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ARTICLES

JAMES McGHEE—A SECOND MRS. DONOGHUE?

LORD HOPE OF CRAIGHEAD*

I DO not imagine that there is anyone who has anything to do with personal injuries litigation who has not heard of Mrs. May Donoghue. Her encounter with a partially decomposed snail at the Wellmeadow Café in Paisley is part of our folklore. The law of liability for negligence was revolutionised by the decision of the House of Lords in *Donoghue* v. *Stevenson*.[1] Indeed, one might even say that the modern law of negligence was created by it. Articles which are too numerous to mention have been written about her case.[2] Some years ago alumni of the University of British Columbia organised a pilgrimage to Paisley to celebrate the 60th anniversary of the event. It was sponsored by the Canadian Bar Association, the Law Society of Scotland and the Faculty of Advocates. Among those present were the Lord Chancellor, Lord Mackay of Clashfern, Madame Bertha Wilson of the Supreme Court of Canada and Mr. Justice Brennan of the High Court of Australia. As a memento of the event we were all presented with a small bottle of ginger beer. Needless to say, the bottle is brown and it is opaque. I have yet to summon up the courage to open the one which I was given. It still sits unopened on my bookcase. A model of a small snail can be seen climbing up one side of it.

Mrs. Donoghue has been described as a very poor lady who became the pursuer in a classic case.[3] But who has heard of James McGhee? He too was the pursuer in an action of damages for personal injury. Like Mrs. Donoghue he raised his action in the Court of Session in Edinburgh. He too lost in that court, both at first instance and on appeal. As in Mrs. Donoghue's case, the decisions at that level were not thought worth reporting in full in

* The Personal Injuries Bar Association Lecture 2002.
[1] *Donoghue* v. *Stevenson* [1932] A.C. 562; 1932 S.C. (H.L.) 31.
[2] For a detailed account of Mrs. Donoghue's life and backgound, see A. F. Rodger, *Mrs. Donoghue and Alfenus Varus* (1988) 41 Current Legal Problems 1.
[3] Rodger, *op. cit.*, p. 9.

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the law reports.[4] Then he too took his case to the House of Lords.[5] As in Mrs. Donoghue's case, the Law Lords found in his favour. And, as I shall hope to demonstrate, his case too was a classic, if rather puzzling, case. It has turned out to be a case of the greatest importance for the humane development of our law relating to liability for personal injury.

There were some differences, of course. Mrs. Donoghue's case was decided on the pleadings. The case never went to proof. So it was never proved that there was a snail in the bottle, nor was it ever proved that she did actually suffer any personal injury as a result of whatever may have come out of it. Mr. McGhee's case however was decided on the evidence. It was proved that he was indeed suffering from dermatitis, and it was admitted that his dermatitis was attributable to the work which he did in the course of his employment with the National Coal Board. The decision in Mrs. Donoghue's case was by a majority. In McGhee's case it was unanimous. But each of their Lordships in McGhee's case delivered a separate opinion, and an examination of their reasoning will show that it was far from uniform. Part of the fascination of Mrs. Donoghue's case lies in the fact that we shall never know what actually happened when she went to the café that morning. In McGhee's case it lies in the exercise of analysis that has to be done to discover whether a principle of law was decided by his case and, if so, what it was.

But it is time to say a little bit more about James McGhee and the small town of Prestonpans where he lived, which lies a few miles to the east of Edinburgh. He was aged about 36 when his case went to trial. He entered the employment of the National Coal Board almost immediately after leaving school. Throughout his time with them he worked in their brickworks at a place nearby called Prestongrange. For most of the fifteen years that he was there he was working in a series of circular kilns, known as the Beehive Kilns, each of which was used independently for making pipes. But at the end of March 1967 he was sent to work in a much larger structure known as the Hoffmann Kiln, which was used for making bricks.

The Hoffmann Kiln was named after the method of moving the bricks through the kiln. This was done according to a method which had been developed by Friedrich Hoffmann in Germany in the middle of the 19th century.[6] It involved a series of arched

[4] There was a brief report of the judgment of the Inner House in 1972 S.L.T. (Notes) 61, but none in the Session Cases until after the judgment of the House of Lords had been issued.

[5] *McGhee* v. *National Coal Board* [1973] 1 W.L.R. 1; 1973 S.C. (H.L.) 37.

[6] The name of Friedrich Hoffmann is closely linked to the development of continuous kilns. The first continuous kiln was built at Konstanz in 1864. His original design underwent various

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chambers connected by passages to one main chimney flue. The structure at Prestongrange, which was built to an improved design, consisted of a rank of twenty-four chambers or burning zones within a single tunnel-shaped building. The chambers were arranged along a central spine, and there were ducts under the floor which led to a single smoke stack which stood apart from the main building. The waste gases passed through all twenty-four chambers before they escaped to the chimney. This enabled the newly made, or green, bricks to be dried and partially burnt before the bricks were fired in the chambers in which they were set.

The process involved two teams of men, known as the green team and the burnt team. The job of the burnt team, to which McGhee was assigned, was to remove the bricks from the burning zones inside the kiln when the baking process was over. The floor of the kiln was covered in ashes from the coal burnt in the fires at the rear of each burning zone, and the men spent much of their time covered in ashes and brick dust. Five days after he had been sent to work there McGhee developed dermatitis on his arms, legs and body and he had to leave his employment with the National Coal Board. How this all came about requires some understanding of the geography.

Prestonpans lies on the south side of the Firth of Forth, between the sea and the main east coast railway line. It takes its name from salt pans which began to be worked there by monks of a Cistertian Abbey in the 12th century.[7] Later there was coal mining, and in the 19th century a deep seam colliery was opened at Prestongrange. As time went on a variety of different operations were carried on at this site. In addition to coal mining, there were kilns for making pipes and bricks. They were made from clay which was available locally and had been used for this purpose since the 17th century. The kilns were fuelled by coal from the colliery. The pipes and bricks were exported to all parts of Britain and Europe from Morison's Haven. Originally this was not much more than a creek, and it has now been filled in. But for a time, after improvements which were made in the 18th century, it became one of the safest harbours on the Firth of Forth[8] and it was in use

improvements as his method was adopted elsewhere in Europe: *A History of Technology* (Oxford 1958), vol. V, pp. 666–668.

[7] It is also the scene of a famous battle which took place in 1745 when, after an engagement lasting only about ten minutes, Prince Charles Edward Stuart's troops defeated an army commanded by Sir John Cope who fled to England, being the first, it is said, to carry the news of his own defeat.

[8] It is mentioned in a marine insurance case, *Wilson & Co* v. *Elliot* (1776) Mor 7096 in which a vessel which was to go from Carron Shore, near the modern port of Grangemouth, to Hull with liberty to call at Leith called at Morison's Haven instead which was "six miles distant": see also W. A. Wilson, *Introductory Essays on Scots Law* (2nd ed., Edinburgh 1984), 78.

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until the end of the First World War as the local seaport. The colliery was still there when McGhee started working for the National Coal Board. It closed in 1963, but the premises remained open for the making of pipes and bricks until the early seventies. They too have been closed and the brickworks no longer exists. The site is now an open air musuem. It illustrates the social history of six centuries of mining in this part of Scotland. Some of the buildings are still there, including that which contained the Hoffmann Kiln where McGhee worked together with its smoke stack. Various large pieces of equipment such as coal wagons, a shunting engine and a giant beam pumping engine, which was constructed in the 1830s from parts shipped from Cornwall, are on display.

Mining for coal is dirty work, as everyone knows. So the Board provided shower baths for the miners. They were in a modern building which was put up at the colliery in the mid 50s, and everyone who worked on the premises could use them. But when the colliery was closed in 1963 the baths were closed too. The building was used instead by a veterinary practice for large animals as their surgery and then for breeding beagles, possibly for research purposes. Men who worked in the kilns now had to make their own arrangements for cleaning up after work. Basins and towels were provided on the premises. There was hot and cold water and usually, but not always, there was soap. But for those who wanted to get completely clean the closing of the baths meant having a bath or a shower when they got home. This was the practice which was followed by James McGhee.

James McGhee lived at 15 Gardiner Crescent. This is a semi-detached house in what used to be an area of council housing, lying close to the south eastern extremity of the town. As a result of the "right to buy" legislation in 1980[9] which gave tenants of local authority dwelling-houses the right to purchase their houses at a substantial discount, most if not all of the houses there are now privately owned. They are attractively decorated, and there are neatly maintained gardens to the front and the back of them. The stark uniformity and tendency to decay which one associates with a council estate has gone. But there is one feature at least which has preserved a measure of uniformity. Almost all the houses, including the one where McGhee lived, are now equipped with television satellite discs. This area of housing is situated on the opposite side of the town from Prestongrange. It is also at the highest point of the town close to the railway line. You can just see the tops of the

[9] The right was introduced by Part I of the Tenants' Rights, Etc (Scotland) Act 1980; now consolidated, with amendments, by the Housing (Scotland) Act 1987, s. 61 *et seq.*

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houses from the GNER train to Edinburgh before it runs into a cutting alongside them. On the other hand Prestongrange, where he worked, lies close to the shore to the west almost at sea level. The contours of the ground were of more than passing interest to McGhee, as his practice was to travel to and from his work by bicycle. The distance he had to travel on his bicycle was about four kilometres on the Ordnance Survey Map or about two and a half miles, as he would have thought of it. It took him between 10 and 15 minutes to travel this distance by means of his bicycle.

On his way to work the journey was quite easy. At first the route was more or less level. Then there was a long descent of a mile or so past the school and the church to the High Street. Then there was a steady run more or less on the level again through the old town, past the Railway Hotel, the war memorial, the town hall and the Lady Susan Public House,[10] to the brickworks a short distance beyond its western end. But the return journey after work was a different matter. Not only was there the effort required at the start if the wind was in his face off the sea as he cycled eastwards through the town. There was then the long climb up the hill when he got to the eastern end of the High Street. It was not so steep that he would have had to get off and push his bicycle. But it was a long and steady incline, and it is unlikely that his bicycle was equipped with as many gears as a modern mountain bike. Lord Reid was later to sum up the position in these words:[11] "This man had to continue exerting himself after work by bicycling home while still caked with sweat and grime". If you were to ride along the same route today you would not regard this description as exaggerated.

McGhee's case against the National Coal Board was not an easy one. His problem was that no-one was able to describe the precise sequence of events that led him to contract the dermatitis. It was a problem of causation. As Lord Reid put it,[12] the medical evidence was to the effect that the fact that he had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. But it did not and could not explain just why that was so. Nevertheless he took his case to the Court of Session on the basis of pleading which asserted that the various breaches of duty which he alleged against the National Coal Board "caused said disease".

Most of the allegations of breach of duty were departed from in the course of the proof which took place in the Outer House before

[10] Named after Lady Susan Grant Suttie (1878–1946), a popular philanthropist who lived at Prestongrange House and took a close interest in the welfare of the local community.
[11] [1973] 1 W.L.R. 1, 3H.
[12] [1973] 1 W.L.R. 1, 4H.

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Lord Kissen. But it was contended that it had been proved that the Board was at fault in two respects. It was said that they failed to take reasonable care to see that the kilns had cooled sufficiently before the men were sent in to work there and remove the bricks. It was also said that they failed to provide adequate washing facilities including shower baths to enable the men to remove dust from their bodies.

Lord Kissen rejected the first of these two arguments on the ground that it was not established by the evidence. He held that the Board were at fault because they did not provide shower baths. But he held that a causal connection between the fault and the contraction of the disease had not been established. He is not to be criticised for doing this, as he was simply applying the law as it was generally understood to be at that time. This was that the onus of proof lay on the workman to show on a balance of probabilities that the employer's breach of duty caused or materially contributed to his injury.[13] As Lord Kissen put it:

> He cannot succeed if the only inference from the evidence is that lack of shower baths is a possibility as a cause of his having contracted the disease and that the provision of shower baths would have increased the possibility but not made it a probability.

The furthest the medical witnesses were willing to go was to say that the provision of showers would have materially reduced the risk of contracting the disease. But Lord Kissen rejected the argument that a material increase in the risk was the same thing as a material contribution to the disease. The judges in the Inner House agreed with him. Lord President Clyde said that the risk of dermatitis and the cause of dermatitis were two separate matters.

This was the starting point for the debate which took place when James McGhee's case reached the House of Lords. The scene was set by the way in which the written cases had been framed. McGhee's counsel were Kemp Davidson Q.C.[14] and Hugh Morton, Advocate,[15] each of whom in his own way was a master of the art of advocacy in this field. They had clearly decided to face up to the fundamental difficulty in the case head on. They contended in their written case that it was enough for McGhee to have proved that the Board's failure to provide shower baths "materially increased the risk" of his contracting dermatitis. This was their only point.

[13] See *Wardlaw* v. *Bonnington Castings Ltd.* [1956] A.C. 613, 1956 S.C. (H.L.) 26.

[14] Subsequently the Hon. Lord Davidson, a Court of Session Judge, who for eight years was also Chairman of the Scottish Law Commission.

[15] Subsequently the Rt. Hon. Lord Morton of Shuna, on his appointment to the House of Lords as shadow Lord Advocate and then a Court of Session Judge.

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They had no fall back position. For the counsel for the Board[16] it all seemed too simple. They based their argument on the proposition that a material contribution had to be proved. They relied on the admitted fact that the evidence was insufficient to show that the use of showers would probably have prevented the disease. As everyone knows, the Board lost the argument. Precisely why they did so has been much disputed ever since.

Lord Reid rejected the distinction which the Lord Ordinary had drawn between materially increasing the risk that the disease would occur and making a material contribution to its occurrence. He said that, looking at the matter from a broad and practical point of view, he could see no substantial difference between these two concepts. He summed the matter up in three crucial sentences:[17]

> There may be some logical ground for making such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which a man's mind works in the everyday affairs of life.

Lord Wilberforce too accepted that there was, as he put it, an appearance of logic in the view that because the pursuer, on whom the onus lay, could not positively prove that the increase of risk caused or materially contributed to the disease he must fail. But his answer to the problem was to say that, as matter of policy and justice, as the creator of the risk must be taken to have foreseen the possibility of damage he must bear the consequences. He returned to this point in the final sentence of his speech,[18] where he said:

> I find in the cases quoted[19] an analogy which suggests the conclusion that, in the absence of proof that the culpable addition 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 consequences of the impossibility, foreseeable inherent in the nature of his injury, of segregating the precise consequence of their default.

Lord Simon of Glaisdale said[20] that in that type of case a stark distinction between breach of duty and causation was unreal, that they were mirror concepts and that the fact that the precaution was

[16] I was junior counsel for the Board. My senior was James Mackay Q.C., who was later to become the Rt. Hon. the Lord Mackay of Clashfern, a Lord of Appeal in Ordinary and then Lord Chancellor.
[17] [1973] 1 W.L.R. 1, 5A–B.
[18] p. 7E–F.
[19] *Wardlaw* v. *Bonnington Castings* [1956] A.C. 613, 1956 S.C. (H.L.) 26 and *Nicholson* v. *Atlas Steel Foundry and Engineering Co. Ltd.* [1957] 1 W.L.R. 613, 1957 S.C. (H.L.) 44.
[20] [1973] 1 W.L.R. 1, 8E.

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one which any reasonable employer would have taken showed that he should have foreseen that failure to take it would, more probably than not, materially contribute to the injury was sufficient prima facie evidence. Lord Kilbrandon said[21] that it was difficult to see, in these circumstances, how the employer could demand more by way of proof of the probability that the failure to take the precaution caused or contributed to the contraction of the disease. Lord Salmon said[22] that it seemed to him, in the circumstances of that case, to be unrealistic and contrary to ordinary common sense to hold that the negligence which materially increased the risk of injury did not materially contribute to the injury. He suggested that the true view was that:[23]

> [A]s a rule, when it is proved, on a balance of probabilities, that an employer has been negligent and that his negligence has materially increased the risk of his employee contracting an industrial disease, then he is liable in damages to that employee if he contracts that disease notwithstanding that the employer is not responsible for other factors which have materially contributed to the disease.

Various lines of thought are at work in this judgment. It was recognised that, in the present state of medical knowledge, the pursuer faced an impossible task. He could prove that the Board was at fault, and he could prove that he had sustained loss and damage. But he could not make the connection between the two in the normal way by leading evidence to show that his loss and damage was caused by the Board's fault. Lord Simon and Lord Salmon both observed that, if the usual approach to the proof of causation were to be applied, it would mean that the employer would be permitted by the law to disregard his duty to take reasonable care for his employees with impunity. The solution was to adopt what Lord Reid described as a broad and practical view of the case and to reject an approach to causation which Lord Salmon described as unrealistic and contrary to common sense. Searching for a more precise explanation, Lord Wilberforce and Lord Kilbrandon suggested that the answer lay in accepting that there were limits to what the claimant has to prove and that, provided he proves that the defendant failed to take precautions which he knew he ought to have taken in order to reduce the risk of an injury which the claimant has in fact sustained, the defendant must simply accept the consequences. There is perhaps an echo here of Lord Mansfield's remark two centuries earlier in *Blatch* v.

[21] p. 10D.
[22] p. 11H–12A.
[23] p. 12H.

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Archer:[24] "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted".

Commenting on this decision in *Hotson* v. *East Berkshire Health Authority*,[25] Lord Mackay of Clashfern said that it might be taken as holding that in the circumstances of that case it was reasonable to infer that there was a relationship between the contraction of dermatitis in these conditions and the absence of washing facilities and therefore it was reasonable to hold that absence of washing facilities was likely to have made a material contribution to the causation of the dermatitis. That was a case where there had been a failure by the hospital to diagnose the plaintiff's injury, but there was a 75 per cent. risk that he would have developed the avascular necrosis even if he had been correctly treated in the hospital. The claim failed because the plaintiff was unable to establish on a balance of probabilities that his disability had been caused by breach of duty on the part of the hospital. Lord Mackay recognised that the case was far removed from *McGhee* on its facts, as indeed it was because the plaintiff's failure to prove his case was not due to any lack of medical knowledge as to what caused his disability. But he went on to say that, unless and until the House departed from the decision in *McGhee*, it could not be affirmed that in no circumstances could evidence of loss of a chance resulting from the breach of a duty of care found a successful claim of damages. It is this feature of the decision in *McGhee* that was soon to come under further scrutiny.

In *Wilsher* v. *Essex Area Health Authority*[26] the plaintiff was born prematurely. Due to the negligence of a doctor excessive amounts of oxygen were administered to him. He then developed a condition known as retrolental fibroplasia which resulted in his becoming blind. The problem in his case was that, while the administration of excessive amounts of oxygen can cause this condition, there are various other possible causes which could in no way be related to the doctor's negligence. Here too there was a problem about causation. It was not the same problem as in *McGhee*, as in that case there was only one possible cause which was in issue—that brick dust in contact with a sweaty skin would cause dermatitis. But it was suggested that the approach taken in *McGhee* should be followed in that case also. Differing views were

[24] (1774) 1 Cowp 63, 65, quoted with approval by the Supreme Court of Canada in *Snell* v. *Farrell* [1990] 2 S.C.R. 311, 328 and by Lord Bingham of Cornhill in *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2002] 3 W.L.R. 89, 98G–H, para. [13].
[25] [1987] A.C. 750, 786.
[26] [1987] Q.B. 730 (C.A.); [1988] A.C. 1074.

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expressed on this point in the Court of Appeal, where the decision was in the plaintiff's favour by a majority. Mustill L.J., who was in the majority, said of the decision in *McGhee*:[27]

> Reading all the speeches together, the principle applied by the House seems to me to amount to this. If it is an established fact that conduct of a particular kind creates a risk that injury will be caused to another or increases an existing risk that injury will ensue; and if the two parties stand in such a relationship that the one party owes a duty not to conduct himself in that way; and if the first party does conduct himself in that way; and if the other party does suffer injury of the kind to which the risk related; then the first party is taken to have caused the injury by his breach of duty, even though the existence and extent of the contribution made by the breach cannot be ascertained.

But the House of Lords would have none of this. Giving what came to be regarded as the orthodox explanation of *McGhee*, Lord Bridge of Harwich quoted various passages from the judgment and said:[28]

> The conclusion I draw from these is that *McGhee* v. *National Coal Board* laid down no principle of law whatever. On the contrary it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

It has been suggested that the reason why this explanation of *McGhee* was regarded as orthodox was because it was it was the easy way out.[29] Everyone agrees that negligence which makes a material contribution to the damage results in liability. A cause does not have to be the sole cause. It is enough that it was a necessary cause. The decision in *Wardlaw* v. *Bonnington Castings*[30] is a good example of this principle. In that case the employers were to blame only for the dust from the swing grinders and not for that from the pneumatic hammers. But the House held that a material

[27] [1987] Q.B. 730, 771H–772A.
[28] [1988] A.C. 1074, 1090.
[29] See Helen Reece, "Pedro Juan Cubillo v. Commonwealth of Australia: right result, wrong method", *in Law and Science* (Oxford 1998), 89.
[30] [1956] A.C. 613.

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contribution from the dust from the swing hammers was sufficient to establish liability, and that it was proved that it contributed an amount of dust that was not negligible to the pursuer's lungs and thus helped to produce the disease.[31]

The problem about this explanation for *McGhee* is quite simple. There was brick dust in the brick kilns where Mr. McGhee worked and there was dust on his skin when he was cycling home. But the Board were not to blame for the heat and dust in the brick kilns, and there was no basis in the evidence for making the inference that the brick dust which Mr. McGhee had on his skin when he was cycling home had made a material contribution to the dermatitis. None of their Lordships was prepared to make that inference. That was the very thing that the medical evidence had failed to establish. This was why, in the reasons which appear at the end of his printed case, his primary argument was that the appeal should be allowed

> [B]ecause the appellant has proved that the respondents were in reach of duty in respect of their failure to provide shower baths, and that their failure *materially enhanced the risk* of his contracting dermatitis. [emphasis added]

Lord Reid acknowledged this when he said that the evidence was to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that the disease might develop.[32]

If the orthodox explanation must be rejected, what then *is* the explanation? What *was* the ratio for the decision? The key to the case lies, I think, is the fact that it was impossible to know which particles of dust caused Mr. McGhee's dermatitis. As Lord Kilbrandon put it, the actual chain of events in his body leading up to the injury was not clearly known.[33] No differences were identified between those who did and those who did not develop dermatitis when exposed to the same amount of brick dust over the same period. As Lord Reid said, the evidence was that dermatitis could result from that exposure in some way not yet understood. In other words, it was impossible to know which particles of dust had caused the dermatitis.

The state of medical and scientific knowledge today is such that cases where expert evidence cannot explain the aetiology of a disease or injury are quite rare. But from time to time they do occur. That is what has happened in the case of men exposed to asbestos who have developed mesothelioma. It is known that

[31] per Lord Reid at p. 623.
[32] [1973] 1 W.L.R. 1, 4H.
[33] p. 10C.

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asbestos plays a part in triggering the development of the malignancy. But it is not known whether the triggering mechanism involves a single asbestos fibre or many of these fibres. It is typical of the working patterns of those employed in industries where they are exposed to asbestos that over a period of years they will have worked for more than one employer. The fact that it may be triggered off by a single fibre means that it is impossible in the current state of medical knowledge to prove that this happened while the men were working for any particular employer. Nor is it possible to prove that the exposure to asbestos dust in the course of any particular employment materially contributed to the contraction of the disease. The most that can be said is that the risk of developing mesothelioma increases in relation to the total dose received. So each of the employers who exposed the men to asbestos dust can be said to have increased the risk that they would develop this condition.

This, as we all know, is the problem which came before the House of Lords in the cases of *Fairchild, Fox and Matthews*.[34] Inevitably, *McGhee* v. *National Coal Board* came under close scrutiny. There were two crucial questions. First, was the House in *McGhee* deciding a question of law or did it, as Lord Bridge said in *Wilsher*, lay down no new principle of law at all? The second was, if it was deciding a question of law, what did it decide? The first question was easier to answer than the second. As both Lord Bingham of Cornhill and Lord Rodger of Earlsferry pointed out,[35] Lord Reid said expressly that that the pursuer's case raised a difficult question of law[36] and it was this question of law that the he and the other judges proceeded to examine and to decide. The second question is, as I have said, more difficult because of the way in which the opinions were expressed. There was not much in the way of detailed reasoning. The crucial passage in Lord Reid's judgment is extremely brief. Only Lord Wilberforce made any attempt to set out a fully reasoned explanation of what he was doing.

As Lord Rodger observed in *Fairchild*,[37] it may well be that the members of the House could have proclaimed more clearly and more openly that they were stating a new principle. Perhaps this is why the doctrine which it established was for so long discredited. But I think that a close examination of what they were saying, and of the appellant's argument, shows that they were indeed laying

[34] *Fairchild* v. *Glenhavon Funeral Services Ltd. and Others* [2002] 3 W.L.R. 89.
[35] at p. 108H, para. [22]; pp. 162H–163A, para. [150].
[36] [1973] 1 W.L.R. 1, 3D.
[37] [2002] 3 W.L.R. 89, 159H, para. [144].

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down a new principle. Now that we have the advantage of the judgment of the House in *Fairchild* we can see more clearly what that principle was and how it fits in to the general pattern of the law.

The key to it lies in the crucial passage of Lord Reid's speech.[38] Four points emerge from this passage, which is expressed in a single, short paragraph. The first is that he was dealing with a case where the medical evidence did not and could not explain how dermatitis of the type in question begins. An accumulation of particles might have been needed, or it could have begun with a single abrasion. The second is that he did not regard the case as indistinguishable from *Wardlaw's* case. That would not have been possible, as there was no proof that the dermatitis was caused by contact with dust while McGhee was cycling home. As Lord Reid put it, "in a case *like this* we must take a broader view of causation". [emphasis added] The third was that the medical evidence was to the effect that the fact that the man had to cycle home unwashed added materially to the risk that the disease might develop. And the fourth, and crucial, point was that there was no distinction in these circumstances between materially increasing the risk that the disease would occur and making a material contribution to its occurrence. There is no citation of authority. These propositions emerge from the printed page almost as baldly as I have stated them to you. All that remains in his judgment, almost by way of an apology, is the comment that the legal concept of causation is not based on logic or philosophy but on the practical way in which the ordinary man's mind works in the every day affairs of life. But the propositions are there. And the last proposition is a proposition of law.

I think that Lord Bingham grasped the point of Lord Reid's speech precisely when he said[39] that, recognising that the pursuer faced an insuperable problem of proof if the orthodox test of causation was applied, but regarding the case as one in which justice demanded a remedy for the pursuer, a majority of the House adapted the orthodox test to meet the particular case. As Lord Rodger explained,[40] what Lord Reid has done is to accept that the pursuer must prove that the defender's conduct materially contributed to the onset of the condition and then to hold, as a matter of law, that proof that the defenders' conduct materially increased the risk was sufficient for this onus to be discharged. You will not find the same analysis of *McGhee* in the speeches of Lord

[38] [1973] 1 W.L.R. 1, 4G–5A.
[39] [2002] 3 W.L.R. 89, 108C–D, para. [21].
[40] p. 159B, para. [142].

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Nicholls of Birkenhead or Lord Hoffmann[41]. But a search for the true ratio of *McGhee* was crucial if the law was to move on in an orderly way in this difficult area. I respectfully agree with Lord Bingham and Lord Rodger that a new principle of law was decided in *McGhee*. As there was only one possible cause, the test which the law lays down for proof of causation was satisfied by proof that there was a material increase in the risk of injury.

This result came as no surprise to those who sat through the hearing of the appeal thirty years ago which took place, unusually, in the Moses Room.[42] Kemp Davidson had prepared a detailed speech extending to twenty-one pages which he has preserved, together with the notes which he took while James Mackay was presenting his argument. All of this, in his immaculate handwriting, I have been privileged to see. His plan was to take their Lordships through the facts in order to show that the appellant had proved enough to justify his success on both grounds of fault, to stress that if the Board had carried out their duty the period during which he was exposed to the risk of dermatitis would have been shortened sufficiently to reduce the risk materially, to examine the authorities and then to criticise the way in which the judges below had dealt with the case. But it was obvious, almost from the moment that he got to his feet, that their Lordships were determined to find in McGhee's favour. The propositions which he wished to make were being pronounced by them almost before he had time to put them forward himself. Lord Salmon slowly and sadly shook his head as the opinion of one of the judges in the Inner House was read out. Davidson soon realised that the best thing for him to do was to say as little as possible, and he cut short his discussion of the authorities.[43] As himself has put it,[44] he grasped the fact early on that his sole submission had been well received, and that thereafter his prime aim should be to bring his submission to an end swiftly in order to ensure that he did not prejudice his client's damages. Shortly after mid-afternoon on the first day, after having been on his feet for about three and a half hours, he sat down. James Mackay, whose immense capacity for sustained and carefully reasoned argument made him such a

[41] See Lord Nicholls at p. 123B–E, paras. [44], [45]; Lord Hoffmann at p. 128B–D, para. [65]. Lord Hutton said that he did not find a clear statement in *McGhee* that the House was formulating a new principle of law: p. 138E, para. [94].

[42] According to the report in the Session Cases, the hearing took place on 8 and 9 October 1972: 1973 S.C. (H.L.) 37, 50. The dates in the head-note in the Weekly Law Reports are 9 and 10 October 1972: [1973] 1 W.L.R. 1. Davidson's notes confirm that the correct dates are those which are given in the Weekly Law Reports.

[43] He omitted the references in his written speech to *Duke of Buccleugh* v. *Cowan* (1866) 5 M 214, (1876) 4 R (H.L.) 14, *Fleming* v. *Gemmill & Others* 1908 S.C. 340, *Ellerman Lines Ltd.* v. *Clyde Navigation Trustees* 1909 S.C. 690 and *Brown* v. *Rolls Royce Ltd.* 1958 S.C. 600.

[44] Personal communication.

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formidable advocate, was unable to rescue the situation for the Board. He completed his argument before lunch on the second day. As he was coming to the end of his speech Lord Reid asked Lord Wilberforce whether he wanted to hear again from Kemp Davidson. Lord Wilberforce shook his head vigorously from side to side. Davidson was not called upon to reply.

The lines of thought which were later to find their way into the judgment were already apparent during their Lordships' exchanges with counsel during the argument. Mackay sought repeatedly to emphasis the point that the questions of increased risk and of causation were two separate and distinct questions and that pursuer had failed to prove the case which he had made on his pleadings, which was that the Board's breach of the duty to provide adequate washing facilities had "caused" the disease. He accepted that there had been a breach of the duty. But the causal connection still had to be proved, he said. "The fact that he has undertaken the onus of proving something different cannot alter the legal position," was Lord Reid's reply. "Sometimes you aver more than you need to," he said. "What is the point of a duty of care if it is no good to the workman?" said Lord Salmon. "How can anyone ever succeed in a dermatitis case, if you are right?" asked a third, unnamed Law Lord. "Surely, if you increase the risk by extending the abraded area, you have materially contributed to the disease?" said someone else. "Let us suppose that the averment about causation was wider than necessary. The pursuer might have said that the lack of washing facilities made a material contribution to the onset of the disease. Has he not proved that that was so?" Kemp Davidson's notes, which are replete with interjections of this kind, confirm my own recollection that no-one on the Appellate Committee saw any merit whatever in the Board's argument that the causal connection had not been proved.

Looking back on it, I doubt whether their Lordships, apart perhaps from Lord Wilberforce, thought that their decision was in the least surprising. Lord Wilberforce did acknowledge[45] that to infer from the fact that the negligence materially increased the risk that it had materially contributed to the disease was something of a fiction. But the others appear to have been untroubled. It has been suggested that they couched their opinions in the way they did deliberately. That may indeed be so. As we all know, it is not at all unusual for judges to seek to confine their decision as far as possible to the facts of the case. It has also been suggested that in *Hotson* Lord Mackay of Clashfern indicated that the case had been

[45] [1973] 1 W.L.R. 1, 7E.

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dealt with by sleight of hand.[46] I do not read his remarks in that case in this way. In any case, I would be inclined to doubt that anything of that kind which may be detected in the speeches in *McGhee* was deliberate. It is much more likely that their Lordships saw the case as a simple one which did not need much by way of elaboration.

Whatever the explanation, I believe that we can derive some satisfaction from the fact that James McGee was awarded his damages. It tells us that the law of causation is not so hard-edged as to deny a remedy where negligence has been established by laying down conditions for the proof of liability which it is impossible to satisfy. We are reminded that we live in a practical world, as Lord Atkin observed in Mrs. Donoghue's case in the famous passage where he asked and then answered the question "who, then, in law is my neighbour?".[47] It has been demonstrated time and time again that what Lord Wilberforce once described[48] as the austerity of tabulated legalism has no part to play in the development of the law of liability for negligence. As Lord Reid said in *McGhee*,[49] the legal concept of causation is not based on logic or philosophy. It is based on the practical way the ordinary man's mind works in the everyday affairs of life. Of course, this must not be reduced simply to the mere application of "common sense", as Lord Rodger of Earlsferry was right to point out in *Fairchild*.[50] Nor, as Lord Hoffmann put it, does it involve the exercise of a discretion to adapt causal requirements to the individual case.[51] The requirements of the law of causation have been relaxed, but not by much.

It has been suggested that the individual judgments in *Fairchild* failed to create a clear ratio.[52] At the heart of this criticism is the complaint with which the Law Lords are all too familiar that they should have sacrificed individualism for the greater good. But I think that the writer was right to point out that the weakness of that decision, if indeed there is a weakness, may well lie in the fact that their Lordships did not all analyse *McGhee* in the same way. That is why it is so important to appreciate what the point was in *McGhee* and not to lose sight of it as a precedent. It underlines the point which I have been trying to make that the true ratio of the

[46] Helen Reese, *op. cit.*, 93.
[47] *Donoghue* v. *Stevenson* 1932 S.C.(H.L.) 31, 44.
[48] *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 329A.
[49] [1973] 1 W.L.R. 1, 5B.
[50] [2002] 3 W.L.R. 89, 163C, para. [150].
[51] p. 126E–F, para. [60].
[52] Sarah Arnell, "Causation Reassessed", 2002 S.L.T. (News) 265.

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decision is to found in the Speeches of Lord Bingham and Lord Rodger in *Fairchild*.

If we can take that proposition as our starting point, I would suggest that the answer to the question how far the approach in *McGhee* may take us must depend in the end on the state of the evidence. If the evidence itself demonstrates that there was a breach of duty but that the law of causation has set itself an impossible task because the current state of medical or scientific knowledge cannot possibly meet its demands, something is wrong. If the duty has been, as Lord Hoffmann put it,[53] emptied of content so that liability cannot possibly exist, the law of causation must soften its demands if it is to meet the requirements of fairness and justice. But that proposition on its own does tell us where the limits lie. As to that point, it is clear that the law will not soften its demands without a good and compelling reason. So it must be demonstrated by evidence that there was only one possible cause, that in subjecting the claimant to that cause the defendant was a breach of its duty of care and that by doing so it materially increased the risk of injury. But it must also be demonstrated that it is not possible to go further and establish the causal link which the law normally requires. If that is the case, a material increase in the risk will be sufficient to satisfy the causal requirements for liability. Above all we must remind ourselves that solutions that are needed to deal with exceptional cases are not there to be used universally. It remains as true as it always has been that is for the claimant to prove his case, and that the law is that he cannot succeed unless he proves that the defendant's breach of duty caused his injury.

There we must leave James McGhee, and his bicycle. His dermatitis kept him off work for nearly a year. When he returned to work at Prestongrange in March 1968 he was given a different job to do, but he had become sensitised to brick dust. He soon had to give up work again. It was well over a year before he returned to work, and when he did so it was as a joiner's labourer. But he became redundant in 1970, when he was aged about 35. What happened to him after that is not recorded, but he had a back condition which may have made it difficult for him to find other work. He was awarded £1,000 together with interest in satisfaction of his claim for damages. That is about £10,000 in today's money. He no longer lives at 15 Gardiner Crescent. According to a neighbour, his mother died and he moved away from the district a long time ago. I have been unable to discover whether he is still alive. There is no record of any other case in his name having

[53] p. 126H, para. [62].

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come before the court. I think that it is perhaps safe now to conclude that, together with Mrs. Donoghue and the Wellmeadow Café in Paisley—which, like the Prestongrange Brickworks, no longer exists—he has passed into history.

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