take a shower. The appellant developed dermatitis and sued his employer for damages based on the allegation that they had failed in certain duties owed to him, and that such failure had caused his dermatitis.

It was common cause that the appellant's dermatitis was the result of his employment at the brickworks and it was alleged by him that the respondent had a duty to provide such adequate washing facilities as would have enabled workers to remove the brick dust from their bodies. The appellant's case was that the aforesaid failure on the part of the respondent had caused him to develop dermatitis. The respondent admitted both a breach of duty as well as the fact that the dermatitis was the result of the appellant's employment at the brickworks. The respondent's defence to the appellant's claim was that the latter had failed to prove that the breach of duty had caused his dermatitis.

The appellant's difficulty was that medical science had not discovered the aetiology of dermatitis. Whilst medical experts were in agreement that the dermatitis had been caused by exposure to brick dust, they could not testify as to whether dermatitis developed after a single exposure to the aggravating dust particles or whether

cumulative or persistent exposure was required to develop the condition. It was, however, commonly understood that any increased exposure to brick dust would result in a higher risk of contracting dermatitis. It was argued that the appellant would have to prove that the dermatitis was caused by a cumulative exposure to the dust in order to demonstrate any link between the respondent's failure to provide shower facilities and the onset of dermatitis.

This is due to the fact that, in circumstances where dermatitis was found to be caused by a single exposure to the dust, the provision of shower facilities would not have prevented the appellant from developing the condition. The respondent argued that it was only in circumstances where dermatitis could be said to develop as a result of cumulative or sustained exposure to dust that the shower facilities could have prevented the appellant's injury.

In light of the fact that science could not confirm that cumulative exposure caused dermatitis, the respondent alleged that the appellant had failed to demonstrate a link between his injury and the respondent's breach of duty. The respondent therefore attempted to distinguish the appellant's case from that considered in *Bonnington Castings v Wardlaw* on the basis that the latter was concerned with two equally noxious possible causes whilst, in the present matter, it could not be said authoritatively that the failure to provide shower facilities had contributed to the injury sustained whatsoever.

Each Law Lord handed down his own opinion and, although their reasoning differed, all concluded that the appeal should be upheld on the basis that the appellant had proved a sufficient connection between the respondent's breach of duty and his own injury in order for liability to attach.

3 3 2 Lord Reid's Opinion¹¹

Lord Reid's reasoning for allowing the appeal commenced from the established principle that a plaintiff may succeed in a claim even in circumstances where his

¹¹ *McGhee v National Coal Board* 1009.

injury resulted from the operation of two causes acting concurrently; all that was required was for the plaintiff to demonstrate that one of the causes arose as a result of the defendant's negligence. In other words, the plaintiff need not prove that the defendant's negligence was a *sine qua non* of his injury but merely that it contributed thereto materially.¹²

Lord Reid conceded that, on the merits of the present case, it could not be determined how the dermatitis developed but held that: "in cases such as these we must take a broader view of causation."¹³ Despite the indeterminacy of the cause of the injury, Lord Reid took cognisance of the fact that the medical experts had concurred that, in their experience, prolonged exposure to brick dust materially increased the risk of dermatitis developing.

On Lord Reid's "broader view" of causation he held that no distinction could be drawn between the concept of a material contribution to harm on the one hand, and a material increase in the risk of harm occurring on the other. He thus concluded that, from a broad and practical viewpoint, the fact that the respondent's failure to provide washing facilities could be said to have materially increased the risk of the appellant contracting dermatitis meant that it had materially contributed to his injury.

3 3 3 Lord Wilberforce's Opinion¹⁴

Lord Wilberforce's opinion was the most controversial due to the fact that it suggested that the burden of proof should be reversed in certain circumstances. Lord Wilberforce considered that the appellant faced two major challenges; one being the lack of knowledge regarding what causes dermatitis and, the second being that the appellant's injury was caused by a combination of exposure to brick dust at work and his inability to wash himself subsequently.

¹² In this regard Lord Reid cited *Bonnington Castings v Wardlaw*.

¹³ *McGhee v National Coal Board* 1011.

¹⁴ *Ibid.*

In the premises Lord Wilberforce determined that the appellant had done no more than to prove that the respondent had negligently exposed him to an increased risk of developing dermatitis and agreed with the lower court in that such a demonstration of an increased exposure to risk was insufficient for a plaintiff to succeed. It was held further that logic dictates that a plaintiff should be unsuccessful in circumstances where he can prove neither that the negligent conduct caused his injury, nor that it contributed materially thereto. In Lord Wilberforce's opinion the question was therefore whether or not this logical deduction was satisfactory.

Lord Wilberforce reasoned that it was a "sound principle" that a party who negligently creates a risk of injury should be held liable in circumstances where injury occurs within that area of risk, unless they can prove that the injury was attributable to another cause.¹⁵ He furthermore questioned the evidential status quo in terms of which an employee that had suffered injury, and who had proven that his employer was negligent in failing to implement precautions to prevent or minimise the risk of injury, should be burdened with the additional task of proving that the employer's negligence had increased the risk of injury to the extent that it caused or materially contributed thereto.

Lord Wilberforce held that proof under the circumstances referred to above was often not possible due to a lack of evidence and considered it just and equitable that the creator of risk, who should have had the foresight to take steps to avoid it, should suffer as a result, and not the other way around. Due to the "evidential gap" present in the appellant's case, Lord Wilberforce was of the view that to draw an inference in the manner that one had been drawn in *Bonnington Castings*, to the effect that the respondent's negligence materially contributed to the appellant's harm, would be to apply a legal fiction and would result in the court inferring what the experts had been unwilling to infer.¹⁶

In upholding the appeal, Lord Wilberforce concluded as follows:

¹⁵ *Id* 1012.

¹⁶ *Id* 1013.

“But I find in the cases quoted an analogy which suggests the conclusion that, in the absence of proof that the culpable condition had, in the result, no effect, the employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default.”¹⁷

3 3 4 Lord Simon’s Opinion¹⁸

Lord Simon disagreed with the lower court’s finding that the appellant was required to demonstrate that it was probable that his injury had been the result of the respondent’s breach of duty in order to succeed. The authority given for this statement was again the decision in *Bonnington Castings v Wardlaw*. Lord Simon recognised that *Wardlaw’s* case concerned two different sources of harm operating cumulatively, but opined that it was immaterial whether such operation took place concurrently or successively and therefore deemed the principle expressed in *Wardlaw’s* case to be similarly applicable in the present matter.

Lord Simon thus concluded that the respondent’s failure to provide facilities that would have materially decreased the appellant’s risk of developing dermatitis was tantamount to a material contribution to the injury itself.¹⁹ In arriving at this conclusion Lord Simon opined that in certain cases, such as *McGhee’s* case, a distinction could not be drawn between breach of duty and causation or, in other words: “That ‘material reduction of the risk’ and ‘substantial contribution to the injury’ are mirror concepts in this type of case...”²⁰

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Id* 1014.

²⁰ *Ibid.*

3 3 5 Lord Kilbrandon's Opinion²¹

Despite the lack of positive scientific evidence available regarding dermatitis, Lord Kilbrandon was of the view that “the fact of causation” was beyond dispute. Proceeding thus from the accepted fact that exposure to brick dust in some manner caused dermatitis, and bearing in mind that the respondent had been aware of the need for washing up facilities but had neglected to provide these regardless, Lord Kilbrandon determined that it was more probable that the appellant would have developed dermatitis in the absence of showers.

In other words, Lord Kilbrandon found the respondent's contention that further proof of causation was required to be untenable under circumstances where the respondent had:

- i. Known that the provision of showers would have reduced the “risk, chance, possibility or probability” of its employees contracting dermatitis; and
- ii. Failed to take the necessary precautions.

In the premises Lord Kilbrandon accepted that the appellant had proved that the respondent's negligent failure to take precautions had probably caused the appellant's injury to occur.

3 3 6 Lord Salmon's Opinion²²

Lord Salmon took issue with the lower court's finding that, even where the respondent's acts had been proven to have materially increased the appellant's risk of injury, this did not amount to materially causing such injury. It had been conceded by the medical experts that washing after exposure to the brick dust would have

²¹ *Id* 1015.

²² *Id* 1016.

decreased the risk of dermatitis developing which, Lord Salmon opined, conversely proved that the absence of washing facilities increased the risk of dermatitis.

In Lord Salmon's view the appellant bore the onus of proof but did not need to prove that the respondent's negligence was the sole cause of his injury: "A factor, by itself, may not be sufficient to cause injury but if, with other factors, it materially contributes to causing injury, it is clearly a cause of injury."²³

Based on these considerations Lord Salmon found himself unable to distinguish between a negligent increasing of the risk of injury, and the material contribution to that injury's occurrence. He opined that the conclusions of the lower courts had confused the standard of proof, being the balance of probabilities test, with the nature of causation.

Having regard to all the considerations, Lord Salmon held that the general rule was that if, on a balance of probabilities, the employer's actions had been negligent and had materially increased the risk of the employee being injured, the employer will be liable in circumstances where the employee is, in fact injured even if his negligence was not the sole cause of the injury sustained.

3 3 7 Discussion

McGhee is significant on account being the first case in the United Kingdom to have crossed the Rubicon into territory even less demanding of proof of causation than *Bonnington Castings* had been. The House of Lord's approach in assisting the appellant is indicative of the willingness it had to develop the common law innovatively, as well as what may be perceived as a certain refusal to observe formalism to the detriment of equity.

The House of Lord's decision in *McGhee*, however, gave rise to much debate regarding whether it should be understood to have modified the common law test for causation or, alternatively, whether it merely provides authority for the drawing of

²³ *Id* 1017.

inferences under supportive circumstances. The debate came to a head in the House of Lord's decision in *Wilsher v Essex Health Authority*,²⁴ which rejected Lord Wilberforce's opinion regarding the reversal of the burden of proof²⁵ and confirmed that *McGhee* "...laid down no new principle of law..."²⁶

3 4 *Fairchild v Glenhaven Funeral Services Ltd & Others* [2002] 3 All ER 305

The decision of the House of Lords in *Fairchild* once again upset the status quo and superseded the House's decision in *Wilsher*. In *Fairchild* it was held that *McGhee* had in fact, altered the test for factual causation and that the decision in the latter had not amounted merely to authority for the drawing of an inference.²⁷

3 4 1 Facts

Fairchild was in fact a consolidation of three²⁸ appeals concerning materially the same issue. Two of the appellants' husbands had already succumbed to mesothelioma whilst the third appellant was in the throes of the disease when the matter was heard. For ease of reference the claimants will be referred to collectively hereunder in the singular form simply as "the plaintiff".

The "essential question"²⁹ that the court had to determine was relative to the following circumstances: the plaintiff, who suffered from mesothelioma, had contracted the disease from inhaling large amounts of asbestos dust at work. All alternative causes of the disease had been ruled out and contraction of the disease

²⁴ [1988] 1 All ER 871.

²⁵ *Id* 179. See in this regard Khoury L *Uncertain Causation in Medical Liability* (2006) 80.

²⁶ *Wilsher v Essex Health Authority* 881. See in this regard McInnes M "Wiping away McGhee's benevolent smile: *Wilsher v Essex Area Health Authority*" (1990) 11 *Advocates' Quarterly* 124.

²⁷ For a critical analysis of the manner in which the House of Lords accepted that the causal requirement had been proven in *Fairchild*, see Stapleton J "Lords a'Leaping Evidentiary Gaps" (2002) 10 *Torts Law Journal* 276, and Morgan J "Lost causes in the House of Lords: *Fairchild v Glenhaven Funeral Services*" (2003) 66 *The Modern Law Review* 277.

²⁸ The other two appeals being *Fox v Spousal (Midlands) Ltd* and *Matthews v Associated Portland Cement Manufacturers (1978) Ltd & Others*.

²⁹ *Fairchild v Glenhaven Funeral Services* 309 at para 2.

occurred under circumstances where the employers had been negligent in failing to ensure that the plaintiff was not exposed to dangerous levels of asbestos dust.

The challenge facing the plaintiff was that he had worked for several employers, had been negligently exposed to high levels of asbestos dust while employed by all, and could not prove which exposure(s) caused or materially contributed to him having contracted the disease due to scientific uncertainty.

The court, therefore, had to determine whether the plaintiff was able to recover damages from his employer in circumstances where he could not prove, on a balance of probabilities, during which period of employment with which employer he had contracted the disease. The lower courts found that the plaintiff could not recover damages from either employer in circumstances where he could not prove which employer had caused or materially contributed to his damage, unless it could be proved that the disease is caused by cumulative exposure (for which there was no evidence).

It was agreed, however, that the disease is possessed of the following traits:³⁰

- i. The risk of developing mesothelioma, but not the severity of the disease, increases in proportion to the amount of the noxious dust and fibers inhaled;
- ii. Medical science cannot, even on a balance of probabilities, indicate whether the disease is caused by the inhalation of a single fiber or whether it requires sustained inhalation of the noxious agent;
- iii. It is impossible to identify even a probable source of the disease or to indicate which fiber, from which source, initiated the disease.

The House of Lords produced five opinions, one for each member of the appellate committee. All of the opinions, but that of Lord Hutton, were in agreement that the

³⁰ *Id* 311 at para 6 and 312 at para 7.

precedent set by *McGhee* constituted a modification to the test for causation, contrary to the decision in *Wilsher*.

3 4 2 Lord Bingham's Opinion

Lord Bingham set out certain conclusions that he held could properly be drawn from a review of the decision in *McGhee*, these were that:³¹

- i. The House was deciding a question of law and its opinions, with the exception of Lord Kilbrandon, cannot be read to amount decisions of fact or the application of settled law;
- ii. The question of law that was being decided was whether, on the proven facts, a pursuer could succeed in his action despite his inability to prove that the defender's breach of duty had probably caused his damages;
- iii. The House of Lords could not have drawn a factual inference to the effect that the breach had caused the damage in circumstances where this conclusion was contradicted by expert medical testimony.³² The expert testimony did away with the possibility of the aforesaid conclusion and all that remained for the House of Lords to determine was whether or not the pursuer could succeed in his action merely by proving that the defender's breach had increased his risk of disease;
- iv. Three³³ of the Lords held that there was no distinction between making a material contribution to causing the disease on the one hand, and materially increasing the risk of the pursuer to contract the disease on the other; and

³¹ *Id* 323 at para 21.

³² See Lord Hoffmann's comment *Id* 344 at para 70: "My Lords, however robust or pragmatic the tribunal may be, it cannot draw inferences in the teeth of the undisputed medical evidence."

³³ *Viz.* their Lordships Reid, Simon and Salmon.

- v. The House of Lords recognised the fact that the pursuer was confronted by “an insuperable problem of proof if the orthodox test of causation was [to be] applied”³⁴ and, in the interests of justice, adapted the test to assist the pursuer.

In a lengthy opinion and after having deliberated on matters of principle,³⁵ authority,³⁶ jurisprudence,³⁷ policy considerations³⁸ and common sense, Lord Bingham concluded that the plaintiff *in casu* should be successful in his action against both respondent employers on the basis that they had both materially contributed to his risk of contracting the disease. This conclusion was reached based on the approval and extension of the principle in *McGhee* to the effect that a material increase of risk of injury could equate to a material contribution to the injury actually suffered. Lord Bingham added that it was open to the employers to seek contribution from each other or from any other employer liable in respect of the same damage.

Lord Bingham thus confirmed what he held to be the precedent in *McGhee*, being a modified test for causation, but was at pains to state that the principle of the adapted test only found application in very limited and narrowly circumscribed factual sets.³⁹ Finally, Lord Bingham expressed the opinion that it was preferable for the courts to recognise the necessary modification of common law principles for what they were instead of applying legal fictions.⁴⁰

³⁴ *Fairchild v Glenhaven Funeral Services* 324 at para 21.

³⁵ *Id* 312 at para 8.

³⁶ *Id* 315 at para 14.

³⁷ *Id* 326 at para 23. Lord Bingham’s analysis of jurisprudence was comprehensive and included a review of continental European as well as Canadian, American and Australian case law and philosophy.

³⁸ *Id* 224 at para 33.

³⁹ *Id* 335 at para 34.

⁴⁰ *Id* 335 at para 35.

3 4 3 Lord Nicholls' Opinion⁴¹

Lord Nicholls agreed that the appeals should be allowed and commented that the “real difficulty” lay in ensuring that the principle being applied was defined in sufficiently specific terms so as to engender legal principlism and coherency:

“The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law.”⁴²

It was Lord Nicholls' opinion that there exist exceptions to the application of the but for test and that these exceptions are applied when the traditional test is “over-exclusionary”.⁴³ The application of the exception entails the lowering of the threshold of the proof of causation and results in the extension of a defendant's liability.⁴⁴ Lord Nicholls formulated the justification for this departure as being the fact that the unattractive consequences for the defendant are outweighed by the unattractive outcome that would conversely have been visited upon the plaintiff.⁴⁵

Lord Nicholls was adamant that this exception only found application in truly exceptional circumstances, such as causal indetermination due to alternative causes,⁴⁶ and stated that the extension of the defendant's liability would usually be unacceptable and contrary to the normal principles of responsibility.⁴⁷ He cautioned further that “considerable restraint” should be exercised in any relaxation of the

⁴¹ *Id* 336 at para 36.

⁴² *Ibid.*

⁴³ *Id* 337 at para 40.

⁴⁴ *Ibid.*

⁴⁵ *Id* 337 at para 42.

⁴⁶ *Id* 336 at para 38.

⁴⁷ *Id* 337 at para 40.

threshold of the test for causation and warned that such relaxation should not benefit any plaintiff faced by causal challenges.⁴⁸

In cases such as the present appeal, however, it was held that so long as an employer's wrongful exposure of its employee to asbestos dust, and thus to an increased risk of mesothelioma, had not been insignificant such wrongful exposure would constitute a causal nexus based on which liability could attach to the defendant's actions.⁴⁹ It is noteworthy that in reaching this conclusion Lord Nicholls had specific regard to the fact that this exception was being allowed under circumstances where the plaintiff was precluded from demonstrating a causal relationship between the defendant's actions and his injury due to the limitations of medical science.

Lord Nicholls made no attempt at understating the possibility that the application of the exception may result in a defendant being held liable when his actions had, in fact, no causal connection to the plaintiff's injury. This being so, Lord Nicholls was of the opinion that the aforesaid unwanted result was preferable to leaving the plaintiff without remedy. Finally, it was held that the exception being applied in the present case was an example of that enunciated by the House in *McGhee*.

3 4 4 Lord Hoffmann's Opinion

Lord Hoffmann held that, under the circumstances, the causal connection could be demonstrated successfully by proving that the defendant had materially increased the plaintiff's risk of contracting the disease. This finding was considered to be consistent both with legal principle and authority.⁵⁰ Regarding legal principle, it was held that whilst no liability will be imposed in the absence of a connection between damage and tort, what is meant by a causal connection and its relevance in the circumstances, needs to be assessed with reference to the purpose of the inquiry being made.⁵¹

⁴⁸ *Id* 337 para 43.

⁴⁹ *Id* 337 at para 42.

⁵⁰ *Id* 338 at para 47.

⁵¹ *Id* 338 at para 49.

Lord Hoffmann formulated the so-called question of fact as an inquiry regarding whether or not the causal requirements prescribed by law had been satisfied. On this formulation the factual question could only be answered with reference to the requirements of the law of causation, which requirements the learned Judge held needed to be ascertained with reference to the facts of each case.⁵²

The principle was thus held to entail the determination of what manner of causal connection would be just with reference to the facts and merits of each case, Lord Hofmann did not exclude the convenience of applying generalised yardsticks but opined that one should not lose sight of the underlying principle when the application of such yardsticks become customary.⁵³ This, he held, was due to the fact that the object of the causal inquiry was to: “produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place.”⁵⁴

As an illustration of this principle, Lord Hoffmann referred to a case⁵⁵ in which a policeman had a positive duty to prevent a person under his supervision from harming themselves. The policeman’s liability in circumstances where that person in fact harmed themselves could not be excluded due to the causal requirements of the law, instead it was held that these requirements should be “adapted to conform to the grounds upon which liability is imposed.”⁵⁶ Lord Hoffmann noted that the House of Lords had in another case⁵⁷ even gone so far as to hold defendant’s liable for the pollution caused by responsible third parties based on the policy of legislation in terms of which strict liability for the protection of the environment was imposed.⁵⁸

Lord Hoffmann therefore concluded that the challenge facing the House in the present appeal was to formulate a just and fair rule founded in principle. Having regard to the

⁵² *Id* 339 at para 52.

⁵³ *Id* 339 at para 55.

⁵⁴ *Id* 340 at para 56.

⁵⁵ *Reeves v Metropolitan Police Commissioner* [1999] 3 All ER 897.

⁵⁶ *Fairchild v Glenhaven Funeral Services* 340 at para 57.

⁵⁷ *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481.

⁵⁸ *Fairchild v Glenhaven Funeral Services* 340 at para 58.

facts of the case he distilled the crisp characteristics thereof into the following points.⁵⁹

- i. There existed a duty specifically designed to protect employees from being unnecessarily exposed to the risk of a certain disease;
- ii. The duty was intended to create a civil right to compensation for injury relevantly connected to the breach of this duty;
- iii. It was accepted that the greater exposure to asbestos a person had, the greater their risk would be of contracting the disease;
- iv. Science was unable to prove which asbestos exposure, originating from which source caused the disease (except by necessary implication in circumstances where there had been a single exposure);
- v. The employee had contracted the disease against which he should have been protected.

Lord Hoffmann was firmly of the view that were the law to demand evidence of a link between the asbestos and the disease in these circumstances it would “empty the duty of content”.⁶⁰ It was thus the task of the House of Lords to formulate an alternative test for causation. Lord Hoffmann contended that the House had therefore to decide whether it deemed the current case, characterised by (i) – (v) above, to justify the formulation of an exception to the usual application of the test for causation.

Lord Hoffmann then considered the relevant authority and, having identified the characteristics discussed in (i) – (v) above to have been present in *McGhee*,⁶¹ held that the latter decision was strongly supportive of an argument that a material increase of risk should be considered sufficient to prove a causal link in matters such as the

⁵⁹ *Id* 341 at para 61.

⁶⁰ *Id* 341 at para 62.

⁶¹ *Id* 342 at para 64.

present appeal. Lord Hoffmann's opinion was, of course, contingent on the understanding that the exception being applied could only be competently invoked in future cases which similarly displayed the characteristics of (i) – (v) above.

3 4 5 Lord Hutton's Opinion

As indicated above, Lord Hutton was the only member of the House who found that the decision in *McGhee* had been reached by way of an inference.⁶² Contrary to the opinions of the other Law Lords, Lord Hutton approved of the common sense approach to causation in terms of which a layperson would be justified in drawing an inference that a scientist would be unwilling to.

With reference to the facts of *McGhee*, Lord Hutton held that the legal inference drawn in the circumstances amounted to a principle of law.⁶³ Having come to this conclusion, Lord Hutton opined that it was in the interests of justice that the approach adopted in *McGhee* be confirmed as a matter of law so that it may be followed by trial judges in the determination of cases of a similar nature.

Lord Hutton described the class of cases to which this rule should apply as being those in which:⁶⁴

- i. The claimant can prove that his employer's breach amounted to a material increase in the risk of contracting a disease;
- ii. That he then contracted the disease;
- iii. That medical science cannot demonstrate that there was a casual link between (i) and (ii) above.

⁶² *Id* 353 para 96.

⁶³ *Id* 357 para 106.

⁶⁴ *Id* 357 para 108.

Whilst counsel for the defendant had argued⁶⁵ that an inference to the effect that a material increase in risk of contracting a disease amounted to a material contribution to causing the disease constituted the reversal of the burden of proof, Lord Hutton disagreed.

In Lord Hutton's opinion, and in circumstances where the plaintiff had established that the defendant's breach had materially increased the risk of contraction of a disease from which he suffers, the defendant could, in response, lead evidence in order to "displace the inference of causation".⁶⁶ On strength of this conclusion Lord Hutton turned to consider the evidence led by the defendant in order to determine whether the defence had succeeded in displacing the inference of causation in the present case.

Having assessed the relevant testimony, Lord Hutton adopted the broad view to causation propounded by Lord Reid in *McGhee* and concluded that the plaintiff had demonstrated a causal link between the defendant's breach of duty and the onset of the disease.⁶⁷

3 4 6 Lord Rodger's Opinion

Lord Rodger conducted a detailed examination of the leading speech of Lord Reid in *McGhee* and concluded that the House of Lords had modified the test for causation in that decision.⁶⁸ Further on the topic of *McGhee*, Lord Rodger opined that the controversial passage in Lord Wilberforce's speech, which has been understood to postulate the reversal of the burden of proof, could not be given this meaning as the non-existence of medical evidence in that case meant that the respondent would have been unable to lead any evidence had the onus shifted to it.⁶⁹

⁶⁵ *Id* 352 at para 92.

⁶⁶ *Id* 358 at para 111.

⁶⁷ *Id* 359 at para 113.

⁶⁸ *Id* 372 at para 143 and 377 at para 153.

⁶⁹ *Ibid.*

Lord Rodger distinguished the present case from *McGhee* on the basis that the latter involved only one possible source of injury, which was directly related to the defendant, whilst in *Fairchild* there were multiple defendants, each of whom was just as likely as the next to have been responsible for the plaintiff's injury.⁷⁰ Having taken cognisance of the above, Lord Rodger proceeded to review the "universality" of legal problems relating to causation with reference to old Roman authorities.⁷¹

Perspectives on causal problems from continental Europe and the commonwealth were also considered, and analogy was found for the House's present decision in the German civil code.⁷² Lord Rodger ultimately concluded that the cross-jurisdictional comparison had revealed that: "it is not necessarily a hallmark of a civilised and sophisticated legal system that it treats cases where strict proof of causation is impossible in exactly the same way as cases where such proof is possible."⁷³

Lord Rodger therefore held that the appeal should succeed based on an extension of the principle in *McGhee* and found that the plaintiff had proved that both defendants had materially contributed to his illness by demonstrating that they had materially increased his risk of contracting the disease.⁷⁴

Having established the defendant's liability in these terms, Lord Roger turned next to the question of limiting the application of the exception to the test for causation that was applied in his decision. Lord Rodger tentatively suggested that the following characteristics were representative of a case, which would justify the application of the exception in future:⁷⁵

- i. The exception is designed to resolve the difficulty that arises where it is inherently impossible for the claimant to prove exactly how his injury was caused. The plaintiff is therefore required to have proved all the elements

⁷⁰ *Id* 377 at para 153.

⁷¹ *Id* 378 at para 157.

⁷² *Id* 382 at para 167.

⁷³ *Id* 383 at para 168.

⁷⁴ *Ibid.*

⁷⁵ *Id* 383 at para 170.

of his case besides causation, which the current state of scientific knowledge should be incapable of demonstrating;

- ii. The defendant's wrongdoing must have been shown to have materially increased the risk of the plaintiff's injury and, such increase in risk may not be demonstrated with reference to a general or statistical population;
- iii. The defendant's conduct must have been capable of causing the plaintiff's injury;
- iv. The plaintiff must prove that his injury occurred within the area of risk created by the defendant's conduct (the plaintiff's case will not apply in circumstances where he can merely prove that his injury could have been caused by a number of different events, one of which was the conduct of the defendant);
- v. The plaintiff must prove that his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way;⁷⁶
- vi. The plaintiff's case must be such that the other possible source of his injury is a similar wrongful act or omission of another person, or the exception may also apply, as in *McGhee*, where the other possible source of the injury is a similar, but lawful, act or omission of the same defendant.

3 4 7 Discussion

The decision in *Fairchild* turned the tables on the question of proof of causation once again after what must have become rather established legal principle, bearing in mind that *Fairchild* was decided some 14 years after *Wilsher*. All of a sudden the proof of

⁷⁶ The example provided in this regard was the two types of noxious dust scenario (*Bonnington Castings v Wardlaw*) where the dust is comprised of different particles from different sources, each of which could have caused injury in the same way.

causation did not necessarily involve the drawing of an inference but was comprised of a modified common law test, albeit one that applies only under exceptional circumstances.

It is submitted that the crystallisation of the modified test for causation expressed by the House of Lords as a defined and circumscribed rule of law is preferable to the situation where courts are left to draw their own inferences. The formulation of an exception to the general rule creates certainty for litigants and prevents differing interpretations in lower courts from producing conflicting judgments.

3 5 *Gregg v Scott* [2005] 4 All ER 812

3 5 1 Facts

The plaintiff went to see the defendant, his GP, after a lump had developed under his arm. The defendant misdiagnosed the lump as being benign when it was, in fact, a non-Hodgkin's lymphoma. The negligent misdiagnosis resulted in a nine month delay of the plaintiff's treatment and a resultant deterioration in his condition; by the time the correct diagnosis was made the cancer had metastasised to the plaintiff's pectoral area.

The best that medical science could do to gauge the impact that the delay had had on the plaintiff's prognosis was to indicate that, given the nature of the plaintiff's pathology, his chances of surviving for a decade had he received immediate treatment would have been 42%. This prognosis was reduced to a 25% likelihood of surviving past ten years due to the delay in the initiation of treatment consequent upon the defendant's negligence. A "cure" in the circumstances was defined as survival after ten years.

The Court of Appeal had rejected the plaintiff's claim due to the fact that it was demonstrated statistically that his prospects of survival in non-negligent circumstances would have been only 42%. It was held that the plaintiff's action failed on this account as his initial prospects of successful treatment were below a probable 50%. The question before the House of Lords was whether the diminution of the

plaintiff's prospects of survival over a ten-year period constituted an actionable damage in tort law. The House produced five opinions of which two, Lord Nicholls and Lord Hope, were dissenting. The majority of the House found that damages are not recoverable based on a reduction of the prospects of a favourable outcome and, furthermore, that there was no basis for the introduction of liability on this basis.

3 5 2 Lord Hoffmann's Opinion

Lord Hoffmann conveniently separated the two arguments advanced by the appellant in the following terms:⁷⁷

- i. The Quantification Argument – the appellant alleged that he had proved that the delay in diagnosis caused by the respondent had caused him injury as the trial judge had found that the cancer would not have spread as quickly as it did had the appellant been diagnosed when the respondent examined him. On this basis the appellant argued that he was entitled to damages, including that concomitant on his reduced chances of survival; and
- ii. Loss of a Chance Argument – the appellant argued that, irrespective of the injury he suffered, he was entitled to damages on the basis that his prospects of survival had been reduced negligently.

Regarding the so called quantification argument, Lord Hoffman opined that the appellant's contentions in this regard were based on the principles relating to the quantification of loss consequent to a wrongful act in terms of which the court would consider possibilities not necessarily proven to be probable. These considerations have bearing on the quantum of damages whereby a claimant may be compensated for contingencies that may occur in future pursuant to the injury sustained; arthritis which may develop following a negligent injury to a joint is an example.

⁷⁷ *Gregg v Scott* 828 at para 66 – 67.

Lord Hoffmann did not accept that this principle could be applied to the appellant's case and held that this type of determination on possibilities (as apposed to probabilities) was applied only where damage had been proved to be the result of a respondent's negligence. The appellant's argument was thus tantamount to an attempt to quantify contingencies pursuant to damage, where he had not proven the damage to be the result of the respondent's negligence.⁷⁸ Lord Hoffmann quoted with approval the comment of a Canadian judge who expressed the principle as follows: "The rule against the recovery of uncertain damages is directed against uncertainty as to cause rather than as to the extent or measure."⁷⁹

In other words, the present appeal was concerned not with the question as to whether the respondent's actions had affected Mr Gregg's chances of surviving more than ten years but rather, whether Mr Gregg's likely premature death could be attributed to the respondent's actions.⁸⁰ Lord Hoffman determined that the first part of the appellant's argument relating to quantification was predicated on the assumption that the reduction in his chance of survival is a recoverable head of damage, and that it was therefore dependent on his second argument.⁸¹ Regarding the appellant's argument that the loss of a chance should be an actionable head of damage, Lord Hoffman opined that existing precedent coupled with an understanding that the law considers everything with reference to causal connectivity was dispositive of this argument.⁸²

Lord Hoffman argued that the House of Lords had on several previous occasions refused to allow claimant's damages in circumstances where such claims were expressed as contingencies of the actual harm sustained. For example, in *Hoston v East Berkshire Area Health Authority*⁸³ the House had reversed a decision of the Court of Appeal in terms of which the latter had awarded a claimant damages for the loss of a 25% chance of an improved outcome following a fall from a tree. The House of Lords did not agree with the award as the lower court's reasoning had been

⁷⁸ *Id* 828 at para 68.

⁷⁹ *Id* 829 at para 69.

⁸⁰ *Id* 828 at para 68.

⁸¹ *Id* 829 at para 71.

⁸² *Id* 829 at para 73.

⁸³ [1988] 1 All ER 871.

incorrect in the following way; in determining causation the lower court had found against the claimant due to the fact that the 25% chance of an improved outcome meant that, on a balance of probabilities, the more favourable outcome would not have eventuated. The court thus found that the claimant had not proven causal negligence at which point the claim should have failed. The court, however, proceeded to use the same unfavourable probability that had resulted in a negative finding of causation, and applied this as a contingency in awarding damages.⁸⁴

In conclusion Lord Hoffman opined that the appellant was attempting to extend the *Fairchild* exception into a generalisation, which may be applied in all cases where a defendant “may have caused an injury and has increased the likelihood of the injury being suffered.”⁸⁵ As this would be untenable Lord Hoffman dismissed the appeal.

3 5 3 Lord Phillips’s Opinion

Lord Phillips found that the statistical information before the court had been misunderstood in that too much credence had been given to this information. He held that statistics were only representative of the general trends of a population and that not enough weight had been ascribed to the appellant’s continued survival.⁸⁶ As a result Lord Phillips took issue with any conclusion drawn from the statistics that ostensibly proved that the difference in the appellant’s statistical prospects of recovery, as opposed to his actual clinical progress at trial, could be attributed to the delay in his treatment.⁸⁷ The court below had assumed that the appellant’s decreased prospects as indicated by the statistics were the result of the fact that the cancer had spread, and surmised that the fact that cancer had spread was as a result of the delay in treatment.⁸⁸

If proper regard was had to the statistical model, in conjunction with the appellant’s actual clinical progress, Lord Phillips was of the opinion that the appellant fell into an

⁸⁴ *Gregg v Scott* 829 at para 74.

⁸⁵ *Id* 832 at para 84.

⁸⁶ *Id* 848 at para 147.

⁸⁷ *Id* 848 at para 149.

⁸⁸ *Id* 850 at para 155.

exceptional category of the statistical model; an individual who had only partially responded to initial treatment, had then gone into remission but had subsequently suffered a relapse.⁸⁹ Based on this real-life trajectory of clinical progress, Lord Phillips did not accept that the appellant fell into the general population considered by the statistical data, and based on which trend the appellant had framed his claim.

Lord Phillips opined that the court below had equated the appellant's lost prospect of recovery before the proceedings began, to "the lost chance of avoiding premature death."⁹⁰ Even had such a conclusion been permissible previously, which Lord Phillips did not accept, he pointed out that these assumptions could not be made presently as they ignored the statistical relevancy of the appellant's actual progress and continued survival.⁹¹

Conversely, Lord Phillips considered that the statistical evidence and testimony in that regard indicated that, in the event of the appellant falling into the 'survivor group' of the statistical model, the odds were in his favour that he would have made a complete recovery had the respondent not been negligent and had treatment commence timeously.⁹² On this construction, the delay in treatment had not affected the appellant's prospects of recovery, but had rather caused the complications he had endured before going into remission.

Lord Phillips did not approve of all the inferences and deductions that the evidence of this particular case engendered. He opined that the evidence was such that too many divergent conclusions could be reached, and held that such analysis under the circumstances was too challenging for it to be legitimately undertaken by a court.⁹³ It was based on this policy consideration that Lord Phillips decided that it would not be favourable to introduce the right to compensation for the loss of a chance into tort law.⁹⁴ In this regard he commented as follows: "A robust test which produces rough

⁸⁹ *Id* 850 at para 156.

⁹⁰ *Id* 854 at para 169.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Id* 854 at para 170.

⁹⁴ *Ibid.*

justice may be preferable to a test that on occasion will be difficult, if not impossible, to apply with confidence in practice.”⁹⁵

As further motivation for dismissing the appeal, Lord Phillips opined that the approach advocated by Lord Nicholls, below, would result in the court developing another exceptional test for causation in order to assist a singular party, and that this piecemeal development of the law of causation would be to the detriment of the coherency of the common law.⁹⁶

Finally, Lord Phillips carefully examined the question as to whether justice required the creation of a special test under the circumstances of the appellant’s case and determined that this was not so. On the contrary, Lord Phillips was persuaded that the appellant’s case was “not a suitable vehicle for introducing into the law of clinical negligence the right to recover damages for the loss of a chance of a cure.”⁹⁷ Lord Phillips therefore dismissed the appeal on the basis that it was not supported by the statistical evidence, as well as on the policy consideration that a new species of claim as proposed by the appellant should not be countenanced.

3 5 4 Lady Hale’s Opinion

As a point of departure, Lady Hale pointed out that in cases where the House had been driven to create an exception to a relevant rule, it had always been able to achieve the implementation of the exception without altering the principles applicable to the field of law in general.⁹⁸ In this regard Lady Hale was quick to confirm that, firstly, the “primary facts” of a case must be proven on a balance of probabilities and, secondly, it must be proven on a balance of probabilities that the defendant is guilty of causal negligence vis-à-vis the plaintiff’s injury as: “the idea that recovery should be proportional to the cogency of the proof of causation is utterly unacceptable...”⁹⁹

⁹⁵ *Ibid.*

⁹⁶ *Id* 855 at para 172.

⁹⁷ *Id* 858 at para 190.

⁹⁸ *Id* 859 at para 192.

⁹⁹ *Id* 860 at para 194 where Lady Hale quoted Tony Weir.

Lady Hale concurred with the majority of the House in finding that the claim under consideration was specious and that its kind had not been considered before the House.¹⁰⁰ The first part of the appellant's claim to be evaluated was the quantification of his alleged damages based on future possibilities as opposed to probabilities. Lady Hale recognised that this manner of quantification was usually employed in assessing the *sequelae* of an injury that had been proven to be the result of negligence.¹⁰¹ It was held in this regard that "consequential loss" would, per definition, invariably have to occur pursuant to something else. The claimant accepted that the diminution of prospects would still have to be proven on a balance of probabilities, but argued that the effect of this diminution (if proven) could then be quantified by reference to future statistical possibilities. Lady Hale opined that this approach failed to take into account that it had not been demonstrated on a balance of probabilities that the appellant had, in fact, suffered a diminution in his prospects as a result of the respondent's negligence.¹⁰²

Next, Lady Hale turned to consider the appellant's argument with regard to the actionability of the loss of a chance as a head of damage.¹⁰³ She found the appellant to be advocating two constructions of the loss of a chance model; a wide version and a narrow version. In terms of the wide version, any reduction of a chance of a favourable outcome, or increase of a chance of an unfavourable outcome would be recoverable in whole notwithstanding the fact that no actual injury had yet come to pass.¹⁰⁴ On the other hand, the narrow version would apply only in circumstances where the injury had become manifest and had resulted in some measure of decrease in prospects.

Whilst Lady Hale had, by her own admission, initially found the narrow approach to be an attractive idea, closer consideration of the exigencies and complications of its application convinced her that to modify the law in this way would be to take "two

¹⁰⁰ *Id* 860 at para 197.

¹⁰¹ *Id* 861 at para 200.

¹⁰² *Id* 861 at para 202 and at para 204 - 205.

¹⁰³ *Id* 863 at para 209.

¹⁰⁴ *Id* 864 at para 212.

steps forward, and three steps back...”¹⁰⁵ Perhaps the most convincing reason for not implementing the new formulation was Lady Hale’s appreciation of the fact that the modification, even in its “narrow” formulation, would have a sweeping impact on the law of obligations as most claims would suddenly be capable of some measure of success.¹⁰⁶

Lady Hale was furthermore of the opinion that the test for causation should be the same regardless of whether it is assessing past or future occurrences. In conclusion, like Lord Phillips, Lady Hale considered the appellant’s continued longevity to be evidence of the statistical inaccuracy or fallacy with which the House was asked to assess the appellant’s prospects.

3 5 5 Lord Nicholls’ Opinion

Lord Nicholls considered the common law’s current failure to recognise the type of claim brought by Mr Gregg to be “crude to an extent bordering on arbitrariness”¹⁰⁷ and held that, since the common law is lauded for its ability to adapt, it should now be adapted to recognise Mr Gregg’s claim.¹⁰⁸

Specifically, Lord Nicholls highlighted the legal discrepancy created in circumstances where the common law recognised financial claims¹⁰⁹ involving the loss of a chance at a better prospect, and legal claims¹¹⁰ for the loss of the ability to have negotiated a better bargain, but declined to do so in the medical context. Why should lawyers and accountants be held liable for their negligence in preventing their clients from having obtained the prospect of a favourable, or more favourable result, but not doctors in respect of their patients’ prognoses?

¹⁰⁵ *Id* 867 at para 225.

¹⁰⁶ *Id* 867 at para 224.

¹⁰⁷ *Id* 825 at para 46.

¹⁰⁸ *Id* 825 at para 45.

¹⁰⁹ *Id* 820 at para 25.

¹¹⁰ *Id* 819 at para 19.

Lord Nicholls ventured an answer to his own question by identifying a complicating characteristic common to medical negligence but not other types of professional liability claims.¹¹¹ That is, in conventional claims based on the negligent loss of a chance, the plaintiff's prospects at the time of the negligent conduct can be better circumscribed, whilst in medical negligence cases it is often unknown how the plaintiff would have responded to the appropriate treatment at the time the diagnosis should have been made. It is therefore not only the future hypothetical that is unknown in the medical context, but also the past.

Despite this obstacle, Lord Nicholls was of the view that the common law could be developed in a coherent manner so as to recognise the claim of a plaintiff in circumstances where he had lost the chance of a favourable medical outcome.¹¹² Lord Nicholls argued that this approach would give credence to the basic objective of the common law, namely to provide a remedy to a person against whom a breach of duty has been committed:

*“If negligent diagnosis or treatment diminishes a patient’s prospects of recovery, a law which does not recognise this as a wrong calling for redress would be seriously deficient today.”*¹¹³

Lord Nicholls cautioned that although statistical evidence could be a useful evidential tool, it was not always an accurate indication of what is likely to have occurred in a particular case as such evidence is indicative of general trends only.¹¹⁴ It was therefore unclear, with regard to the patient's non-negligent 42% prospect of survival, whether he would have fallen into the population who survived or that which did not. Lord Nicholls considered that it had been this statistical uncertainty that had been used in dissenting arguments as proof that the loss of such a statistical chance carried no value and therefore should not be actionable.¹¹⁵

¹¹¹ *Id* 820 at para 26.

¹¹² *Id* 820 at para 24.

¹¹³ *Ibid.*

¹¹⁴ *Id* 821 at para 28.

¹¹⁵ *Id* 821 at para 31.

Whilst Lord Nicholls recognised the logic in the aforesaid argument he refused to accept it and made reference to cases such as *Fairchild v Glenhaven Funeral Services* in which the House of Lords was willing to “leap the evidentiary gap” in order to ensure fairness.¹¹⁶ By analogy, he argued that statistical evidence could be used in the context of lost chance cases. Based on what is known from common experience, Lord Nicholls argued that it was plain to see that when people required urgent medical treatment, any delay might well result in an adverse outcome for the patient and that cancer, having metastasized, is less responsive to treatment. These common truths are evidenced by the real life outcomes of other people and may constitute the only basis on which a court can evaluate the loss of a chance of a patient to have received such treatment.

Lord Nicholls opined in this regard that statistical evidence, like any other evidence, could be submitted to scrutiny and its value could be determined from the quality of the statistical data with reference to the methodology used, the populations considered, the relationship between the population and the plaintiff etc. But to reject the use of statistics out of hand would be to do away with all cases of delayed treatment with the only possible exception being those cases where the figures approach a 0% or 100% statistical probability.

Having regard to the fact that the need to refer to statistics had been precipitated by the defendant’s negligence, Lord Nicholls argued that courts should make use of statistical evidence in circumstances where it is the only evidence available, and ascribe to that evidence the evidentiary weight that is appropriate under the circumstances. Moreover, the use of statistics in this manner is not novel and is habitually applied in compensating plaintiffs for the contingency risk that an adverse event may eventualise as a result of a negligent defendant’s conduct.¹¹⁷

Lord Nicholls proceeded to identify another complicating factor concerning medical negligence claims, being that the lack of certainty regarding the plaintiff’s position at

¹¹⁶ *Ibid.*

¹¹⁷ The example was provided of a head injury coming with a 20% risk of future epilepsy, the court would take this risk into account in assessing the quantum of the award to be made in favour of the successful claimant.

the time of the negligence will often be determinative of his position thereafter. Put differently, if the extent of the plaintiff's pathology can be circumscribed at the time the negligence occurs it might be possible to determine what the likely outcome would have been had he received timely treatment, the prospects of which treatment would be beholden to the pre-existing pathology. If, on the other hand, the exact nature and extent of a pathology is unknown at the time of the negligent conduct it will often be very difficult, if not impossible, to hypothesise how an individual would have responded to treatment.¹¹⁸ As Lord Nicholls put it: "the answer to the first question necessarily provided the answer to the second question, because the second question is no more than a mirror image of the first."¹¹⁹

In circumstances such as the present case, Lord Nicholls considered that the identification of the nature and extent of the plaintiff's cancer at the time of the negligent misdiagnosis did not result in a predetermined outcome that could be assessed with any satisfactory certainty.¹²⁰ Based on this consideration, Lord Nicholls determined that medical negligence cases could be divided into two categories:

*"...Depending on whether a patient's condition at the time of the negligence does or does not give rise to significant medical uncertainty on what the outcome would have been in the absence of the negligence."*¹²¹

Lord Nicholls then turned to consider the "all-or-nothing" probabilistic assessment of causation and noted that in the case of *Hoston v East Berkshire Area Health Authority*¹²² the House of Lords had acknowledged the possibility that certain medical negligence cases may pose such challenging causative problems that the court may only be able to measure "statistical chances".¹²³ Based on the distinction in types of medical negligence cases alluded to above, Lord Nicholls opined that the use of a statistical assessment instead of a probabilistic assessment of a plaintiff's prospects

¹¹⁸ *Id* 822 at para 35.

¹¹⁹ *Ibid.*

¹²⁰ *Id* 823 at para 37.

¹²¹ *Id* 823 at para 38.

¹²² [1987] 2 All ER 909.

¹²³ *Gregg v Scott* 823 at para 39.

should only be employed in circumstances where there is uncertainty regarding the nature of the plaintiff's condition at the time of the negligence, and thus medical uncertainty going forward.¹²⁴

All-or-nothing probabilistic assessment would therefore be retained in circumstances where the court is considering a case in which it is aware of the plaintiff's condition at the time of the negligence. For example, the case of a plaintiff who breaks his femur and then receives negligent treatment in the casualty department would be assessed in terms the traditional all-or-nothing yardstick as the court would be able to determine, with the assistance of the necessary evidence, what the plaintiff's prospects of recovery pursuant to a broken femur would have been.

Lord Nicholls argued that in medical negligence cases where the plaintiff's condition is unknown at the time of the negligent conduct, the law should take cognisance of the fact that a plaintiff will not be able to avail himself of a remedy at common law were the all-or-nothing assessment of probabilities to be applied.¹²⁵ In these circumstances, Lord Nicholls advocates an approach in terms of which the law accepts that the statistical likelihood regarding what the plaintiff's prospects of recovering would have been under non-negligent circumstances represents the position as best as it can be explained by medical science.

This construction of liability incumbent on a patient's lost chance at increased prospects of recovery was considered to be in keeping with a doctor's duty of care to maximize his patient's recovery prospects, which Lord Nicholls considered to be a "matching and meaningful remedy."¹²⁶ By contrast, should this remedy not be recognised it would mean that a patient who was deemed to have a 60% chance of recovery, and whose prospects were reduced to 40% would be entitled to recovery, whilst a patient whose prospects had gone from 40% to 0% stood to recover nothing.

¹²⁴ *Id* 823 at para 40.

¹²⁵ *Id* 824 at para 42.

¹²⁶ *Ibid.*

Lord Nicholls countered arguments that his proposed approach would open the “floodgates”¹²⁷ and further demonstrated that the modification of the common law (in the terms proposed) would not create liability based singularly on exposure to noxious substances as per *Fairchild*, which may result in a disease developing in future.¹²⁸ Instead Lord Nicholls suggested that the “diminution in prospects” approach be confined to medical negligence cases in which the plaintiff’s illness or injury was manifest at the time of the negligent conduct and, in circumstances where the defendant had a duty to ameliorate that illness or injury.¹²⁹

3 5 6 Lord Hope’s Opinion

Lord Hope also disagreed with the lower court’s decision that the appellant could not recover damages flowing from the diminution of his prospects of recovery due to the fact that his chances of recovery before the negligence were below 50%.¹³⁰ Considering the fact that the appellant’s diminution in prospects had been proven on a balance of probabilities, Lord Hope formulated the crisp question posed by the present appeal in the following words:

*“Must the conclusion then be that no damages are due for the proved and significant reduction in the prospects of a favourable outcome, notwithstanding the fact that this was caused by a delay in treatment which it was within the scope of the doctor’s duty to prevent when he examined his patient?”*¹³¹

Lord Hope distinguished Mr Gregg’s case from those medical negligence cases in which the inquiry pertaining to whether or not certain treatment would have been successful related to a point in time prior to the negligent conduct, and therefore to

¹²⁷ *Id* 825 at para 48 Lord Nicholls quipped that the “Floodgates” excuse was unconvincing and always advanced when a development of the law is under consideration.

¹²⁸ *Id* 826 at para 51.

¹²⁹ *Ibid.*

¹³⁰ *Id* 840 at para 113.

¹³¹ *Id* 840 at para 114.

past facts which the law assessed on a balance of probability.¹³² In other words, Lord Hope opined that in cases involving, for example, the negligent failure to treat a patient who then in fact is not treated and therefore loses a leg, the inquiry as to what would have been, but for the negligent omission, is a question of past fact. Conversely, in Mr Gregg's case the enlargement and metastases of his tumor still lay in the future at the time that Dr. Scott negligently failed to diagnose the lymphoma, and the plaintiff's case is framed in the hypothesis of what would have occurred differently in future had he been timeously diagnosed.¹³³

Lord Hope turned next to consider what form the contingency of an improved recovery took. He stated that a patient would value any prospects of recovery even if such prospects were less than even, and concluded that any prospects therefore held value in circumstances where they were not merely speculative. Lord Hope expressed the opinion that a plaintiff was entitled to appreciate the loss of his prospects in circumstances where he had been deprived of them negligently, and held that this loss was not competently described as a loss of a chance.¹³⁴

Instead, Lord Hope considered that in circumstances such as Mr Gregg's case where he had proven on a balance of probabilities that a substantial reduction had been effected on his prospects of recovery, irrespective of the chances that he would or would not have been treated successfully, the fact remained that the diminution of prospects would not have occurred but for the doctor's negligence.¹³⁵

Lord Hope opined that the appellant was disadvantaged by the fact that his claim had been framed as a loss of a chance and disagreed with this categorisation. In Lord Hope's opinion, Mr Gregg's claim was one for damages incumbent on the enlargement of his tumor due to the delay in diagnosis, which constitutes a physical injury that had been proven on a balance of probabilities' and, which occurred as a result of the respondent's negligence. On this formulation Lord Hope held that: "the

¹³² *Id* 840 at para 115 where Lord Hope cited the cases of *Hoston v East Berkshire Area Health Authority*[1987] 2 All ER 909 and *Kenyon v Bell* (1953) SC 125.

¹³³ *Id* 838 at para 109.

¹³⁴ *Id* 841 at para 116.

¹³⁵ *Ibid.*

way is open for losses which are consequent on the physical injury to be claimed too.”¹³⁶

Finally, Lord Hope opined that the claim formulated in this manner would be analogous to claims in respect of the loss of prospects of employment or promotion. In such claims based on employment, the claimant was not required to prove what course his career would likely have taken had he been employed or promoted. All that was required for success in such claims was for the claimant to prove that there was a prospect at the time before the defendant’s negligence, and that such prospect had been lost.¹³⁷ Lord Hope thus deemed these employment claims to be for the loss of prospects and not for the loss of a certainty, and that on this basis, a claim like that of Mr Gregg’s could also be supported if formulated properly.¹³⁸

Due to the fact that Mr Gregg had proven that Dr. Scott’s negligence had reduced his prospects of recovery as a result of the physical injury that had been inflicted by the latter, Lord Hope concluded that Mr Gregg should be entitled to damages.

3 5 7 Discussion

The proposition of recovery based on the loss of a chance and the arguments for and against its adoption as a recognised head of damage, or actionable injury, forced the House of Lords to examine the very nature of the causal element in careful detail. Lord Phillips and Lady Hale both admitted that their decisions had not come to them easily and that they had been beguiled, albeit temporarily, by the possibility of accepting a version of the loss of a chance model.

The Lords’ difficulty in deliberating on this subject and the majority’s inability to even hypothesise a feasible manner in which the model could be implemented, should be a serious warning to any jurisdiction considering adopting the notion of a loss of a chance into its law of delict as it relates to medical negligence.

¹³⁶ *Id* 841 at para 117.

¹³⁷ *Id* 842 at para 119.

¹³⁸ *Id* 842 at para 120.

It is furthermore telling how, on close inspection, an argument propounding a concept like the loss of a chance seems to take on the characteristics of the *Fairchild* exception in that, in a distilled form, the concept merely seeks the relaxation of causal proof in an attempt to address a perceived injustice, which does not conform to the parameters of the law. This case could therefore serve as a reminder that the law of obligations will always have its boundaries and that individual injustice is not *per se* grounds for reform.

It should be noted that the *Fairchild* exception was subsequently qualified by the House of Lords in *Barker v Corus (UK) Ltd.*¹³⁹ In *Barker*, the House confirmed that the exception was only applicable to single agent cases and determined that defendants in cases where the exception finds application should only be held liable for their proportionate share of the damages to the extent that they increased the plaintiff's risk, and that liability should therefore not attach jointly and severally.¹⁴⁰ This decision, however, was soon overturned by Parliament by way of the Compensation Act 2006, section 3 of which deals exclusively with damages in mesothelioma cases and provides that defendant liability will be joint and several.¹⁴¹

¹³⁹ [2006] 3 All ER 785. For a critical discussion on the exception created in *Fairchild* and the challenges that confronted the House of Lords in qualifying the exception in *Barker* see Thomson J "Barker v Corus: Fairchild chickens come home to roost" (2006) 10 *The Edinburgh Law Review* 421.

¹⁴⁰ See in this regard Turton G "Risk and the damage requirement in negligence liability" (2015) *Legal Studies* Vol 35.1 75.

¹⁴¹ Section 3 (2) of the Compensation Act 2006 reads as follows:

3 Mesothelioma: damages

(2) The responsible person shall be liable—

(a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos— (i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or (ii) by the responsible person in circumstances in which he has no liability in tort), and

(b) jointly and severally with any other responsible person.

3 6 *Sienkiewicz v Greif (UK) Ltd* [2011] 2 All ER 857

Sienkiewicz is the first case under discussion to have been heard in the Supreme Court of the United Kingdom which was created pursuant to the the abolition of the judicial function of the House of Lords. *Sienkiewicz* was a consolidation of two appeals that concerned the same issue; the second appeal (i.e. other *Sienkiewicz*) was dismissed on the basis that the court was unwilling to interfere with the factual findings of the trial judge, it did not concern an issue of principle and is therefore not discussed below.

3 6 1 Facts

The claimant in *Sienkiewicz* was the administratrix of the deceased estate of one Ms. Costello. Ms. Costello had succumbed to mesothelioma at the age of 74 and it was the claimant's contention that the deceased had contracted mesothelioma during her employment with the respondent. The deceased had worked at the respondent's factory from 1966 to 1984 where she had been exposed to light but sustained exposure to asbestos dust over a period of many years. A complicating factor was that the deceased had also been exposed to non-tortious environmental asbestos dust.

The trial judge dismissed the claim on the basis that the *Fairchild* exception could not be applied to cases in which there had been only one defendant who had negligently exposed the claimant to asbestos. Under the circumstance the judge held that it had not been demonstrated that the tortious exposure to asbestos had been the probable cause of Ms. Costello's disease. The Court of Appeal reversed the decision of the trial judge having found that section 3 of the Compensation Act 2006 superseded the common law, which resulted in the application of the material increase of risk test *ex lege*. The appellant employer appealed to the Supreme Court contending that the Court of Appeal had erred regarding the *ex lege* application of the *Fairchild* principle and, that said principle only applies in cases of multiple negligent tortfeasors in circumstances where causation cannot not be demonstrated against any of them.

The appellant raised two separate grounds of appeal. In terms of the first ground it was contended that the appellant had done no more than to increase the total asbestos exposure to which the deceased had been subjected, in addition to environmental

exposure, by 18 percent. As such, the argument went that the respondent had failed to demonstrate that it was probable that the appellant had caused the deceased's mesothelioma.¹⁴²

The second ground of appeal concerned the applicability of the so-called “doubles the risk” test, usually applied to assess epidemiological evidence, to the test for causation. In terms of the “doubles the risk” test an agent can only be said to have had a causal effect on an outcome if it more than doubled the likelihood of that outcome eventuating. As the exposure caused by the appellant had merely increased Ms. Costello's chances of contracting the disease by 18% it was contended that such exposure could not be deemed to have been causative.¹⁴³

The Supreme Court was unanimous in its dismissal of the appeal and found the respondents to have proved their cases against the appellant employers sufficiently in order for liability to attach. The President of the court, Lord Phillips, handed down the leading judgment.

3 6 2 Judgment

In what proved to be a sweeping judgment on the topic of causation, Lord Phillips considered the development of the law of causation in terms of landmark cases and also analysed principles of causation in relation to disease.

Lord Phillips commenced his judgment by articulating the *Fairchild* exception in its varied form, i.e. as qualified in *Barker v Corus*¹⁴⁴ and varied by the Compensation Act 2006, as follows:

“When a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a ‘material increase in risk’ of the victim

¹⁴² *Id* 862 at para 4.

¹⁴³ *Ibid.*

¹⁴⁴ n 138 above.

*contracting the disease will be held jointly and severally liable for causing the disease.*¹⁴⁵

It was established that medical knowledge about mesothelioma was comprised of a mixture of scientific proof and statistical analysis (epidemiology).¹⁴⁶ Lord Phillips held that, in essence, the question before the court was whether, and to what extent, causation could be demonstrated by way of epidemiology both in mesothelioma cases and in general.

In the analysis of causation generally, Lord Phillips differentiated between diseases that could be said to be “indivisible” and those that were “divisible”. Indivisible diseases were found to have single causal “triggers” such as a mosquito bite in relation to malaria. The risks of contracting an indivisible disease are dependent on the extent of exposure to the causal agent; using the malaria example, the more malarial mosquitos are found in the area the higher the risk will be of a person contracting malaria. The incidence of the causal agent, however, has no bearing on the severity of the disease, nor the manner in which it is contracted, as the disease is always initiated by mosquito bite and, once a person becomes infected, the quantity of mosquitos in the area play no part in the severity of the disease.¹⁴⁷

The contraction of another category of indivisible disease is relative to the measure of the causal agent that the victim ingests. Multiple exposures therefore act cumulatively in causing the disease, which will become manifest once a certain amount of the causal agent is ingested. Lord Phillips termed this type of disease to be “dose related” and examples provided include lung cancer caused by cigarette smoke. Dose related diseases such as lung cancer are also defined as indivisible as one cannot determine which drag of which cigarette had caused the cancer, instead the person’s smoking habit caused the disease cumulatively. Whilst risk of contraction of the disease is related to exposure to smoke, the severity of the disease once contracted is not.¹⁴⁸

¹⁴⁵ *Sienkiewicz v Greif* 861 at para 1.

¹⁴⁶ *Id* 864 at para 11.

¹⁴⁷ *Id* 864 at para 12.

¹⁴⁸ *Id* 864 at para 13.

Other diseases, such as asbestosis and silicosis, although dose related, are divisible in nature. The severity of these disease is exacerbated by increased ingestion of the causal agent. Lord Phillips held that the distinction between divisible and indivisible diseases is important when it come to the determination of causation, as the proof of causation is often more challenging, or impossible, when an indivisible disease is operative.

Lord Phillips considered that the need for the *Fairchild* exception had partly been occasioned by the fact that mesothelioma is an indivisible disease due to scientific uncertainty regarding how it is contracted. The indivisibility of the disease means that a claimant cannot demonstrate which exposure led to him contracting the disease, and he would therefore be precluded from proving causation despite having established negligence and harm. The *Fairchild* exception remedied this injustice by creating an exception that did the best that it could with reference to the current levels of scientific knowledge in order to ensure equity for claimants and defendants.¹⁴⁹

With regard to the present appeal, Lord Phillips held that the Compensation Act only applied in circumstances where a person had been found to be liable in terms of the *Fairchild* exception (i.e. for materially increasing risk of harm), and rejected an interpretation of the Act which took it to stipulate that the exception should always be applied in determining liability.¹⁵⁰ As such, the inquiry as to whether someone is to be held liable and the legal mechanism which liability attaches is still a question of common law.

Lord Phillips turned next to consider the appellant's contention that the case should be decided with reference to epidemiology and the "doubles the risk" test instead of the application of the *Fairchild* exception. He determined that the proposed test was unsuitable for purposes of determining causation in cases: "where two agents have operated cumulatively and simultaneously in causing the onset of the disease."¹⁵¹

¹⁴⁹ *Id* 865 at para 18.

¹⁵⁰ *Id* 882 at para 70.

¹⁵¹ *Id* 887 at para 90.

This conclusion was reached after a detailed analysis of the nature of epidemiology in terms of which Lord Phillips held that the manner in which epidemiological studies indicated a causal relationship was incompatible with the legal notion of causation, and could not be determinative when there were two possible causes of negligence. Lord Phillips reaffirmed the position that the *Bonnington Castings* rule applied in cases where two agents operate simultaneously in causing a disease, i.e. a defendant will be held liable if it can be proved that his negligence contributed materially to the contraction of the disease even if it was not the only cause thereof.

In determining whether or not, and in which circumstances the “doubles the risk” test could find application in the common law, Lord Phillips considered different scenarios with reference to whether a disease was divisible or indivisible in nature. Indivisible diseases such as lung cancer would result in full liability for a defendant who had negligently contributed to causing the disease.¹⁵² Conversely, in the case of a divisible disease such as asbestosis, the defendant would only be liable for the “share” of the disease for which he is liable.¹⁵³

Liability in respect of a dose related disease, which had been caused by consecutive exposure to two noxious agents, one negligent and the other innocent, would depend on the sequence of exposure. Lord Phillips determined that where negligent exposure came first it was axiomatic that such exposure would have contributed to causing the disease, despite the presence of other exposures.¹⁵⁴

However, in circumstances where the innocent exposure came first, followed by the negligent exposure, Lord Phillips held that this may give rise to a question as to whether the innocent exposure had been sufficient to cause the disease without the contribution of the negligent exposure. It was in this scenario that Lord Phillips, for the first time, accepted that the “doubles the risk” test could find application provided

¹⁵² *Ibid.*

¹⁵³ This being the application of the *Barker v Corus* model of proportionate liability.

¹⁵⁴ *Sienkiewicz v Greif* 887 at para 91.

that the court confirmed the integrity of the epidemiological information on which it relies.¹⁵⁵

Lord Phillips also found that the “doubles the risk” test could be applied in cases of “competing alternative, rather than cumulative, potential causes”¹⁵⁶ such as a case where the injury could either have been caused by negligence or would have occurred in any event due to a pre-existing condition. In such circumstances, Lord Phillips determined that epidemiology could be indicative of causation if it can demonstrate that one possible cause was more than twice as likely to have been causative of the injury than all the other possible causes combined.

Having regard to the dearth of scientific knowledge regarding mesothelioma specifically, Lord Phillips concluded that the use of epidemiology would be inadequate for purposes of determining causation of the disease. More specifically, it was held that until the aetiology of mesothelioma could be expressed as a scientific fact, no epidemiological data would constitute persuasive enough evidence on which to make a causal determination.¹⁵⁷

The yardstick for liability with respect to mesothelioma claims would thus continue to be the material increase of risk of contraction of the disease.¹⁵⁸ Lord Phillips declined the request to formulate a test for “materiality” and insisted that this would have to remain an issue for determination on the facts of each case. He similarly could not accept that the “doubles the risk” test could be a measurement of materiality.

In the present case, Lord Phillips took cognisance of the fact that Mrs. Costello had contracted mesothelioma as a result of a low exposure to asbestos dust. She had been exposed both to low environmental levels as well as low occupational levels, and yet she had contracted the disease. On this basis, Lord Phillips found that it was reasonable to conclude that there was a “significant possibility” that the additional

¹⁵⁵ *Ibid.*

¹⁵⁶ *Id* 887 at 93.

¹⁵⁷ *Id* 888 at para 97.

¹⁵⁸ *Id* 890 at para 107.

exposure that Mrs. Costello had been subjected to at work had been instrumental in causing her to contract the disease.¹⁵⁹ The appeal was therefore dismissed.

3 6 3 Discussion

As Lady Hale commented in her short opinion on the judgment in *Sienkiewicz*, the *Fairchild* exception has “kicked open the hornets’ nest.”¹⁶⁰

A reading of Lord Phillips’ judgment quickly reveals that the assessment of causation has become an exceedingly technical and arduous process, which is often as difficult to understand, as it is hard to follow. It is submitted that this difficulty was precipitated by the House of Lords’ decision in *Fairchild* to create an exception to the universal rule for the proof of causation.¹⁶¹

With the *Fairchild* exception having been entrenched and varied by parliamentary enactment, in the form of the Compensation Act 2006, the courts are not able to make findings of proportionate liability, which would have gone a long way to temper the harshness of determinations of liability based on the relaxed test for causation. The resultant inequity often visited upon defendants should not be overlooked.

3 7 Conclusion

The impact that the mesothelioma industrial litigation has had on the development of the test for causation in the United Kingdom is staggering. It is submitted that the consequences of these developments, both good and bad, provide invaluable guidance to a jurisdiction like South Africa, which appears to be on the cusp of reform regarding the proof of causation.

¹⁵⁹ *Id* 891 at para 110.

¹⁶⁰ *Id* 909 at para 167.

¹⁶¹ See in this regard Steel S “Uncertainty over causal uncertainty: Karen Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) v Greif (UK) Ltd (2010) 73.4 *The Modern Law Review* 646

Perhaps the most striking lesson to be learnt from the development of the test for causation in the United Kingdom is the need to properly circumscribe the scope of application of exceptions to general rules in the event of the common law being developed. A comprehensive reading of the judgments and opinions referred to in this chapter reveal a multitude of misgivings regarding the decisions made by previous courts that had made adjustments to the but for test, as Lord Brown remarked in *Sienkiewicz*: “the law tampers with the ‘but for’ test of causation at its peril.”¹⁶²

On the other hand, the difficulty in deciding complex causal problems has ostensibly resulted in more sophisticated methods of analysing causation in the United Kingdom. The distinction, for example, between “divisible” and “indivisible” disease is a useful tool when considering questions of causation, despite the arbitrary appearance of this terminology at first glance.

Finally, it is interesting to note that the common law in the United Kingdom, in practice at least, does not appear to analyse causation in the same segregated manner the South African law requires. There is no discernable separation in the United Kingdom common law between the South African concepts of “factual” and “legal” causation, both of which were analysed as a singular concept in the judgments considered above.

¹⁶² *Id* 915 at para 186.

Chapter Four **The South African Position on Factual Causation After *Lee v Minister of Correctional Services***¹

4 1 Introduction

The Constitutional Court’s judgment in *Lee* has clearly had a marked impact on the test for factual causation in South Africa and it has become arguably the most authoritative case law on the subject, specifically regarding the so called “flexibility” of the test, since the advent of Constitutionalism in this country. It is therefore important to consider carefully what the implications of the majority judgment may be, and to assess how these implications will impact on the proof of causation in future.

This Chapter will therefore serve to critically analyse the reasoning of the Constitutional Court’s approach to factual causation in *Lee* with reference to academic commentary pursuant to the judgment, and will attempt to determine whether the majority of the court arrived at a satisfactory formulation of the but-for test. Subsequent case law that has applied the judgment in *Lee* is then discussed, whereafter perspectives gleaned from the United Kingdom are considered.

4 2 Criticism of the Constitutional Court’s Approach To Factual Causation in *Lee v Minister of Correctional Services*²

It is unsurprising that the Constitutional Court’s decision in *Lee* has elicited the amount of academic commentary that it has.³ Although *Lee* involved the negligent

¹ 2013 (2) SA 144 (CC).

² *Ibid.*

³ See in general: Veldsman “Factual Causation: One size does not fit all” 2013 *De Rebus* 32, Wessels ‘Alternatiewe benaderings ten opsigte van feitelike kousaliteit in die deliktereg’ 2013 *Litmet Akademies: ‘n Joernaal vir die Geesteswetenskappe* 10.3 68, Visser and Kennedy-Good ‘The Emergence of a “Flexible” *conditio sine qua non* test to factual causation? *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC)’ 36.1 *Orbiter* 150, Price ‘Factual Causation After *Lee*’ 2014 Vol 13.3 *South African Law Journal* 491, Paizes A ‘Factual causation: which “*conditio*” must be

omissions of a state department, the impact of any changes to the test for factual causation, especially changes that relax the test, will always spark interest due to the broader impact such relaxation might have on delictual claims in general.

Price⁴ argues that although the result in *Lee* may appear to have been just under the particular circumstances of the case, the implications of the judgment are worrisome due to the uncertainty it creates surrounding the causal requirement. In this regard Price comments as follows:

*“To the extent that the certainty of the test for factual causation in delict is eroded, so too is the rule of law: one’s legal position becomes less predictable; it becomes harder to plan one’s affairs or to give reliable legal advice; and an increase in costly, undesirable litigation may follow.”*⁵

It is submitted that this comment should be supported in principle, but what is it about the judgment in *Lee* that could lead to the type of erosion mentioned by Price? It would appear that the majority judgment in *Lee* failed to elucidate the basis on which the “flexibility” of the test for causation, as applied by it, managed to overcome the evidentiary shortcomings of Mr Lee’s case. Despite the majority’s insistence that it had applied the traditional but-for test in reaching its conclusion regarding causation, Price has identified two aspects of the judgment, which suggest otherwise.⁶ The first departure flows from Nkabinde J’s finding regarding the hypothetical substitution test in the case of an omission. The learned Judge held that, should the hypothetical substitution test have been applied at all, the object of the test should have been to inquire whether non-negligent precautions implemented by the prison staff would have had a better chance of curbing potential TB infection than the existing negligent

a “sine qua non”? A critical discussion of the decision in *Lee v Minister for Correctional Services*’ 2014 Vol 13.3 *South African Law Journal* 500, Neethling ‘Delictual liability of prison authorities for contagious diseases among inmates’ 2013.1 *TSAR* 177. With regard to the aspects relating to HIV transmission in prisons see Nienaber A “liability for the wrongful transmission of communicable diseases in South African prisons: what about HIV?” (2013) 28 *SA Public Law* 163.

⁴ Price 2014 *SALJ* 491.

⁵ *Ibid.*

⁶ *Id* 492.

conduct had.⁷ Specifically, Nkabinde J had the following to say regarding the Supreme Court of Appeal's judgment:

*“As I understand the logic of the Supreme Court of Appeal’s approach, it is not possible to make this kind of inference of likely individual infection from the fact that a non-negligent system of general systemic control would generally reduce the risk of contagion. I do not agree.”*⁸

It is submitted that Price correctly concludes that the majority’s formulation of the test for factual causation accepted that proof of the fact that negligence had increased the risk of contagion was sufficient to demonstrate a nexus between that negligence and the injury suffered.⁹

The next aspect identified by Price is a criticism also raised by Fagan,¹⁰ being that the majority of the court reached a conclusion of causation by merely considering whether the defendant’s actual negligent conduct had caused the plaintiff’s injury. This is due to the majority’s finding that the hypothetical substitution test need not always be applied. In other words, the court did not employ the usual application of the test for factual causation by inquiring what the outcome would have been under non-negligent circumstances and comparing that hypothetical outcome with the actual outcome in order to gauge the causative effect of the latter.¹¹ Instead the court deemed it sufficient to simply ask whether the defendant’s negligent omission *per se* was likely to have caused the plaintiff’s injury.¹²

These criticisms no doubt indicate that the majority’s findings were, with respect, not as regular as they were made out to be. The problem is that the only justification

⁷ *Lee CC 168 at G.*

⁸ *Id 170 at A.*

⁹ Price 2014 *SALJ* 492.

¹⁰ Fagan ‘Causation in the Constitutional Court: *Lee v Minister of Correctional Services*’ (2013) 5 *Constitutional Court Review* 105.

¹¹ This being the approach that was applied in *International Shipping Co v Bentley*, which is discussed at 27 *supra*.

¹² *Lee CC 168 at B.*

provided by the majority for its judgment was the refrain that its findings are consistent with the flexible test for factual causation that has, according to the court, long since been applicable in South Africa. However, an analysis of the manner in which the test for factual causation has been applied in South African courts prior to *Lee* reveals a formalistic application of the but-for test; the few judgments that evidence a more flexible or alternative approach being older precedent from the 1970s and earlier as discussed in Chapter 2. Price agrees with this appraisal of precedent: “...before *Lee* was decided, no South African judgment had explicitly departed from the orthodox understanding of the but-for test...”¹³

Whilst Price’s criticism of the majority judgment is sound, it is respectfully submitted that the “constructive interpretation” he proposes to make of the judgment is less so. In an attempt to smooth over the deficiencies in the majority judgment, Price argues that the judgment should be seen in the context of a delict involving a systemic negligent omission on the part of the state.¹⁴ Price attempts to justify the exceptional approach, or departure from orthodoxy, evident in the majority judgment by arguing that the exception may be confined to cases where the state has a positive duty to perform in terms of a constitutionally guaranteed right, and is found to have failed to do so.¹⁵ Indeed, the subsequent Constitutional Court judgment in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*¹⁶ seems to point at the same conclusion.¹⁷ A “key feature” of such constitutional obligations, Price contends, is the fact that they may be met in many different ways. In other words there are many variable reasonable systems that the state may implement, all of which would satisfy its constitutional obligations. It is left up to an involved, bureaucratic procedure to determine which of these reasonable systems will be implemented and Price argues that it would be impossible for a court to determine which variable reasonable system would have been implemented had the state not been negligent. On

¹³ Price 2014 *SALJ* 492. See also Visser and Kennedy-Good ‘The Emergence of a “Flexible” condition sine qua non test to factual causation? *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC)’ 36.1 *Orbiter* 150.

¹⁴ Price 2014 *SALJ* 495.

¹⁵ *Ibid.*

¹⁶ 2015 (1) SA 1 (CC).

¹⁷ See 4.4 *infra*.

this basis, Price considers that a court would not have realistically been able to conduct the hypothetical substitution exercise if it could not possibly determine what the alternative reasonable system is likely to have been.

Price further substantiates the parameters of the proposed exception by adding that courts should be loathe to step into the shoes of government and prescribe what reasonable actions it should take; these kinds of decisions, he argues, fall properly to be taken by politically accountable individuals: “Although courts may decide whether a given system is unconstitutional, it is inappropriate for them to decide which system should be adopted.”¹⁸ When the aforesaid principle is considered in light of the functionality of the test for factual causation, Price concludes that it is doubtful whether the court would ever have been able to determine what reasonable action the state would have taken *in lieu* of its negligent omission; and thus the basis for the exception. For, so the argument goes, had the exception not been applied, an innocent citizen who had clearly suffered wrong would have been left without recourse due to the court’s inability to determine the likely reasonable conduct of the state, and therefore the element of factual causation.¹⁹

It is respectfully submitted that Price’s attempts to justify and circumscribe the deviation in the application of the test for factual causation applied by the majority is unsatisfactory. The hypothetical substitution exercise has never entailed knocking on the door of the defendant and asking him what he would have done had he not been negligent, nor is it necessary for the court to identify a particular factually supported non-negligent alternative that stood to have been implemented. What would have been reasonable is wholly within the court’s discretion to determine in general terms. And it is against such general standards of reasonability that the negligent omission may be measured. Even if this were not so and the court sought a factual alternative, the court’s opinion regarding what would have amounted to reasonable action is by no means prescriptive unto the state; it is not an injunction.

¹⁸ *Id* 496.

¹⁹ *Id* 497.

Visser and Kennedy-Good, for their part, take a less technical approach to analysing the majority's findings and opine that the court's main consideration was whether the negligent conduct had been the "probable cause" of the injury sustained.²⁰ Their criticism of the majority judgment is threefold. First, they argue that the court applied a common sense test to causation, which did not amount to a variant of the but-for test at all. Second, Visser and Kennedy-Good are critical of the majority's failure to distinguish between the different tests for factual causation that it applied which, they submit, results in an "amorphous" treatment of factual causation.²¹ Finally, they comment that the court defaulted on an opportunity to clarify how different approaches to the test for factual causation may be applied.

Paizes advocates a completely novel approach.²² As a point of departure he concurs with the minority judgment in concluding that the but-for test is incapable of rendering an equitable result when being applied to a scenario involving scientific uncertainty. He thus finds the approach of the majority "unsuitable and unsound" and agrees with the minority judgment to the extent that it seeks to develop the common law, but disagrees on its method of doing so. Paizes contends that the test whereby factual causation is determined with reference to negligent conduct has become "ingrained" in our practice, when there may be a more favourable alternative. Paizes suggests that factual causation be measured with reference to wrongfulness instead of negligence.²³ He argues that when the element of wrongfulness is inserted into the test for causation it enables a distinction between blameworthy and non-blameworthy actions and thus attributes liability accordingly, whereas the traditional test would have found causation not to be demonstrated where the outcome would have remained unchanged.

By way of example Paizes postulates the scenario of speeding driver X who encounters an oil spill whilst travelling at 200km per hour, when the speed limit was 80km per hour. Unbeknown to X, the presence of the oil spill means that an accident

²⁰ Visser and Kennedy-Good 2013 *Orbiter* 161.

²¹ *Id* 162.

²² Paizes A 'Factual causation: which "conditio" must be a "sine qua non"? A critical discussion of the decision in *Lee v Minister for Correctional Services*' 2014 Vol 13.3 *South African Law Journal* 500.

²³ *Id* 504.

can only be avoided when travelling at 60km per hour or slower. X hits the oil spill and an accident ensues in terms of which Y is killed, X is charged with culpable homicide. The traditional test for factual causation would be determined in the negative as, despite the negligent speed at which X was travelling, the reasonable speed of 80km would have given rise to the same result. As X could not have been held to a speed of 60km he is spared a guilty finding.

Paizes therefore questions whether we should persist with a system that only allocates liability in respect of causal negligence when it results in perceived injustices such as X escaping liability when he was travelling at such an unreasonable speed. Instead, Paizes suggests that a different approach should be implemented with regard to “what notion we subject to the *sine qua non* test”.²⁴ When the test for factual causation is applied with reference to the element of wrongfulness instead of negligence, Paizes insists that it generates a different result; X’s actions become wrongful when he starts to travel in excess of 60km per hour as a greater speed creates “the impermissible risk of causing another motorist’s death”. It does not matter, Paizes argues, that X is unaware of the oil spill as the test is satisfied with the objective reality that this was so. The test would find that X’s wrongful speeding at 200km per hour had been the cause of Y’s death as the speeding could have been avoided by driving at a lawful speed. However, had X been driving at 80km per hour he would have been acting reasonably, or so Paizes contends, and would thus not be found to have caused Y’s death as the element of wrongfulness would be absent.

Paizes recognises but one possible flaw to his proposed test by wrongfulness; to illustrate the possible flaw Paizes uses an example of train driver L who inadvertently runs over M who had stepped in front of the moving train. Whilst L acted reasonably and could not have foreseen M’s actions, he could have avoided the collision had he been taking reasonable care in driving the train. Paizes asks whether L’s conduct can be said to have been wrongful under these circumstances. He concedes that there appears to be no difference between this example and that of speeding driver X, as the unforeseeability of the oil slick, just as the unforeseeability of M’s actions, are no bar to the proposed objectivity of the wrongfulness test.

²⁴ *Id* 503.

Paizes distinguishes the example of the train driver on the basis that: "...the driving of trains is an activity that has such a high social and economic value and utility that our law...accepts and condones a number of risks that necessarily arise in the *proper* carrying out of the activity."²⁵ Paizes deems the risk of people stepping onto train tracks to be a permissible risk, which would prevent a finding of causation as long as the driving of the train was carried out properly (i.e. reasonably). In terms of his proposed wrongfulness test Paizes suggests that:

*"The only way to prevent liability in the case of a person who has acted reasonably but unlawfully is to allow the fact of the reasonable conduct to negate the fault element of the crime or delict."*²⁶

With respect, the proposed substitution of negligence with wrongfulness in the determination of *sine qua non* analysis of a delict is wholly untenable. Firstly, the purpose of the element of factual causation, as its name suggests, is to determine the factual connection between negligence and harm. It is, at least theoretically, not supposed to entail normative considerations, which are considered in the elements of wrongfulness, negligence and legal causation. This notwithstanding, Paizes' reasoning does not always stand scrutiny. He assumes in the speeding driver example that a slower speed would not have resulted in death and furthermore seeks to distinguish the acts of public functionaries on the basis that they fulfill important duties; none of this, to the extent that it is understood correctly, accords with the principles of the South African law of obligations and seems to draw arbitrary lines between reasonability and responsibility. The possibility of, not to mention the frequency with which, a person's actions may amount to being "reasonably unlawful" is also questionable. Above all, however, Paizes' proposed test appears to equate wrongfulness to proof of causation and therefore negligence, for only wrongful negligence (as opposed to causal negligence) would attract liability on Paizes' formulation. This seems to amount to a duplication of the wrongfulness element of a delictual action and, considering that wrongfulness must be demonstrated in any event, cannot serve any further meaningful purpose.

²⁵ *Id* 504.

²⁶ *Id* 505.

Finally, Prof Anton Fagan subjected the majority judgment in *Lee* to arguably the most comprehensive analysis it has undergone.²⁷ Prof Fagan conducted his analysis by posing four central questions, which can be paraphrased conveniently as follows:

- i. Is there any practical significance between what can be termed the “traditional” but-for test on the one hand, and the version of the test applied by the court on the other?
- ii. Did the majority apply the common law correctly?
- iii. If the version of the common law that was applied by the court was incorrect, should the common law be adapted to represent the version applied by the court?
- iv. If the court were found to have erred in its application of the common law, would such an error have altered the common law?

Prof Fagan determined that the common law regarding negligence prior to *Lee* provided, inter alia, that negligence could only be said to have caused harm if, but-for such negligent act or omission, the harm would not have ensued. The proof of factual causation was determined on a balance of probabilities whereby it had to be proved that, but-for the negligent act or omission, the harm *probably* would not have ensued.

On an analysis of the approach adopted by the majority in *Lee*, Prof Fagan found that the court had held that the common law contained exceptions to the above rules that he had not been able to identify. The first of these exceptions was that, in exceptional circumstances, conduct *per se* instead of negligent conduct could be examined as a possible *sine qua non* of injury. The second exception, again applied in exceptional circumstances, relates to the proof of causation. This exception apparently provides that causation could be proven by indicating either that, but-for the conduct *per se* the

²⁷ Fagan A ‘Causation in the Constitutional Court: *Lee v Minister of Correctional Services*’ 2014 *Constitutional Court Review* 104.

injury would probably not have occurred or, but-for the negligent act or omission the risk of injury would have been reduced.

Prof Fagan considered these alleged exceptions with empirical detail and concluded that the exceptions that the majority had applied made a significant difference to the outcome of the test of causation. By reference to authority Prof Fagan further demonstrates that the exceptions to the common law did not, in fact, exist and it had therefore not technically been open to the court to apply these standards under the guise of the traditional test of causation, irrespective of how flexibly the court believed the test could be applied.²⁸

Prof Fagan concluded that the majority of the court had, contrary to its assurances that it was not doing so, developed the common law relating to factual causation by significantly relaxing its requirements. Prof Fagan questioned whether the common law could truly be developed in circumstances where the court expressly disavowed any intention of doing so and, in any event, was uncertain whether the common law could be adapted on strength of an incorrect application of its rules.²⁹

4 3 Comments

There can be no denying that the majority judgment in *Lee* is controversial. Whilst the outcome does not ultimately come across as being unjust the real question is whether the court's judgment constitutes a principled, or indeed accurate, reflection of the common law as it stood at the time that the matter was heard. The commentary and analyses of the judgment discussed above, though varied, have to a fault agreed that the majority's approach to factual causation overreached the boundaries of the common law. It is submitted that this conclusion is justified on a close reading of Nkabinde J's reasoning as discussed herein above.³⁰

²⁸ *Id* 123

²⁹ *Id* 133.

³⁰ See 2 10 *supra*.

The fact of the matter is that the but-for test cannot be said to have been satisfied by a mere analysis of negligent conduct without the contemplation and comparison of hypothetical reasonable conduct, for only in the comparison of these two scenarios can the causative nature of the negligent omission be revealed as a probability of the injury sustained. To apply the test for causation in the manner that the majority of the court did and to do so on strength of the alleged flexibility of the test, it is respectfully submitted, amounts to the application of a legal fiction.

The issue with the current position, therefore, is not that any injustice was done to either of the parties under the circumstances, for the Minister could hardly be pitied, but rather that the deliberation of *Lee* may well fall into that category of difficult case that produces bad law. It is submitted that the minority of the court was therefore correct in holding that the common law test for factual causation, being the “traditional” but-for test, was incapable of finding the prison staff’s negligence to have been causative of Mr Lee’s contraction of TB.

It is submitted that the traditional but-for test is incapable of accounting for situations characterised by scientific uncertainty or ignorance and, when applied correctly to such facts, will invariably determine that the plaintiff failed to prove a causal nexus between negligence and injury. Whilst *sine qua non* analysis of factual causation will continue to suffice in the majority of cases, our courts should, with respect, acknowledge that there will be exceptions where the application of the traditional test will be unjust towards a plaintiff who has proven negligence and injury, but is precluded from demonstrating factual causation due to scientific ignorance or uncertainty.

4 4 Acceptance and application of the judgment in *Lee v Minister of Correctional Services*

Since the Constitutional Court handed down judgment in *Lee*, the precedent has been cited in several cases.³¹ Although no subsequent judgment has had occasion to delve

³¹ *Loureiro & Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC), *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC), *H v Fetal*

deeply into the implications of *Lee*'s approach to factual causation, the manner in which the courts have referenced *Lee* does reveal certain clues regarding how the judgment is being interpreted.

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*³², which was also a Constitutional Court judgment, the court was tasked with deliberating a dispute concerning a building contract that had been concluded between the MEC for the Department of Infrastructure and Development and a private company. The MEC repudiated on the contract, which resulted in Country Cloud sustaining a loss and the latter duly filed suit against the MEC claiming damages in delict. Khampepe J handed down judgment for a unanimous court and, citing *Lee* made the following statement:

*“It is true that the value of state accountability can be a reason to impose delictual liability on a state defendant. Equally, however, it should be stressed that this value will not always give rise to a private-law duty.”*³³

In the medical negligence matter of *Lushaba v MEC for Health, Gauteng*³⁴ the plaintiff sued the MEC after she had been subjected to grossly negligent treatment at the Charlotte Maxeke Johannesburg Academic Hospital, where she had presented at the maternity ward complaining of abdominal pain. The plaintiff suffered from abruptio placentae, which leads to foetal hypoxia and thus cerebral palsy. The urgency of the plaintiff's condition was not properly addressed, a delay in treatment ensued and when the foetus was eventually delivered, it was indeed hypoxic and the baby now suffers from spastic quadriplegic cerebral palsy.

Assessment Centre 2015 (2) SA 193 (CC), *Lushaba v MEC for Health, Gauteng* 2015 JDR 0236 (GJ) (unreported), *ZA V Smith & Another* 2015 (4) SA 574 (SCA).

³² *Ibid.*

³³ *Id* at para 45.

³⁴ See n 28 *supra*. This case received a lot of attention in the media when the Judge, after having determined the merits, awarded a costs order *de bonis propriis* against the MEC and state attorney in their personal capacities for the reckless manner in which they defended the matter.

In her assessment of the element of causation, Robinson AJ quoted extensively from *Lee*. In the circumstances the learned judge experienced no difficulty in implementing the hypothetical substitution test to the omission in question but, in doing so, applied the flexible test for causation contemplated in *Lee*. The judge concluded that, had the plaintiff been taken for an emergency caesarian section at a reasonable time, the foetus would have had a better *chance* of avoiding brain damage. The extent to which the precedent set by *Lee* was applied to the facts of the case is evident from the judge's conclusion that:

“Undoubtedly the plaintiff found herself in the kind of situation where the risk of her baby being born with cerebral palsy would have been reduced by a caesarian section being performed without delay...the hospital was under a duty to take reasonable measures to reduce the risk of brain damage, or cerebral palsy. Following the reasoning in Lee, Menzi would be less likely to be born with cerebral palsy, had the caesarian been performed without delay. By permitting the abruption to progress as it did the hospital caused or contributed materially to Menzi's cerebral palsy. In these circumstances the necessary connection between the breach and the harm done exists.”³⁵

It is submitted that the learned judge's application of the test for factual causation was definitively influenced by *Lee* and is characterised by a relaxed test for factual causation. Significantly, no inquiry is made as to whether or not the plaintiff's foetus would have suffered any abnormalities in circumstances of hypothetical reasonable conduct; instead the judge accepts *per se* that the increase in risk concomitant with the negligent delay establishes factual causation.

Then, in *ZA v Smith & Another*³⁶ the Supreme Court of Appeal had occasion to consider the question of factual causation in the light of the judgment in *Lee*. This case, which like *Lushaba v MEC for Health, Gauteng*, received a lot of attention in the media involved liability flowing from the omission on the part of a nature reserve to warn visitors of a slippery and precipitous drop into a gorge at a lookout point.

³⁵ *Id* at para 124 – 126.

³⁶ See n 28 *supra*.

The appellant, who is the wife of the deceased and was the plaintiff *a quo*, sued the respondents in the High Court for damages in the form of loss of support. The appellant's husband, who had paid to enter the reserve, slipped on ice concealed under snow when he got out of his car at the abovementioned vantage point and fell to his death. The appellant alleged that the respondent had negligently failed to take reasonable steps to avoid the accident, which in turn resulted in her husband's death. The trial judge had non-suited the appellant on the basis that she had failed to prove a causal connection between the respondent's negligence and her husband's death.

The Supreme Court of Appeal, per Brand JA, reversed the High Court's finding and upheld the appeal by applying the flexible test for causation enunciated in *Lee*. With regard to the hypothetical substitution test for a negligent omission, Brand JA held that the enquiry entails the determination of whether: "but-for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued."³⁷

It is submitted that this construction of the hypothetical substitution test is inconsistent with the manner in which it was formulated originally in *International Shipping Co (Pty) Ltd v Bentley*³⁸ and, in fact, amounts to no more than ordinary *sine qua non* analysis without paying any regard to the fact that the negligence took the form of an omission (which prior to *Lee* required an analysis of whether the injury would have ensued under reasonable, non-negligent circumstances).

4 5 Perspectives from the United Kingdom

As mentioned at the conclusion of Chapter 3, South African courts may stand to learn much from the case law of the United Kingdom. The discussion that follows applies certain of the United Kingdom common law principles of factual causation to the facts of *Lee*'s case in an attempt to determine whether these foreign principles might prove beneficial to South African causal analysis. In doing so the minority judgment in *Lee* is also explored as the implementation of foreign principles may give insight

³⁷ *Id* at para 30.

³⁸ See 2 7 *supra*.

into how South African common law could be adapted to address the shortcomings of traditional *sine qua non* analysis of factual causation.

TB may be said to be an indivisible disease as science cannot determine when infection occurred or from which individual the infection was transmitted to the victim. At the same time it can be agreed that the more a person is exposed to other people who suffer from TB, the greater the risk that they will contract the disease although, once infected, continued exposure would have no bearing on the severity of the disease. If the hypothetical substitution test is applied, as it is submitted it must be in this case of systemic state omission, one comes to the conclusion that a certain contingent of contagious inmates may be said to have been “non-negligent” as authorities would not have been able to detect their infection with the disease due either to its dormancy, or to reasonable systemic limitations.

Another contingent of contagious inmates may be said to have been “negligent” as, had reasonable preventative measures been implemented, such inmates would have been separated from the general prison population and would thereby have been incapable of causing further transmission of the disease. It is at this point, however, that further deductions become tenuous. For how is one to determine whether Mr Lee was likely to have been infected by a “negligent” inmate or whether he would likely have been fortunate enough to escape infection by being surrounded by “non-negligent” inmates. At this point, it is submitted, the plaintiff’s case would fail on the application of the traditional but-for test, as Mr Lee would not have been able to prove that he is more likely than not to have escaped infection under non-negligent conditions.

On this construction *Lee*’s case may, on initial reflection, be thought to be analogous to *Bonnington Castings v Wardlaw*³⁹. However, it is submitted that the latter is distinguishable on the basis that, in *Bonnington Castings*, both the “negligent” and “non-negligent” agents could be proved to have been operative on the plaintiff simultaneously. It is on this basis that the House of Lords was able to conclude that the defendant’s negligence had contributed materially to the plaintiff’s injury. A

³⁹ See 3 2 above.

material contribution to injury cannot, however, be demonstrated in circumstances where simultaneous operation of both the negligent and non-negligent agents is uncertain in the hypothetical substitution of reasonable conduct.

The possibility exists that, had Mr Lee advanced an argument to this effect, he may have been able to convince the court that it was probable that he would have been exposed to both “negligent” and “non-negligent” inmates under the hypothetical reasonable TB system. To the extent that this can be demonstrated Mr Lee’s case is indeed analogous to *Bonnington Castings* and the court would have been able to come to his assistance by adapting the common law to include an exception. The exception could be that, where a plaintiff has proved negligence and injury but is incapable, due to the limitations of science or medicine, to prove that his injury was caused by the defendant’s negligence, a court may exercise its discretion and apply a material contribution test for causation. In terms of this exception a plaintiff would thus be able to prove a causal nexus between negligence and injury if he can demonstrate that, although not the sole cause, the defendant’s negligence contributed materially to his injury. The considerations of materiality and the applicability of the *de minimis* principle discussed in Chapter 3 would similarly be of application.⁴⁰

On the other hand, had Mr Lee been unable to convince the court of the simultaneous operation of the negligent and non-negligent agents under the hypothetical substitution exercise, the only modification to the common law that would have been able to assist him is the material increase in risk model as per *McGhee v National Coal Board*.⁴¹ Had the court deemed it appropriate, it could have modified the common law to include an exception in the exact same terms as the exception discussed above, except that, in this instance, a causal nexus may be demonstrated by way of proof of the fact that the defendant’s negligence had materially increased the risk of the plaintiff’s injury.

It is submitted that the further relaxation of the proof of causation associated with the material increase in risk exception should not be implemented to assist a plaintiff who

⁴⁰ See the discussion on Lord Reid’s opinion in *Bonnington Castings v Wardlaw* at 3 2 2 above.

⁴¹ See 3 3 above.

has not done all he can to prove that the defendant's negligence had made a material contribution to his injury.⁴² A deviation from the common law can only be justified in circumstances where a plaintiff has availed himself of all the possible existing remedies and still cannot prove causation. Finally, it is submitted that the common law should be developed restrictively and that in circumstances where development is justified, the least radical modification possible should be implemented.

⁴² See in general Lord Rodger's opinion in *Fairchild v Glenhaven Funeral Services* supra at 3 4 6.

Chapter Five

Conclusion

5.1 The Legacy of *Lee v Minister of Correctional Services*¹

As was the case in the United Kingdom, it seems as though a judgment in terms of which the common law is modified will inevitably lead to uncertainty and sometimes, controversy. The level of uncertainty will usually be determined by the extent to which the modification of the law was qualified or circumscribed by the court, any indication of the scope of application of the exception goes a long way towards clarity.

Unfortunately, as has been illustrated herein above, the majority in *Lee* professed not to be modifying the traditional but-for test at all but, in result if not by design, there seems to be little doubt that they have done so. It is respectfully submitted that it is difficult to conceive of a situation that engenders greater uncertainty than a court that is observed to alter the law without expressly identifying such modification, or the narrow field within which the modification may find application.

As Visser and Kennedy-Good point out, the Constitutional Court was presented with the perfect opportunity to develop the test for factual causation in a defined and coherent manner and, moreover, to provide guidance regarding circumstances in which the proof of factual causation amounts to an insurmountable hurdle to a plaintiff's case.² To be fair, that is easier said than done. The House of Lords clearly did not have an easy time of finding a solution to the challenges posed by the test for causation that came before it, and even handed down contradictory opinions.³ Indeed, Lady Hale commenced her judgment in *Sienkiewicz v Greif* by expressing pity for those who had to attempt to make sense of such "judgments in difficult cases".⁴ Even

¹ 2013 (2) SA 144 (CC).

² Visser and Kennedy-Good 2013 *Orbiter* 161.

³ In *Fairchild v Glenhaven Funeral Services* the majority gave an opinion contrary to that which the same House had handed down in *Wilsher v Essex Health Authority*, see 3.4 above.

⁴ See 3.6 above.

more extraordinarily, as alluded to by Price,⁵ Lord Hoffmann who was part of the House of Lords panel that decided *Fairchild v Glenhaven Funeral Services* has since changed his mind regarding the House's approach to factual causation in that matter.⁶

Unlike the House of Lords, however, the Constitutional Court in *Lee* made no attempt to limit or circumscribe the formulation of factual causation that it enunciated. The cases decided subsequent to *Lee*, and discussed above in Chapter 4, indicate a worrisome trend towards the relaxation of the test for factual causation, not only in cases involving constitutional duties on the part of the state, but also with regard to medical negligence suits and general delictual claims.⁷ We therefore find ourselves in the uncanny situation where courts are citing the Constitutional Court's judgment in *Lee* as authority for less stringent causal requirements actually being applied, whilst the judgment in *Lee* itself denies having made any modification to the common law.

It is submitted that the modifying impact that the judgment in *Lee* has had on the proof of factual causation, coupled with the manner in which courts are applying the precedent it has set, represents a prodigious departure from traditional standards of the proof of delictual liability.

5 2 Factual Causation and the Constitution

Lee's case contained a direct constitutional element due to the fact that Mr Lee had been incarcerated and was therefore under the care and supervision of the state. His case, to the extent that it comprised constitutional prayers, was to the effect that his rights in terms of sections 10, 11, 12(1) and 35 (2)(e) of the Constitution of the Republic of South Africa⁸ had been infringed upon by the negligent conduct of the prison staff. The rights cited by Mr Lee as having been infringed therefore included the rights to human dignity, life, freedom and security of the person and, crucially, the

⁵ Price 'Factual Causation After *Lee*' 2014 Vol 13.3 *South African Law Journal* 491

⁶ Price cites Lord Hoffmann's essay '*Fairchild* and after' in Burrows, Johnston & Zimmermann Eds *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013) 68, see also in this regard Hoffman L '*Fairchild* in Retrospect' (2012) 39.3 *The Advocates Quarterly* 257.

⁷ See 4 4 *supra*.

⁸ Act 108 of 1996 or "The Constitution".

right to be detained in conditions that are consistent with human dignity, including healthcare.⁹

The constitutional implications of state negligence vis-à-vis prisoners or patients in public hospitals are plain to see. Whilst government should be accountable to society, especially to ensure the observation of constitutional rights, the services an overextended and resource deficient government is able to provide are not likely to improve if it is to face liability for ever-increasing damages awards. It is moreover unclear whether litigation against government institutions has any deterrent effect in the first place.¹⁰ In circumstances where the state may be faltering, the relaxation of the requirements for the proof of factual causation can represent a serious threat to its financial integrity. The pertinent question then becomes to what extent the limitation of rights provisions of section 36 of the Constitution can be invoked to resist government liability for negligence.

It is submitted that in the post-*Lee* landscape the state may well have to seek refuge in the provisions of section 36 of the Constitution in order to avoid continuous liability for the negligence of state departments and officials. Whether the courts are likely to accept the application of the limitation of rights clause of the Constitution as a barrier for liability to attach to state functionaries in terms of an action for damages, remains to be seen. Considering the manner in which courts have approached state negligence in the past, however, the chances of a Constitutional defence being implemented effectively on the part of the government seems unlikely.

In this regard Cameron J's comments in the minority judgment in *Lee* regarding the Constitution are instructive:

“All this indicates that the common-law but-for test for factual causation is an over-blunt and inadequate tool for securing constitutionally tailored justice in cases where prisoners have proved exposure to the disease because of negligence on the part of the prison authorities, but cannot pin-point the

⁹ *Lee* CC 151 at F.

¹⁰ See Price ‘Factual Causation After *Lee*’ (2014) 13.3 *South African Law Journal* 491.

source of their injury. The change in the United Kingdom jurisprudence has been justified frankly, on grounds of simple justice, since it would be wrong for employers to avoid liability for wrongdoing because of causal indeterminacy. The English courts did this without constitutional imperative. With us, that imperative is there.”¹¹

Of great importance therefore, is the need to find a balance between the relaxed test for factual causation propounded by the Constitutional Court in *Lee* and the likely increased ease with which the state may now be held liable for the negligence of its servants.

It is submitted further that Constitutional considerations regarding factual causation are not limited to cases involving the implementation (or failure to do so) of Constitutional rights by the government. It is conceivable that some of the same rights may be invoked by an individual outside the sphere of public law to ensure “constitutionally tailored justice”. It is conceivable that, as in the United Kingdom, occupational injuries litigation in South Africa, such as class actions involving miners having contracted silicosis, may give rise to Constitutionally motivated relaxation of the application of the test for factual causation. Put otherwise, if one is to use terminology employed in *Lee*, such cases may invoke Constitutional rights on strength of which a court may be asked to apply the flexible test for causation.

In circumstances where a plaintiff is precluded from the proof of her claim on grounds of either scientific ignorance, or the fact that the only direct knowledge regarding the negligent conduct resides with the defendant, the right to access to courts and a fair hearing contained in section 34 of the Constitution may well be employed in an argument motivating for the flexible application of the test for factual causation.

¹¹ n 1 *supra* 181 at D.

5 3 Factual Causation and Medical Negligence

It is submitted that the judgment in *Lee* has far-reaching implications for patient-plaintiffs in medical negligence suits. Whilst, in the past, it was thought that plaintiffs often faced overly burdensome causal challenges in medical negligence litigation, it seems that *Lee* has gone a long way to ameliorate this traditional obstacle to the success of a plaintiff's claim. In fact, it may be questioned whether *Lee* has not inadvertently gone too far in relaxing the requirements for the proof of causation.

If regard is had to the test for factual causation employed in *Lushaba v MEC for Health, Gauteng*¹² it becomes apparent that the requirement for the proof of factual causation in the context of medical negligence claims has indeed been relaxed. It should be noted, however, that although the learned judge did not expressly consider the fact that the defendant was a state official or that the hospital in question was a state institution, it might be argued that the flexible test was employed in this case due to the fact that it concerned positive constitutional duties on the state.¹³ This approach would be in keeping with the Constitutional Court's comments regarding the distinction between delictual liability in terms of public and private law duties.¹⁴

On grounds of the aforesaid technicality then, it is submitted that a measure of uncertainty still exists regarding the flexibility with which courts will apply the test for factual causation in medical negligence suits, which do not involve public hospitals or clinics, after the decision in *Lee*. It is submitted, however, that it is unlikely that the flexibility of the test for factual causation will not permeate into the sphere of private health care litigation to some extent.

It can thus be concluded that the flexibility instilled in the test for factual causation by the majority in *Lee*, coupled with the Supreme Court of Appeal's judgment in *Goliath*¹⁵ regarding the manner in which inferences should be drawn, has given rise to

¹² See 4 4 above.

¹³ i.e. the right to health care in terms of section 27 of the Constitution.

¹⁴ See 4 4 above.

¹⁵ 2015 (2) SA 97 (SCA), see 2 9 above.

a delictual dispensation which can be said to be more plaintiff-friendly than it has ever been before in South African law.

Whilst it cannot be disputed that an analysis of South African case law reveals that courts have long since considered the use of the material contribution test, and to a limited extent applied it,¹⁶ it is submitted that the manner in which the test for factual causation was formulated in *Lee*, and applied subsequently in *Lushaba* and *ZA v Smith*,¹⁷ represents a departure even from the most lenient formulations of the test for factual caution that have been applied in the past.

5 4 Final Thought

Whilst the proof of causation is likely to always remain a contentious legal element, much stands to be gained from the clear articulation of the ambit of the test for factual causation by courts, regardless of the formulation they chose to apply. In this regard, a systematic analysis of a claim with reference to each individual delictual element and the proof thereof conduces to clarity of precedent.

¹⁶ See in this regard the discussion in Chapter 2.

¹⁷ See 4 4 above.

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