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CHESTER V. AFSHAR: STEPPING FURTHER AWAY FROM CAUSATION?

Chester v. Afshar

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I. INTRODUCTION

Shortly after *Fairchild v. Glenhaven Funeral Services Ltd.*,[1] the House of Lords once again departed from orthodox causation rules in order to assist what it thought was a deserving plaintiff. In *Chester v. Afshar*,[2] the highest English court went further than it had previously dared to by accepting such a departure in a medical liability case.

II. THE CASE

The plaintiff, a journalist who specialised in travel writing, had for several years suffered from lower back problems. Although she was initially anxious to avoid surgery, she was eventually advised by the defendant neurosurgeon to have three intravertebral discs removed through an elective lumbar surgical procedure. The case arose out of the defendant's alleged negligent failure to warn his patient of the 1-2 per cent risk of *cauda equina* syndrome[3] associated with the surgery. When the risk was realised, leaving the plaintiff partly paralysed, she claimed damages for breach of contractual duty and negligence against the defendant doctor.

The trial judge found that the defendant, although not negligent in his conduct of the operation, had been negligent in failing to warn the claimant of the risk of paralysis which in fact ensued. The key fact of this case was that the plaintiff provided frank testimony to the effect that, if duly warned, she could not say for certain she would have refused the surgery. Rather, she testified that she would not have consented to the procedure on that particular day, since, due to her fear of surgery, she would

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1 [2003] 1 A.C. 32 [*Fairchild*].

2 [2004] U.K.H.L. 41, [2005] 1 A.C. 134 [*Chester*].

3 This syndrome is characterized by the impairment of the nerves at the lower end of the spinal cord. It can cause pain in the lower back and upper buttocks, lack of feeling in the buttocks, genitalia and thigh, as well as disturbances of bowel and bladder function.

have wanted to obtain at least a second, if not a third, opinion and that she would also have wished to explore other options. She pleaded that by not being informed, she *lost the opportunity* to reflect, consider and/or seek alternative opinions as to the options which might be open to her.[4] The trial judge, Taylor J., agreed with her, but found that she would ultimately have had the procedure in any case. Although under traditional causation principles, she would only have been able to satisfy the causal demonstration by proving she would probably not have undergone the surgery had she been warned of the risk, Taylor J. held the defendant liable for the injuries sustained in the operation. He believed that it was "improbable that any surgery she might eventually undergo would have been *identical* in circumstances (including the nature of the surgery, procedure and surgeon) to the operation she actually underwent…." This was sufficient to prove a causal link between the failure to warn and the damage suffered,[5] as per the majority decision in the Australian case *Chappel v. Hart.*[6] This decision, in Taylor J.'s opinion, supported a conclusion that all the plaintiff had to prove was that had she been properly advised, she would not have undergone the operation *when* she did.[7] What might have happened in the future was relevant to quantum only.[8]

The Court of Appeal refused to interfere with this decision. Before the House of Lords, the central question was whether the conventional approach to causation in negligence actions should be varied.[9] The House of Lords' majority judges responded positively, with a strong dissent from Lords Bingham and Hoffmann.

A. *The Dissent—The Orthodoxy*

Lord Bingham and Lord Hoffmann decided the case on a straightforward application of causal principles developed in informed consent cases. Lord Bingham asserted that the rationale of the duty to inform is to enable adult patients of sound mind to make for themselves decisions intimately affecting their own lives and bodies.[10] He recognised that satisfying the "but-for" test is a necessary if not a sufficient condition of establishing causation, and that it was not satisfied in this case.[11] In his opinion, causation would have been proven only if it had been shown either that if warned, the patient would probably not have agreed to surgery, or that she could and would have *minimised the risk* of surgery, by entrusting herself to a different surgeon or undergoing a different form of surgery.[12] As the trial judge had made neither finding, the injury was liable to occur whenever the surgery was performed and by whomever

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4 Emphasis added.
5 *Supra* note 2 at para. 81.
6 (1998) 195 C.L.R. 232 [*Chappel*].
7 Emphasis added.
8 *Supra* note 2 at para. 81. Compare the Supreme Court of Canada decision in *Reibl v. Hughes* [1980] 2 S.C.R. 880.
9 See Lord Bingham, *supra* note 2 at para. 1.
10 Lord Bingham, *ibid.* at para. 5.
11 *Ibid.* at para. 8. His Lordship stressed, however, that on the basis of *Fairchild,* it does not provide a comprehensive or exclusive test of causation in the law of tort.
12 *Ibid.* at para. 6 [emphasis added].

performed it.[13] Allowing the plaintiff to recover despite these conclusions would "be a substantial and unjustified departure from sound and established principle":[14]

> The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. I do not for my part think that the law should seek to reinforce that right by providing for the payment of potentially very large damages by a defendant whose violation of that right is not shown to have worsened the physical condition of the claimant.[15]

For Lord Hoffmann, the purpose of a duty to warn was to give the opportunity to a person to *avoid or reduce* the risk involved in what he proposes to do, or allows to be done to him.[16] If the person is unable or unwilling to take that opportunity and the risk eventuates, the failure to warn has not caused the damage.[17] Hence, in this case the plaintiff had to prove that she would not have had the operation at all.[18] Commenting on whether it was sufficient that the plaintiff would not have had the operation at that time or by that surgeon, even though the risk would have been precisely the same if she had it at another time or by another surgeon, Lord Hoffmann responded:

> In my opinion this argument is about as logical as saying that if one had been told, on entering a casino, that the odds on No 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail. The judge found as a fact that the risk would have been precisely the same whether it was done then or later or by that competent surgeon or by another.[19]

Consequently, Lord Hoffmann also decided that causation has not been proven.[20]

B. *The Majority—The Triumph of Policy*

While the frankness of the plaintiff should, on a strict application of causation rules, have led to the rejection of her case, the majority of the Law Lords granted recovery. For Lords Steyn, Hope and Walker, allowing the claim was mainly justified on the basis of policy.

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[13] See, too, Lord Hope: *Ibid.* at para. 7.
[14] *Ibid.* at para. 8.
[15] *Ibid.* at para. 9, on the basis of the dissent of McHugh J. in *Chappel*.
[16] Emphasis added.
[17] *Supra* note 2 at para. 28.
[18] *Ibid.* at para. 29.
[19] *Ibid.* at para. 31. This analogy is criticised by Lord Walker at paras. 97-98.
[20] *Ibid.* at paras. 31-32. His Lordship however accepted, at paras. 34-35, that damages could have been granted for grief resulting from the affront to the patient's right to choose, but he believed that the modest *solatium* that could be recovered compared to the cost of litigation over such cases would make the law of torts an unsuitable vehicle for distributing such modest compensation.

1. *Lord Steyn*

As Lord Hoffmann had done, Lord Steyn proceeded on the premise that if Miss Chester had agreed to surgery at a subsequent date, the risks associated with it would have been the same, *i.e.* 1-2 per cent. In an attempt to fit his analysis within the *causa sine qua non* test of causation, Lord Steyn argued that this demonstrated how improbable it is that she would have sustained neurological damage at this later date.[21] But for the surgeon's negligent failure to warn the claimant, the actual injury would not have occurred when it did and the chance of it occurring on a subsequent occasion was very small.[22]

This conclusion was heavily influenced by the importance which Lord Steyn attached to the rights of individuals to make important medical decisions affecting their lives for themselves[23] and the fact that the right to be informed is an "important right which must be given effective protection whenever possible".[24] He also insisted on the necessity in the context of attributing legal responsibility, to identify precisely the protected legal interests at stake.[25] In this specific case, these interests were the avoidance of the particular injury, the risk of which a patient is not prepared to accept, and the necessity to ensure due respect to the autonomy and dignity of each patient.[26] His Lordship did, however, state that such factors must be weighed against the undesirability of departing without good reason from established principles of causation.[27] Lord Steyn nevertheless showed a willingness to depart from such established principles on the basis of policy.[28] The main policy factor influencing him was the fact that:

> Her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles…. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs … [and] … reflects the reasonable expectations of the public in contemporary society.[29]

2. *Lord Hope*

Lord Hope was similarly influenced by policy factors and concerned with protecting patients' rights. For him, the problem in this case was that the failure to warn

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[21] *Ibid.* at para. 11.
[22] *Ibid.* at para. 19.
[23] *Ibid.* at para. 14.
[24] *Ibid.* at para. 17.
[25] *Ibid.* at para. 18.
[26] *Ibid.* at para. 18, referring to Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) at 224.
[27] *Supra* note 2 at para. 20.
[28] Resting the argument on *Chappel, supra* note 6, and *Fairchild, supra* note 1. His Lordship stressed (*supra* note 2 at para. 23) that *Chappel* reveals two fundamentally different approaches, the one favouring firm adherence to traditionalist causation techniques and the other a greater emphasis on policy and corrective justice. As for *Fairchild*, he believed it should not be restricted to its particular facts and that it shows that where justice and policy demand it, a modification of causation principles is "not beyond the wit of a modern court."
[29] *Ibid.* at paras. 24-25.

had not increased the risk of injury, which was inherent in the medical act itself[30] and was liable to occur at random, irrespective of the degree of care and skill with which the operation was conducted by the surgeon. Thus, the result would have been the same regardless of when or with whom she had the surgical procedure. Consequently, although one could say that Miss Chester would not have suffered her injury "but for" Mr Afshar's failure to warn her of the risks, as she would have declined the operation, it was difficult to say that his failure was the *effective* cause of the injury.[31] Nevertheless, Lord Hope insisted that the injury suffered by the patient was nevertheless within the scope of the doctor's duty to warn:[32] "[if] she had been given the warning she would have avoided that risk, and the chances of her being injured in that way if she had had the operation later would have been very small ...."[33]

On the basis of a careful review of *Chappel*, Lord Hope agreed that granting the patient's claim cannot be based on conventional causation principles since "to expose someone to a risk to which that person is exposed anyhow is not to cause anything."[34] The risk was not created by the failure to warn but was an inevitable risk of the operative procedure itself however skilfully and carefully it was carried out. It was not increased, and the chances of avoiding it were not lessened by the defendant's wrong.[35] Lord Hope nevertheless granted the claim, rejecting the concept of "common sense" as a justification,[36] preferring rather to rely on "policy":[37]

> [Q]uestions about causation tend to be issues of legal policy in disguise which are better answered by asking whether, all things considered, the defendant should be held liable for the harm which ensued, or, on another view, whether the harm was foreseeable as within the risk, or was within the scope of the rule violated by the defendant. I would prefer to approach the issue which has arisen here as raising an issue of legal policy which a judge must decide. It is whether, in the unusual circumstances of this case, justice requires the normal approach to causation to be modified.[38]

Lord Hope also insisted on the fact that it is the function of the law to protect the patient's right to choose.[39] The fundamental policy reason for allowing the claim was the fact that leaving this case without a remedy would render the duty to inform useless in the cases where it may be needed the most:[40]

> This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would

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[30] *Ibid.* at para. 61.
[31] *Ibid.* [emphasis added].
[32] *Ibid.*
[33] *Ibid.* at para. 62.
[34] *Ibid.* at para. 81.
[35] *Ibid.*
[36] *Ibid.* at paras. 83-4, agreeing with Lord Hoffmann's comments in *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd.,* [1999] 2 A.C. 22 at 29F.
[37] *Ibid.* at para. 85, relying on Hart and Honoré's preface to *Causation in the Law*, 2nd ed. (Oxford: Clarendon, 1985) at xxxiv-xxxv.
[38] *Ibid.* at para. 86, based on Hart & Honoré, *ibid.*
[39] *Ibid.* at para. 56. See also T. Honoré, "Medical Non-Disclosure, Causation and Risk: *Chappel v. Hart*" (1999) 7 Torts L.J. 1at 20, on which the court relied in *Chester.*
[40] *Ibid.* at para. 87.

> find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence.[41]

Lord Hope thus concluded, on policy grounds, that the test of causation was satisfied: "justice requires" that the plaintiff be compensated, as the injury she suffered at the hands of the defendant was within the scope of the very risk which he should have warned her about when he was obtaining her consent to the operation.[42]

3. *Lord Walker*

Lord Walker agreed with Lord Steyn and Lord Hope that the patient should not to be left without a remedy, "even if it involves some extension of existing principles, as in *Fairchild*…."[43]

Although the three majority decisions vary in their reasoning, there are some common propositions that can be extracted from them: 1) traditional causation principles can be departed from when it is necessary to do so; 2) policy can ground this departure; 3) policy factors to be taken into account include the increase of the risk to which the patient was otherwise submitted; 4) policy also requires assessing causation in light of the purpose for which the rule exists. The present rule exists for the protection of the patient's right to autonomy, dignity, and his right to choose, and it ought to be vindicated.

III. COMMENT

All the Law Lords in *Chester* agreed on one thing: according to the traditional principles guiding the assessment of causation in the law of medical informed consent, causation was not demonstrated in this case. Indeed, the evidence showed that 1) if the risk had been disclosed, the patient would have undertaken the same procedure, albeit at a later time; 2) this temporary postponement of the procedure would not have modified the nature of the risk to which the patient would have been exposed. A strict application of the subjective causation test normally relied on in the English law of medical informed consent should have led to the rejection of the claim.[44]

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[41] *Ibid.*

[42] *Ibid.* at paras. 87-8, adding that the reasoning of Kirby J. in *Chappel*, *supra* note 6 at para. 95, supports this conclusion. This passage indicates that questions of factual causation may have been confused with issues of legal causation/remoteness in this case. On this point, see Jane Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences" (2003) 119 Law Q. Rev. 387.

[43] *Ibid.* at para. 101. Like Lord Hope, he stressed (at para. 91) that the issue of causation cannot be properly addressed without a clear understanding of the scope of the defendant's duty.

[44] See however, the judgment of Lord Steyn, who used the fact that the risk has remained the same to argue that the probabilities were to the effect that the risk would not have occurred during the later hypothetical surgery.

C. *Causation in the Law of Informed Consent*

In English law, causation has to be strictly proven by plaintiffs who invoke a breach of the medical duty to inform and courts have opted for a subjective test when assessing this requirement; it asks whether the *specific* plaintiff would have nevertheless agreed to submit to the medical act if he had been informed of the risks associated with it.[45] However, this subjective test has not been applied without difficulties in informed consent cases. The main problem flows from the fact that the assessment of causation depends then almost entirely on the testimony of the plaintiff who, with hindsight, will often declare that he would not have undertaken the procedure if he had known of the risks associated with it. In response to such concerns, some decisions have relied on an amalgam of subjective and objective considerations,[46] by weighing the claimant's evidence against an objective criterion in order to assess its credibility; if the reasonable patient would have accepted the treatment, this may undermine the credibility of the claimant who argues he would not have.[47] However, the problem the Law Lords faced in *Chester* was entirely different and more complex. It rather turned on whether one can justify granting damages to a credible plaintiff who, based on the subjective approach reinforced by objective considerations, does not establish causation in the orthodox manner.

Before answering this question, one may consider whether it needed to be asked in the first place. Since the inherent risk to the claimant was the same regardless of when the operation took place, Lord Steyn concluded that it was improbable that she would have sustained the neurological damage since the probability that injury would occur during the latter surgery was only 1-2 per cent, thus not meeting the balance of probabilities.[48] This reasoning seems to imply that the causal inquiry in informed consent cases could be addressed in two steps. After examining what the specific plaintiff would have done if informed, one could carry out a hypothetical inquiry as to whether the choice exercised by the plaintiff would have allowed him to avoid suffering *injury,* as opposed to avoiding being submitted to the risk. When the plaintiff convinces the court that he would have never undertaken the medical procedure, the answer is simple: not only would the risk have been averted, but, as a result, the plaintiff would have escaped injury. But in a case where the act would nevertheless have been carried out at a later time and under different conditions, the answer is more problematic. In addition to assessing whether the risk would have then been different, one must ask whether the change of condition would have resulted in injury. While the answer to the first question may be relatively straightforward in

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[45] Michael A. Jones, *Medical Negligence* (London: Sweet & Maxwell, 2003) at para. 6-154.

[46] Michael Davies, *Medical Law* (London: Blackstone, 2001) at 175.

[47] Jones, *supra* note 45 at para. 6-154, citing *Hills v. Potter,* [1983] 3 All. E.R. 716 at 728, *Chatterton v. Gerson,* [1981] Q.B. 432 at 445 and *Smith v. Barking, Havering and Brentwood Health Authority* unreported, 29 July 1989, on which the Court of Appeal relied in *Chester, supra* note 2 at para. 16. The same approach is adopted, under the name of "rational subjectivity " in the Canadian civil law province of Quebec: *Drolet v. Parenteau,* [1994] R.J.Q. 689 (Qué. C.A.).

[48] See also Hayne J. in *Chappel, supra* note 6: In this specific case, the infection was such a rare event that it was very unlikely that it would have happened if the operation had been performed on another day. See, to a similar effect, Peter Cane commenting on *Chappel*: Peter Cane, "A Warning about Causation" (1999) 115 Law Q. Rev. 21 at 22. Similarly, see Jane Stapleton's distinction (*supra* note 42 at 419) between factual causation and the scope of liability. She situates (correctly, in the opinion of this writer) the question raised in *Chester* in the latter category.

many cases, as it was in *Chester*, imagining whether injury would have followed or not in the hypothetical situation is more complex. Normally, the only evidence available in this respect will be the probabilistic evaluation of the inherent risk associated with the later procedure. In every case, however, the statistical probability is likely to be under 50 per cent, thereby constantly showing a probability that the injury would not have occurred at this later time, leading to automatic liability in every case. Indeed, it will be particularly arduous for defendants to counter the statistical evidence by establishing that in the hypothetical situation, the plaintiff would have been as unfortunate as he was in the situation that really took place. The proof of the slightest change in circumstances will have the effect of allowing the plaintiff to recover. Although the analysis appears to obey a traditional balance of probabilities assessment, the result is fallacious in its over-inclusiveness and leads instinctively to the belief that something must be wrong with the reasoning. The Law Lords escaped this difficulty, however, by reinforcing their position with an injection of policy, thereby avoiding an answer to the extremely difficult question just posed.

D. *Policy as a Justification away from Orthodoxy*

Two very influential decisions in this respect, on which Lord Steyn based his majority judgment, are *Chappel* (Australian High Court)[49] and *Fairchild* (English House of Lords).[50] Common to these two rulings is a clear willingness to depart from the but-for test when thought appropriate to do so, and an acceptance that such departure can be justified solely on policy grounds.

Although issues of policy are often said to be reserved for the legal causation (remoteness or scope of liability) analysis, it is now accepted that the factual causation stage is not devoid of policy considerations, especially in cases involving uncertainty. Recent common law cases involving uncertain causation have given rise to interesting discussions of policy considerations on the basis of which courts have agreed to relax principles of factual causation in order to assist plaintiffs. Tony Honoré recognised this reality when he wrote: "legal policy may impose liability in tort despite the fact that the plaintiff has failed on the balance of probabilities to prove causal connection,"[51] although he did warn that this judicial power must be exercised with caution.[52] Such a tendency in medical liability cases has been increasingly observed in jurisdictions like Canada and Australia.[53] In the meantime, English courts have been more timid in their response to causal uncertainty in medical liability litigation, staying true to the orthodox requirement of proof on the balance of probabilities of but-for causation or material contribution to the injury, and refusing to depart from orthodoxy.[54] However, they have proved willing to deviate

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[49] *Supra* note 6.

[50] *Supra* note 1.

[51] Honoré, *supra* note 39 at 15.

[52] *Ibid.* at 20-1, giving *Chappel* as an example of such cases.

[53] E.g. in Canada: *Snell v. Farrell* [1990] 2 S.C.R. 311 [*Snell*] at 320.

[54] *Wilsher v. Essex Area Health Authority*, [1988] 1 A.C. 1074 (H.L.) [*Wilsher*]. This position was reiterated very recently in *Gregg v. Scott,* [2005] U.K.H.L. 2 [*Gregg*]. In most of the English medical malpractice cases in which causation has been debated since *Wilsher*, the controversies or uncertainties have been resolved by applying the balance of probabilities requirement to a detailed analysis of the facts and the

dramatically from it in cases outside medical malpractice.[55] These departures have invariably been based primarily on policy rather than principle. The fundamental idea on which the House of Lords rested its approach in *Chester* is therefore not totally foreign to common law, although it had never been relied on so predominantly in British medical liability cases before. Thus, the importance of policy in addressing factual causation issues is not a novel idea, although this popularity is recent and has been restricted to specific cases.[56] Taking for granted that policy can indeed ground a shift from normal factual causation requirements, one is still left with the question of which policy concerns are compelling enough to justify such a departure.

E. *Which Policy Considerations?*

1. *Increase of Risk*

A first consideration, invoked by Lord Hoffmann and Lord Bingham in their dissent, and indirectly by Lord Steyn, is that causation is shown if it can be demonstrated that having surgery at another time would have reduced the risk to which a patient is submitted. What distinguishes *Chester* from *Chappel* is the fact that, in the former case, it was found that at whatever time the claimant would ultimately have undergone the procedure, she would have faced the same inherent risks associated with it. Conversely, in *Chappel,* the majority agreed that the risk of injury would have been reduced if the procedure had been delayed and undertaken by a more experienced physician.[57] For the dissenting judges in *Chester*, the absence of any reduction of the risk in delaying the procedure or in having it carried out by another surgeon prevented the plaintiff from recovering. Lord Hoffmann was willing to vary the traditional subjective causal test by accepting that causation is proven if it can be shown that, if warned, the patient would probably not have agreed to surgery, or could and would have *minimised the risk* associated with it by entrusting herself to a different surgeon, or undergoing a different form of surgery.[58] Lord Steyn did not raise this point as strongly, but it is striking that the two cases which primarily

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expert evidence, and without addressing the plaintiff's hurdles in demonstrating causation: *e.g.*, *Newbury v. Bath District HA* (1999) 47 B.M.L.R. 138 (H.C.) at paras. 5 and 12 and *Smith v. NHS National Health Service Litigation Authority,* [2001] Lloyd's Rep. Med. 90 [H.C.] at para. 20. See also *Elvicta Wood Wood Engineering Ltd v. Huxley* (C.A.) at 13 (industrial disease). Some cases nonetheless rest their analyses on inferential reasoning: eg, *Mirza v. Birmingham Health Authority* (Q.B. 31 July 2001) 8-9, *Webb v. Barclays Bank Plc*, [2001] Lloyd's Rep. Med. 500 (C.A.).

[55] Most notably in the recent decision of the House of Lords in *Fairchild, supra* note 1, involving industrial disease. See also *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 (H.L.).

[56] See however the criticisms of doctrinal authors and judges: e.g. Honoré, *supra* note 39 at 6-7. See also McHugh J. in *March v. Stramare* (minority judgment): (1991) 171 C.L.R. 506, 65 A.L.J.R. 334 (H.C.A.) [*March*] at 532-3. To similar effect, see Lord Nicholls, dissenting in *Fairchild, supra* note 1 at para. 43.

[57] Compare with the minority decision which considered the occurrence of the risk was "random" and therefore a "coincidence, and which took the view that it would not be fair to hold the doctor responsible for the chain of events. See also Cane, *supra* note 48 at 23-4 and Honoré's comment (*supra* note 39 at para. 10, with reference to *Chester*) that "[t]o cause something is to intervene so as to alter the existing or expected course of events. Hence to expose someone to a risk to which that person is exposed anyhow is not to cause anything." Honoré believed that the plaintiff should nevertheless recover on the basis of policy.

[58] *Chester, supra* note 2 at para. 6 [emphasis added].

inspired him in reaching his majority decision, *Chappel* and *Fairchild*, rest their policy reasoning on the fact that the defendant's negligent behaviour increased the risk of injury to the plaintiff.[59]

These stands on increase of risk as a justification for a lenient causal analysis are at odds with the most current judicial position on the use of increase of risk in assessing medical causation in England. In *Wilsher* a case involving more than one possible distinct and solely sufficient cause of the plaintiff's injury,[60] Lord Bridge explained that the only way the plaintiff's claim could succeed was by establishing, according to the traditional rules of evidence, that the defendant's fault was more likely the cause of the damage than all the other possibilities combined or any single possibility. It was not enough to show a material increase in risk occasioned by the defendant's negligence; to succeed, the plaintiff had to demonstrate that the defendant's negligence materially contributed to his loss. This position was reinforced in *Fairchild*, in which the House of Lords indicated clearly that *Wilsher* was still good law and that the material contribution to the risk approach could not assist the plaintiff where not all the sources of the risk were created by the defendant, as in *Chester* where the risk realised was inherent to the procedure itself.[61] Moreover, recently, the British House of Lords refused to be influenced by *Fairchild*'s policy approach in a case dealing with medical malpractice.[62] In *Gregg*, the House of Lords argued that justice would be best achieved by legal certainty and refused to follow *Fairchild* or to rely on the loss of chance reasoning in a medical liability case involving the late diagnosis of a cancer. Because of the restrictions imposed on the application of *Fairchild,*[63] as well as the policy considerations specific to it, the House of Lords refused to extend its principle to this case. It argued that the *Fairchild* rule was restrictively defined in terms which made it inapplicable to *Gregg*.[64] Lord Philips stated clearly: "it seems to me that there is a danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed."[65]

In any event, while the fact that the defendant had increased the risk of the plaintiff suffering injury was a major consideration for agreeing to relax the rules of causation in both *Chappel* and *Fairchild*, such justification, good or bad,[66] was absent in *Chester*. In this case, the evidence had not shown that having the operation later on, in different conditions, would have reduced the risk of injury. The statistical chance was the same in both cases. Stapleton describes such case as involving coincidental consequences of a piece of conduct which she defines as "a consequence

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[59] See Gaudron J. in *Chappel, supra* note 6 at para. 9; and McHugh, dissenting in the same case at para. 28. See also *Fairchild, supra* note 1 at paras. 21 and 35 (Lord Bingham). See also similarly para. 45 (Lord Nicholls), para. 46 and 65 (Lord Hoffmann), and paras. 142 and 144 (Lord Rodger).

[60] The baby plaintiff, born premature, suffered from retrolental fibroplasias which could have been caused by the defendant doctor's negligence or by conditions from which babies born premature suffer, such as apnoea, hypercarbia, intraventricular haemorrhage, and patent *ductus arteriosus*.

[61] On this, see Stapleton, *supra* note 42 at 398.

[62] *Gregg, supra* note 54 at para. 85 (Lord Hoffmann), and 174 (Lord Philips).

[63] Lord Hoffmann imposed five conditions: *supra* note 1 at para. 61. Lord Rodger also noted the need not to extend *McGhee* too far and imposed six conditions: *supra* note 1 at paras. 169-70.

[64] *Gregg, supra* note 54 at paras. 78 and 85.

[65] *Ibid.* at para. 172.

[66] We have elsewhere criticised this justification for relaxing the rules of causation: L. Khoury, *Uncertain Causation in Medical Liability*, forthcoming (Oxford: Hart Publishing, 2006).

the risk of which is *not generally* increased by the occurrence of that conduct."[67] She observes that courts are usually wary about holding defendants liable for a coincidental consequence of the defendant's tort, even if it is foreseeable.[68] In her opinion, cases such as *Chester* and *Chappel* "raise the issue of when, if ever, and why coincidental consequences should be judged within the appropriate scope of liability for the tort of negligence".[69] The House of Lords answered through reliance on the importance of the scope of the rule.

2. *The Purpose of the Rule—Protection of the Patient Right to Autonomy, Dignity, and His Right to Choose*

A second factor, relied on by Lord Steyn and Lord Hope, was the importance of protecting the patient's right to autonomy and dignity, his right to be informed, and his right to choose.[70] For Lords Steyn, Hope and Walker, a significant issue when assessing causation was the identification of the purpose of the rule, here the doctor's duty to warn, and the question of whether their decision would serve its achievement. This factor had a tremendous impact, especially since the rule in this case aimed at protecting fundamental rights, namely the patient's right to autonomy and dignity and her right to choose. Both Lord Steyn and Lord Hope insisted that the patient's right of autonomy and dignity "can and ought to be vindicated" and that the right to be informed is an "important right which must be given effective protection whenever possible".[71] Lord Hope was also influenced by Michael Jones' argument that the greater the difficulties that stand in the way of the patient on these issues, the more difficult it is to say that the law of informed consent works as a means of protecting patient autonomy.[72]

The idea, again, is not new. Several cases both inside and outside the area of medical malpractice have stressed that the assessment of causation will vary according to the purpose for which the question is asked. In *Environment Agency v. Empress Car Co. (Abertillery) Ltd.*,[73] Lord Hoffmann argued that while "the notion of causation should not be overcomplicated", it should not "be oversimplified" and emphasised that "common sense" answers to questions of causation will differ according to the purpose for which the question is asked and the rule by which responsibility is being attributed. In particular, "one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule".[74] In *Fairchild*, Lord Hoffman reiterated this principle, adding that "[o]nce it is appreciated that the rules laying down

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[67] Stapleton, *supra* note 42 at 418 [Emphasis in original text].

[68] *Ibid.* at 418-419. Stapleton cites *Chester* (C.A.) and *Chappel* as proof.

[69] *Ibid.* at 419.

[70] Lord Hope and Lord Walker also argued that leaving this case without a remedy would render the duty to inform useless in the cases where it may be needed the most.

[71] *Chester, supra* note 2 at para. 24 (Lord Steyn) and para. 87 (Lord Hope).

[72] Michael Jones, "Informed Consent and Other Fairy Stories" (1999) 7 Med. L.Rev. 103 at 129, cited in *Chester, supra* note 2 at para. 58.

[73] *Supra* note 36 at 29. See also *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos 4 and 5)* [2002] 2 W.L.R. 1353 at para. 128 and Lord Hope in *Gregg, supra* note 54.

[74] Relied on in *March, supra* note 56.

causal requirements are not autonomous expressions of some form of logic or judicial instinct but creatures of the law, part of the conditions of liability, it is possible to explain their content on the grounds of fairness and justice in exactly the same way as the other conditions of liability."[75]

Although Hayne J., dissenting in *Chappel,* agreed, he stressed that that connection was not enough. Nor was it sufficient to say that a purpose of this area of the law is to promote reasonable conduct by medical practitioners and, particularly, the giving of advice necessary to enable people to make their own decisions about their lives: "[t]he ambit of the liability is not to be decided only according to whether enlarging that ambit will promote careful conduct". Hayne J. recalled that the question of causation must still be answered,[76] a view with which this writer agrees. The purpose of the rule should not be a justification in and of itself for ignoring absence of causation. Accepting such an argument would have the effect of allowing recovery on the basis of fault and injury simply to vindicate rights without insisting on the proof of what is still a fundamental requirement under negligence law, that the breach of these rights has indeed caused the injury. Damages could be granted every time a duty that can be described in terms of human rights has been breached.[77]

F. *Why Not Loss of a Chance?*

The focus on the issue of relative risks, as well as the predominance given by the House of Lords to the protection of the patients' rights, leads one to conclude that *Chester* ultimately demonstrates the advantage of admitting the loss of chance reasoning in certain medical malpractice cases. Indeed, what the plaintiff argued in this case is essentially that she had lost an opportunity to change the circumstances in which the inherent risk associated with the surgery would be taken, not that the defendant had created or even increased the risk itself.[78] Lords Steyn and Hope attempted, through other means, to meet one of the goals that a loss of chance argument would essentially seek to achieve, namely the recognition that the right to choose has an intrinsic value which is worthy of legal protection. They did so, however, by granting (full) recovery despite the absence of orthodox causation in order, essentially, to afford legal protection to a right they feared would be left unprotected should the strict application of causal principles be insisted on.

Despite its drawbacks,[79] the loss of chance reasoning would have helped the court deal with the dilemma of applying the rules of causation and vindicating the patient's rights. Could it not be pleaded, for instance, that by getting the plaintiff to enter into a chain of events in which she would not otherwise have taken part,

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[75] *Fairchild, supra* note 1 at paras. 48-9 and 54. See also Kirby J. in *Chappel, supra* note 6 and Hayne J., dissenting in the same case: *supra,* note 6 at para. 123.

[76] *Ibid.* at para. 126.

[77] See Jacqueline Perry, "Personal Injury Update" (2004) New L.J. 154.7154 (1781) (26 Nov 2004).

[78] See Charles Foster, "Last Chance for Lost Chances" (2005) New L.J. 155.7164 (248) (18 Feb 2005), commenting on *Gregg, Fairchild* and *Chester:* "…arguments about lost chances will not be silent; they will just become rather more subtle".

[79] See Khoury, *supra* note 66.

the defendant made her lose something of value which can form actionable injury? Indeed, instead of defining the "injury" as the loss resulting from the realisation of the risk, it could easily be redefined as the loss of the opportunity to choose to avoid or to modify the inherent risk to which the plaintiff was submitted without her knowledge. However, this is not a route the House of Lords chose to follow. This is hardly surprising given the reluctance this court has shown in the recent past towards such reasoning.[80] Moreover, in *Chappel,* a case that was instrumental to the majority judges' opinions, the loss of chance argument was also met with great reluctance. For Gaudron J., the damage sustained by the plaintiff was not the loss of a chance but the physical injury which she, in fact, sustained.[81] McHugh J., dissenting on another issue, believed this was not a case concerned with loss of a chance because no part of the relationship between the plaintiff and the defendant involved the plaintiff being given the opportunity to seek a higher standard of care or better treatment from another surgeon or an opportunity to have the procedure carried out without injury. The damage that the plaintiff suffered was physical injury, not loss of a chance or opportunity.[82]

In this light, *Chester* could hardly be decided on this basis. However, one cannot help but notice that, more than the injury itself, which primarily flowed from the realisation of an inherent risk not due to the defendant's wrong, what the defendant caused was the loss of the opportunity to avoid the coincidental realisation of this risk or, in other words, the loss of the chance to choose to modify the conditions in which this risk could materialise. By trying to avoid relying on loss of chance at all costs, the House was guilty of overkill: it granted full recovery for the final injury when the loss could more logically be described restrictively as the opportunity to meet a hypothetical result. The weaknesses in the reasoning ultimately relied on in *Chester* might be the result of the struggle of judges who attempted in this case to justify compensation without resorting to loss of chance. Still, the reasoning sought indirectly to compensate for a lost opportunity without admitting that this was the case, which ultimately caused the House to grant full recovery for the ultimate injury while loss of chance would have only led to a partial one.

IV. Conclusion: A Future for *Chester*?

Given all these criticisms, could one say that there is a chance of survival for *Chester*? As was the case for *Fairchild,* one must conclude that this is, yet again, an isolated radical departure from orthodoxy that will be restricted to its own facts. Indeed, the implications of such a case are too wide to allow it to become the rule. It not only opens the door to full recovery in almost all cases involving the breach of the medical

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[80] See *Hotson v. East Berkshire Area Health Authority,* [1987] 1 A.C. 750 (H.L.) and the recent refusal to accept the argument in *Gregg, supra,* note 54 at para. 90.

[81] This is a classical argument against the loss of chance technique: see *e.g.* in Canada: *Laferrière v. Lawson* [1991] 1 S.C.R. 541.

[82] *Supra* note 6 at para. 50. See also a similar argument developed by Hayne J., dissenting on another issue: at para. 139. In the same case, Kirby J. (a majority judge) however accepted at para. 93 that damages should be reduced if, independently of the breach on the part of a defendant, the evidence showed that the plaintiff would have suffered loss, the damages may be reduced by reference to the estimate of the chances that this would have occurred.

duty to inform, but could easily be extended to all instances of professionally rendered advice. The English courts did not wait long to recognise this danger. Indeed, all the English courts' decisions that have cited *Chester* have refused to follow it or have sought to distinguish it in some way or another.[83] The Court of Appeal refused to adopt its reasoning in *White v. Paul Davidson & Taylor*,[84] a claim involving an allegation of negligent handling of litigation by a solicitor. Ward L.J. considered *Chester* to be an "unusual case" where departure from traditional causation principles was necessary for policy reasons. Arden L.J. insisted that the principle of informed consent to medical procedures has a special importance in law, adding that *Chester* does not establish a new general rule in causation and that the policy considerations present in that case, could not be found in the present one.[85] Because none of the long-established authorities on causation were overruled by the House of Lords in *Chester*, "it would not be right for this court to apply *Chester* in preference to those traditional principles."[86]

According to this analysis, *Chester* is an atypical case of medical liability involving special considerations. This is not a view with which this writer agrees. The facts involved in *Chester* are actually quite characteristic of this area of the law, and it is likely that the rational response of any patient who is in need of non-urgent or elective surgery will be, *ex post facto,* that disclosure of risk would have prompted him to reflect further on the opportunity to have such surgery and to seek additional advice. Nor does *Chester,* as did *Fairchild,* entail policy considerations that are restricted to this particular situation, since the right to dignity and autonomy are predominant in most medical cases, as is the right to bodily integrity. Moreover, while it may involve policy considerations favourable to the plaintiff, such as the importance of the right to autonomy, it also requires taking into account compelling policy concerns in favour of the defendant, such as the need to avoid overburdening the medical profession and the public health system.

Chester leaves us with a series of unanswered questions. When exactly can policy be relied on in these cases to depart from a restrictive view of the subjective test of causation? Does increase of risk ground an alternative causal approach in cases in which the plaintiff's response to the risk would have been to change the circumstances in which the medical procedure would take place? Or is the House of Lords ultimately telling us that because of the importance of the aim of the rule at stake, one can go further and forgo the causal requirement altogether? Ultimately, this is where the true issue lies: is the aim of protecting the patient's dignity and right to choose compelling enough to eliminate causation as a formal requirement for medical liability (in cases where the conditions under which the risk would have been taken would be modified by the plaintiff's decision)?

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[83] See also the doctrinal criticism: *e.g.* Peter Causton, "Professional Negligence: Causation Effect (2005) The Lawyer 24 (7 Feb 2005), Perry, *supra* note 77.

[84] [2003] EWCA Civ. 1511.

[85] *Ibid.* at paras. 40-42.

[86] In *Gregg,* Baroness Hale of Richmond was of a similar opinion: *supra* note 54 at para. 192. See also *Beary v. Pall Mall Investments (a firm),* [2005] EWCA Civ. 415, [2005] All. E.R. (D) 234 (Apr). The court concludes by asking "If the established principles of causation are to be abandoned, what is to take their place?" See also the reaffirmation of the but-for test despite *Chester* in *Al Hamwi v. Johnston* [2005] EWHC 206 (Q.B.), [2005] All. E.R. (D) 278 (Feb).

Chester v. Afshar may have succeeded in demonstrating the necessity for English law to address directly and clearly the issue of medical loss of chance and take a clear stance on whether the achievement of the policy goals set out by cases like *Fairchild* or *Chester* would not be better met through this technique. It is also to be hoped that it is the beginning of a serious and open debate as to which policy reasons may be stringent enough to allow for departures from normal causal and evidential requirements.