Die Mercurii, 15° Novembris 1972

Upon Report from the Appellate Committee, to whom was referred the Cause McGhee against National Coal Board, that the Committee had heard Counsel as well on Monday the 9th, as on Tuesday the 10th, days of October last, upon the Petition and Appeal of James McGhee, residing at 15 Gardiner Crescent, Prestonpans, praying, That the matter of the Interlocutors set forth in the Schedule thereto, namely, an Interlocutor of the Lord Ordinary in Scotland (Lord Kissen) of the 4th of June, 1971 and also an Interlocutor of the Lords of Session there of the First Division of the 17th of March 1972, might be reviewed before Her Majesty the Queen, in Her Court of Parliament, and that the said Interlocutors might be reversed, varied or altered, or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen, in Her Court of Parliament might seem meet; as also upon the Case of the National Coal Board, lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged,* by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Interlocutors of the 4th day of June 1971 and of the 17th day of March 1972, complained of in the said Appeal, be, and the same are hereby, **Recalled** : And it is further *Ordered,* That the Case be, and the same is hereby, remitted back to the Court of Session in Scotland with a Direction to award to the Pursuer the sum of £1,000 by way of damages, with interest thereon at five *per centum per annum* from the date of Citation until this Day: And it is further *Ordered,* That the Respondents do pay, or cause to be paid, to the said Appellant the Expenses incurred by him in respect of the Action in the Court of Session and also the Costs incurred by him in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments: And it is also further *Ordered,* That unless the Costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the Certificate (hereof, the Cause shall he, and the same is hereby, remitted back to the Court of Session in Scotland, or to the Judge acting as Vacation Judge, to issue such Summary Process or Diligence for

the recovery of such Costs as shall be lawful and necessary.

McGhee *v.* National Coal Board.

HOUSE OF LORDS

McGHEE

v.

NATIONAL COAL BOARD.

Lord Reid
Lord Wilberforce
Lord Simon of Glaisdale
Lord Kilbrandon
Lord Salmon

Lord Reid

My Lords,

The Appellant was employed for many years by the Respondents as a labourer at their Prestongrange Brickworks. His normal work was emptying pipe kilns. On 30th March, 1967 (a Thursday), he was sent to empty brick kilns. Working conditions there were much hotter and dustier than in the pipe kilns. On Sunday, 2nd April, he felt extensive irritation of his skin. He continued to work on the Monday and Tuesday and then went to his doctor who put him off work and later sent him to a skin specialist. He was found to be suffering from dermatitis.

He sued the Respondents for damages alleging breaches on their part of common law duties to him. After proof before answer the Lord Ordinary assoilzied the Respondents. On 17th March, 1972, the First Division refused a reclaiming motion.

It is now admitted that the dermatitis was attributable to the work which the Appellant did in the brick kilns. The first ground of fault alleged against the Respondents is that the kilns ought to have been allowed to cool " sufficiently " before the Appellant was sent to remove the bricks from them. I agree with the Scottish Courts that this contention fails ; the pleading lacks specification and the evidence is much too vague to prove any breach of duty.

The other ground of fault alleged raises a difficult question of law. It is said in Condescendence 3: " It was their duty to take reasonable care to " provide adequate washing facilities including showers, soap and towels " to enable men to remove dust from their bodies. In each and all of said " duties the defendant failed and so caused said disease. Had the defenders " fulfilled said duties incumbent on them the pursuer would not have " contracted said disease." Originally the defence was twofold: (i) a denial of any such duty, and (ii) an argument that the disease was of a non-occupational character. But the Lord Ordinary decided against the Respondents in both of these matters and the Respondents accept these findings. So the Respondents' defence in the Inner House and before your Lordships has taken the unusual form that breach of duty is admitted, and that it is admitted that the disease is attributable to the work which the Appellant performed in the brick kiln, but that it has not been proved that failure to carry out the admitted duty caused the onset of the disease.

The medical witnesses are in substantial agreement. Dermatitis can be caused, and this dermatitis was caused, by repeated minute abrasion of the outer horny layer of the skin followed by some injury to or change in the underlying cells, the precise nature of which has not yet been discovered by medical science. If a man sweats profusely for a considerable time the outer layer of his skin is softened and easily injured. If he is then working in a cloud of abrasive brick dust, as this man was, the particles of dust will adhere to his skin in considerable quantity and exertion will cause them to injure the horny layer and expose to injury or infection the tender cells below. Then in some way not yet understood dermatitis may result.

If the skin is not thoroughly washed as soon as the man ceases work that process can continue at least for some considerable time. This man had to continue exerting himself after work by bicycling home while still caked with sweat and grime, so he would be liable to further injury until he could wash himself thoroughly. Washing is the only practicable method of removing the danger of further injury.

The effect of such abrasion of the skin is cumulative in the sense that the longer a subject is exposed to injury the greater the chance of his developing dermatitis: it is for that reason that immediate washing is well recognised as a proper precaution.

I have said that the man began working in hot and dusty conditions on the Thursday. It appears to be accepted that his work on the Thursday, Friday and Saturday, together with the fact that in these three days he had to go home unwashed, was sufficient to account for his condition on the Sunday, and that this together with what he did on the Monday and Tuesday caused the onset of dermatitis.

It was held in the Court of Session that the Appellant had to prove that his additional exposure to injury caused by his having to bicycle home unwashed caused the disease in the sense that it was more probable than not that this additional exposure to injury was the cause of it. I do not think that that is the proper approach. The Court of Session may have been

misled by the inadequacy of the Appellant's pleadings. But I do not think that it is now too late to re-examine the whole position.

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury. That is well illustrated by the decision of this House in *Wardlaw* v. *Bonnington Castings Ltd.* 1956 S.C. (H.L.) 26. There the pursuer's disease was caused by an accumulation of noxious dust in his lungs. The dust which he had inhaled over a period came from two sources. The defenders were not responsible for one source but they could and ought to have prevented the other. The dust from the latter source was not in itself sufficient to cause the disease but the pursuer succeeded because it made a material contribution to his injury.

The Respondents seek to distinguish *Wardlaw's* case by arguing that then it was proved that every particle of dust inhaled played its part in causing the onset of the disease whereas in this case it is not proved that every minor abrasion played its part.

In the present case the evidence does not shew—perhaps no one knows—just how dermatitis of this type begins. It suggests to me that there are two possible ways. It may be that an accumulation of minor abrasions of the horny layer of the skin is a necessary precondition for the onset of the disease. Or it may be that the disease starts at one particular abrasion and then spreads, so that multiplication of abrasions merely increases the number of places where the disease can start and in that way increases the risk of its occurrence.

I am inclined to think that the evidence points to the former view. But in a field where so little appears to be known with certainty I could not say that that is proved. If it were then this case would be indistinguishable from *Wardley's* case. But I think that in cases like this we must take a broader view of causation. The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. But experience shews that it is so. Plainly that must be because what happens while the man remains unwashed can have a causative effect, though just how the cause operates is uncertain. I cannot accept the view expressed in the Inner House that once the man left the brick, kiln he left behind the causes which made him liable to develop dermatitis. That seems to me quite inconsistent with a proper interpretation of the medical evidence. Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence.

There may be some logical ground for 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 the ordinary man's mind works in the every-day affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury.

I would therefore allow this appeal.

Lord Wilberforce

My Lords,

My noble and learned friend, Lord Reid, has explained the circumstances in which, as the relevant claim in this appeal, the Appellant claims damages at common law in respect of his employers' fault in failing to provide adequate washing facilities so as to remove the dust from his body before he left the place of work.

The Lord Ordinary, while finding that the Respondents were at fault in not providing shower baths for their men who, like the Appellant, worked under hot and dusty conditions in the kilns, yet dismissed the Appellant's claim because he was not satisfied that the Appellant had shown, on the balance of probabilities, that this breach of duty caused or materially contributed to his injury. This reasoning was approved by the First Division. In order to evaluate it, it is necessary to amplify the findings and inferences.

In the first place, the holding that there was a breach of duty by the Respondents was founded upon the evidence of the Appellant's medical expert that washing by shower baths is the only method of any practical use by which the risk of dermatitis, in the relevant conditions, can be reduced. Possibly damaging agents, the doctor said, should be removed as soon as possible: washing is standard practice in all industrial medicine. The Respondents must, from their experience with occupations involving the production of dust, have been aware of this, and as one would expect, there were showers available at the nearby Prestongrange Colliery which men on the kilns could use until the Colliery was closed in 1963. There was, therefore, a solid basis for a finding that showers ought to have been provided. It was inherent in this finding that the employers should have foreseen that, unless showers were available at the place of work, there would be an increased risk of dermatitis occurring.

But it was not enough for the Appellant to establish a duty or a breach of it. To succeed in his claim he had to satisfy the Court that a causal connection existed between the default and the disease complained of. i.e.. according to the formula normally used, that the breach of duty caused or materially contributed to the injury. Here two difficulties arose. In the first place, little is known as to the exact causes of dermatitis. The experts could say that it tends to be caused by a breakdown of the layer of heavy skin covering the nerve ends provoked by friction caused by dust, but had to admit that they knew little of the quantity of dust or the time of exposure necessary to cause a critical change. Secondly, there could be little doubt that the Appellant's dermatitis resulted from a combination, or accumulation, of two causes: exposure to dust while working in hot conditions in

the kiln and the subsequent omission to wash thoroughly before leaving the place of work ; the second of these, but not the first, was, on the findings, attributable to the fault of the Respondents. The Appellant's expert was unable to attribute the injury to the second of these causes for he could not say that if the Appellant had been able to wash off the dust by showers he would not have contracted the disease. He could not do more than say that the failure to provide showers materially increased the chance, or risk, that dermatitis might set in.

My Lords, I agree with the judge below to the extent that merely to show that a breach of duty increases the risk of harm is not, *in abstracto,* enough to enable the pursuer to succeed. He might, on this basis, still be met by successful defences. Thus, it was open to the Respondents, while admitting,

or being unable to contest, that their failure had increased the risk, to prove, it they could, as they tried to do, that the Appellant's dermatitis was " non-occupational ".

But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail—a logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who, *ex hypothesi* must be taken to have foreseen the possibility of damage, who should bear its consequences.

There are analogies in this field of industrial disease. In cases concerned with pneumoconiosis, the courts faced with a similar, though not identical, evidential gap, have bridged it by having regard to the risk situation of the pursuer. Pneumoconiosis being a disease brought on by cumulative exposure to dust particles, the courts have held that where the exposure was to a compound aggregate of " faulty " particles and " innocent "

particles, the workman should recover, so long as the addition of the " faulty " particles (i.e., those produced by some fault of the employers) was material, which I take to mean substantial, or not negligible *(Wardlaw* v. *Bonnington Castings* 1956 S.C. (H.L.) 26; *Nicholson* v. *Atlas Steel Foundry and Engineering Co. Ltd.* 1957 S.C. (H.L.) 44. *Wardlaw's* case was decided with full acceptance of the principle that a pursuer must prove not only negligence but also that such fault caused or materially contributed to his injury (per Lord Reid, 1.c. p. 31) and the pursuer succeeded because negligently-produced dust made a material contribution to the total dust which injured him. I quote from the opinion of Lord Keith:

> " It was the atmosphere inhaled by the pursuer that caused his illness " and it is impossible, in my opinion, to resolve the components of " that; atmosphere into particles caused by the fault of the " defenders and particles not caused by the fault of the defenders, " as if they were separate and independent factors in his illness. *Prima* " *facie* the particles inhaled are acting cumulatively, and I think the " natural inference is that had it not been for the cumulative effect " the pursuer would not have developed pneumoconiosis when he did " and might not have developed it at all."

The evidential gap which undoubtedly existed there (i.e. the absence of proof that but for the addition of the " guilty " dust the disease would not have been contracted) is similar to that in the present case and is expressed to be overcome by inference.

In *Nicholson's* case, the pursuer was similarly affected by an indivisible aggregate of silica dust. He succeeded because (I quote from the opinion of Viscount Simonds) " owing to the default of the Respondents the deceased " was exposed to a greater degree of risk than he should have been "—the

excess not being negligible, and according to Lord Cohen because the Respondents' default had materially increased the risk and so, on a balance of probabilities, caused or materially contributed to his injury.

The present factual situation has its differences: the default here consisted not in adding a material quantity to the accumulation of injurious particles but by failure to take a step which materially increased the risk that the dust already present would cause injury. And I must say that, at least in the present case, to bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make. But I find in the cases quoted an anology 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 consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default.

I would allow this appeal.

Lord Simon of Glaisdale

My Lords,

I beg to take advantage of the narrative history and the summary of the medical evidence given by my noble and learned friend, Lord Reid, whose speech I have had the advantage of reading in draft. For the reasons which he gives I agree that the Appellant failed to establish the first breach of common law duty alleged. I desire only to add some observations on the alleged breach of duty to provide adequate washing facilities.

The Lord Ordinary held that such a breach of duty was established. He held, however, that there was not established a sufficient causative connection between that breach of duty by the Respondents and the Appellant's injury. The medical evidence showed that the fulfilment of what was held to be the Respondents' common law duty to provide adequate washing facilities would, if they had been used (and the Appellant had used shower baths immediately after work when they had been available in earlier years), have materially reduced the risk of dermatitis. Neither consultant would, however, go so far as to say that washing after work would have made it more probable than not that the Appellant would have escaped dermatitis. The consultant called for the Appellant averred, indeed, that no one could say such a thing-implying that no doctor could, in the present state of medical knowledge, make such an assertion in any circumstances. The Lord Ordinary held that the Appellant, to succeed, had to prove a causative connection between the Respondents' breach of duty and his own injury and that this involved proving that it was more likely than not that what had caused the Appellant's injury was the Respondents' breach of duty. Merely to show that compliance with that duty would have materially reduced the risk of injury was insufficient: it was necessary to go further, and show that such compliance would on a balance of probabilities have avoided the injury. The First Division upheld these findings of the Lord Ordinary.

But *Wardlaw* v. *Bonnington* 1956 S.C. (H.L.) 26 and *Nicholson* v. *Atlas Steel Foundry & Engineering Co.* 1957 S.C. (H.L.) 44 establish, in my view, that where an injury is caused by two (or more) factors operating cumulatively one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so con-currently or successively.

The question, then, is whether on the evidence the Appellant brought himself within this rule. In my view, a failure to 'take steps which would

bring about a material reduction of the risk involves, in this type of case, a substantial contribution to the injury. In this type of case a stark distinction between breach of duty and causation is unreal. If the provision of shower baths was (as the evidence showed) a precaution which any reasonable employer in the Respondents' position would take, it means that such employer should have foreseen that failure to take the precaution would, more probably than not, materially contribute towards injury: this is sufficient *prima facie* evidence. That " material reduction of the risk " and " sub- " stantial contribution to the injury " are mirror concepts in this type of case appears also from Simonds' speech in *Nicholson* v. *Atlas* at pp. 62 and 63 where he is applying the concept of " substantial contribution " laid down in *Wardlaw* v. *Bonnington:* "... it was practicable for the respondents " to have reduced the risk ... It follows that owing to the default of the " respondents the deceased was exposed to a greater degree of risk than he " should have been, and, though it is impossible even approximately to " quantify the particles which he must in any event have inhaled and those " which he inhaled but need not have, I cannot regard the excess as something " so negligible that the maxim ' *de minimis'* is applicable." See also Lord Kilbrandon, Lord Ordinary, in *Gardiner v. Motherwell Machinery & Scrap Co.* 1961 S.C. (H.L.) 1, a dermatitis case, where at p. 3 he rehearsed the pursuers' argument which he accepted, as follows: "... that the washing " facilities which were provided were inadequate and primitive, and that, if " they had been up to standard, the risk of dermatitis would have been very " much reduced." His judgment was upheld in your Lordships' House, the headnote stating:

> "... where a workman who had not previously suffered from a " disease contracted that disease after being subjected to conditions likely " to cause it, and showed that it started in a way typical of disease caused " by such conditions, he established a *prima facie* presumption that his " disease was caused by those conditions; and that, since, in the present " case, the employers had failed to displace the presumption, they were " liable to the workman in damages at common law."

To hold otherwise would mean that the Respondents were under a legal duty which they could, in the present state of medical knowledge, with impunity ignore.

I would therefore allow the appeal.

Lord Kilbrandon

My Lords,

The facts relating to the nature and conditions of the pursuer's work, to the facilities provided by the defenders, and to the pursuer's having contracted an industrial dermatitis in consequence of those conditions of work, are undisputed. Medical science has, however, not yet been able to provide an indubitable account of how those conditions actually give rise to that disease, although the fact of causation is, according to the evidence in this case, unanimously accepted. Thus, of two men exposed to the same condi-

tions, and taking the same precautions both during exposure to the condition and after having ceased to be exposed, one will get dermatitis and the other will not. A post-exposure precaution desiderated is the shower bath. As it was put to, and accepted by, the consultant physician giving evidence for the defenders, assuming that a workman had to work in a hot atmosphere and exposed to the risk of ash and dust over his working day, if he was given the opportunity to have a shower, and in fact took the shower that would materially reduce the risk to that man's skin of injury from those working conditions. It was for this reason that the Court of Session has held that it was the duty of the defenders, which they failed to carry out, to supply the pursuer with facilities for taking a shower after he had finished work.

That can only be because knowledge must be imputed to the defenders that if the pursuer's body were to continue to be exposed to the dirt and sweat, inevitably attendant on his conditions of work, which were operating on him *after* he had finished work—being the only dirt and sweat that a shower could have removed—it was more probable that he would contract the disease than if no shower had been taken. It is, in the present state of medical knowledge, impossible to say that if the pursuer had taken a shower he would certainly not have got the disease, and it is equally impossible to say that another man, in exactly the same case as the pursuer, would on the contrary certainly have got it.

In that state of facts, what the pursuer has to establish, as a condition of his substantiating a claim against the defenders, is that their admitted breach of the duty which they owed to him caused or materially contributed to the damage which he has suffered. He has proved that there was a precaution, neglected by the defenders, which, if adopted by them, as their duty in law demanded, would have made it less likely that he would have suffered that damage. The argument against him as I follow it, is that that only shows that the provision of a shower bath would have reduced the risk of injury: it does not show that in his case he would more probably not have contracted the disease had the bath been provided.

It would have been possible to state the argument in this way: " The " pursuer cannot show that it is more probable than not that, if a shower " had been provided, he as an individual would not have contracted dermatitis. " Therefore it is impossible to say that the defenders were under a duty " to him as an individual to supply a shower; A cannot have owed to B a " duty to take a precaution the absence of which B fails to show probably " caused him injury ". The duty can only be examined in relation to the individual who complains of the breach of it; it is not owed to him as a mere potential victim of dermatitis ; and this is unaffected by the fact that other men, for reasons we do not understand, would not have required the benefit of the precaution.

But once the breach of duty to the pursuer has been accepted, this argument seems to me to become untenable. It depends on drawing a distinction between the possibility and the probability of the efficacy of the precautions.

I do not find it easy to say in the abstract where one shades into the other; it seems to me to depend very much upon the nature of the case. This is a case in which the actual chain of events in the man's body leading up to the injury is not clearly known. But there are effective precautions which ought to be taken in order to prevent it. When you find it proved (*a*) that the defenders knew that to take the precaution reduces the risk, chance, possibility or probability of the contracting of a disease, (*b*) that the precaution has not been taken, and (*c*) that the disease has supervened, it is difficult to see how those defenders can demand more by way of proof of the probability that the failure caused or contributed to the physical break-down. In other classes of case such a defence could more easily be established. An example of facts which could give rise to the defence was seen recently by your Lordships—*Gibson* v. *British Insulated Callenders' Construction Co. Ltd.* Suppose it to be the duty of employers in certain circumstances to supply safety-belts. They do not do so, and an employee is injured in a way which would not have happened if the belt had not been provided. But he cannot prove that the failure to provide it contributed to the accident, because it is certain that if it had been provided he would not have used it. In the present case, the pursuer's body was vulnerable, while he was bicycling home, to the dirt which had been deposited on it during his working hours. It would not have been if he had had a shower. If showers had been provided he would have used them. It is admittedly more probable that disease will be contracted if a shower is not taken. In these circumstances I cannot accept the argument that nevertheless it is not more probable than not that, if the duty to provide a shower had been neglected, he would not have contracted the disease. The pursuer has after all, only to satisfy the court of a probability, not to demonstrate an irrefragable

chain of causation, which in a case of dermatitis, in the present state of medical knowledge, he could probably never do.

I agree with the Court of Session that the pursuer's case, in so far as it relates to the actual conditions of work, fails, but in my opinion he has succeeded in showing that his injury was, more probably than not, caused by or contributed to by the defenders' failure to provide a shower-bath. I would therefore allow this appeal.

Lord Salmon

My Lords,

All the relevant facts, and the medical evidence about which there is no dispute, are fully set out in the speech of my noble and learned friend, Lord Reid. It is apparent that the hot and dusty conditions under which the pursuer was required to work exposed him to a serious risk of contracting dermatitis The fact, however, that the defenders required the pursuer to work under these conditions has not been shown to constitute negligence on their part. On the other hand, it has been proved that in the circumstances any prudent employers would have provided adequate washing facilities

for their employees. It is well recognised that shower baths should be available for employees to use immediately after finishing work of the kind upon which the pursuer was engaged. Such facilities would materially reduce the risk of contracting dermatitis The defenders failed to supply shower baths or any other proper washing facilities. It is conceded that this failure on the part of the defenders did constitute negligence.

The pursuer contracted dermatitis. The question is: was the dermatitis proved to have been caused or materially contributed to by the defenders" negligence? The Court of Session answered this question in the defenders' favour on the ground that although the uncontradicted medical evidence established that adequate washing facilities would have materially reduced the risk it was impossible in the present state of medical knowledge to say that they would probably have prevented the pursuer from contracting dermatitis The medical witnesses could not say that it was more likely than not that these precautions which reasonably careful employers should have taken would have prevented injury but only that such precautions would have materially reduced the risk of injury The Lord Ordinary concluded that materially to increase the risk of injury does not amount to causing or materially contributing to the injury and that accordingly on a balance of probabilities no causal connection had been established between the defenders' negligence and the pursuers' injury. He, therefore, assoilzied the defenders. The Inner House upheld this decision largely for the same reasons as those given by the Lord Ordinary. The Lord President, however, in the course of his judgment, said: " Even if the pursuer had established " (as he did not) that the absence of washing facilities increased the risk " of the pursuer getting dermatitis, that would clearly not prove that the " absence of these facilities caused the disease, nor indeed would it go any " distance towards proving it." The first part of this passage, with all respect, seems to be based on a misunderstanding of the undisputed medical evidence. Nor can I accept the second part of the passage if the Lord President meant that in the circumstances of this case materially to increase the risk of injury was not a cause of the injury.

I, of course, accept that the burden rests upon the pursuer to prove, on a balance of probabilities, a casual connection between his injury and the defenders' negligence. It is not necessary however, to prove that the defenders' negligence was the only cause of injury. A factor, by itself, may not be sufficient to cause injury but if, with other factors, it materially contributes to causing injury, it is clearly a cause of injury. Everything in the present case depends upon what constitutes a cause. I venture to repeat what I said in *Alphacell Ltd.* v. *Woodward:* " The nature of causa- " tion has been discussed by many eminent philosophers and also by a " number of learned judges in the past. I consider, however, that what or

" who has caused a certain event to occur is essentially a practical question " of fact which can best be answered by ordinary commonsense rather than " abstract metaphysical theory." In the circumstances of the present case it seems to me unrealistic and contrary to ordinary commonsense to hold

that the negligence which materially increased the risk of injury did not materially contribute to causing the injury.

Dr. Hannay, an eminent dermatologist, made it plain in his evidence that medical knowledge relating to dermatitis was not yet very far advanced. He was asked:

> *Q.*—" Can you explain a little more fully the mechanics of it, how the " condition occurs in such a situation?"
>
> *A.*—"As far as medical knowledge can help, yes. We have a lot " to learn unfortunately, yet... what that reaction " (reaction of damage to the layers of the skin) " precisely is or how it occurs we do not know. " We know what may cause it" (dermatitis) " but the reaction, the " mechanism, we don't know ..."

When he said that the lack of washing facilities materially increased the risk of contracting dermatitis he added: " One cannot give a percentage " figure for such things."

It is known that some factors materially increase the risk and others materially decrease it. Some no doubt are periphery. Suppose, however, it were otherwise and it could be proved that men engaged in a particular industrial process would be exposed to a 52 per cent. risk of contracting dermatitis even when proper washing facilities were provided. Suppose it could also be proved that that risk would be increased to, say, 90 per cent. when such facilities were not provided. It would follow that if the decision appealed from is right, an employer who negligently failed to provide the proper facilities would escape from any liability to an employee who contracted dermatitis notwithstanding that the employers had increased the risk from 52 per cent. to 90 per cent. The negligence would not be a cause of the dermatitis because even with proper washing facilities, i.e. without the negligence, it would still have been more likely than not that the employee would have contracted the disease—the risk of injury then being 52 per cent. If, however, you substitute 48 per cent. for 52 per cent. the employer could not escape liability, not even if he had increased the risk to, say, only 60 per cent. Clearly such results would not make sense ; nor would they, in my view, accord with the Common Law.

I think that the approach by the courts below confuses the balance of probability test with the nature of causation. Moreover, it would mean that in the present state of medical knowledge and in circumstances such as these (which are by no means uncommon) an employer would be permitted by the law to disregard with impunity his duty to take reasonable care for the safety of his employees.

My Lords, I would suggest that the true view is that, as 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 the disease notwithstanding that the employer is not responsible for other factors which have materially contributed to the disease. *Wardlaw* v. *Bonnington Castings Ltd.* 1965 S.C. (H.L.) 26 and *Nicholson* v. *Atlas Steel Foundry and Engineering Co.* 1957 S.C. (H.L.) 44. I do not find the

attempts to distinguish those authorities from the present case at all convincing.

In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease, and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the Common Law. I would accordingly allow the appeal.

300446 Dd 197094 80 11/72 St.S