CASE COMMENT

WIPING AWAY McGHEE'S BENEVOLENT SMILE: WILSHER v. ESSEX AREA HEALTH AUTHORITY*

In negligence law, conventional wisdom holds that it is for the plaintiff to prove on a balance of probabilities that his loss or injury resulted from the defendant's actions. Typically this is satisfied by showing that "but for" those actions, the accident would not have occurred,[1] although the less stringent "substantial factor" test is used where multiple causes underlie the complaint.[2] Evidentiary gaps, however, may render that task difficult, if not impossible, to fulfil. Mindful of that fact, the courts have on occasion fashioned anomalous rules which remove the usual onus from the plaintiff. The best known example of this, the so-called "*McGhee* principle",[3] has been widely accepted and frequently invoked in Canadian tort law. Now, 16 years after its birth, it appears that the principle may have been misconceived. The unanimous opinion of the House of Lords in *Wilsher v. Essex Area Health Authority*[4] will force Canadian jurists to reassess their long-standing interpretation of *McGhee v. National Coal Board.*

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[1] *Matthews v. McLaren* (1969), 4 D.L.R. (3d) 557, [1969] 2 O.R. 137 (H.C.J.), revd 11 D.L.R. (3d) 277, [1970] 2 O.R. 487 (C.A.), *sub nom. Horsley v. MacLaren*, affd 22 D.L.R. (3d) 545, [1972] S.C.R. 441; *Kauffman v. Toronto Transit Com'n.* (1959), 18 D.L.R. (2d) 204, [1959] O.R. 197, 80 C.R.T.C. at p. 305, affd 22 D.L.R. (2d) 97, [1960] S.C.R. 251, 80 C.R.T.C. 305.

[2] A blind application of the "but for" test would have the unfortunate result of relieving all of several defendants of responsibility where each could show that, absent his contribution, the loss would have still been suffered. Pragmatically, the courts have required only that each defendant's actions be a substantial factor. *Lambton v. Mellish*, [1894] 3 Ch. 163; *Arneil v. Paterson*, [1931] A.C. 560 (H.L.).

[3] *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.). *Cook v. Lewis*, [1952] 1 D.L.R. 1, [1951] S.C.R. 830, in other circumstances, similarly helps plaintiffs faced with insurmountable difficulties in proving cause-in-fact.

[4] [1988] 1 All E.R. 871.

I

The pursuer[5] in *McGhee* was employed by the defender to clean out brick kilns. By all accounts the working conditions were rather unpleasant: hot and dusty. Making a bad situation worse, the employer failed to provide washing facilities at the job site and, as a result, the employee, uncomfortably caked in sweat and dirt, was forced to cycle home carrying the day's grime with him. Unfortunately, but not surprisingly, poor McGhee was soon suffering from a dermatitic condition. In the suit which ensued, the defender made several frank admissions. Faced with the weight of medical evidence, it conceded that the pursuer's affliction was attributable to his work environment. That the working conditions were unpleasant, however, did not involve a breach of duty and, consequently, the admitted existence of that causal link did little to further McGhee's case. The National Coal Board also conceded that its failure to provide showers *did* constitute a breach of duty, but felt secure that the nature of the medical evidence before the court was its ace-in-the-hole.

The medical evidence was inconclusive. What *was* clear was that the dermatitis was caused by the repeated abrasion of the pursuer's skin by dust particles as he exerted himself. What could not be said with certainty was what, if any, role the lack of showers played in the onset of McGhee's disease. Clearly, he was *liable* to further injury as he exerted himself cycling home. At its strongest, however, the evidence established only that the employer's negligence materially increased the *risk* of injury. The pursuer could not positively prove on a balance of probabilities that the breach "caused or materially contributed to" the disease; nor could the defender positively prove the contrary. The lacuna in medical science appeared to seal the action's fate. The lower courts, adhering to traditional views regarding causation and proof, certainly did their best to see that fate realized — they assoilzied the defender. Dramatically, the House of Lords intervened to turn aside destiny. James McGhee was awarded damages.

A simple reading of their Lordships' decision does not easily yield a clear *ratio decidendi* and, consequently, it has meant different things to different people. Fortunately, Canadian courts have consistently settled on variations on the same theme, if not precisely the same interpretation. Mr. Justice MacGuigan very recently reviewed the

[5] "Pursuer" and "defender" are the Scots law equivalent of "plaintiff" and "defendant".

authorities, summarized the pertinent opinions and formulated a guiding principle based largely on Lord Wilberforce's judgment in *McGhee*. It was held in *Letnik v. Municipality of Metropolitan Toronto*[6] that a plaintiff can in certain circumstances benefit from a reversal of the usual rules concerning the allocation of the evidentiary onus and succeed in his action without establishing, on a balance of probabilities, that his loss or injury was caused by the defendant's carelessness.[7]

> . . . [A]n onus shift should occur (1) where a person has by breach of duty of care created a risk, (2) where injury occurs within the area of that risk, and (3) where there is an evidential gap which prevents the plaintiff from proving that the negligence caused the loss.

His statement is echoed in, and supported by, the Courts of Appeal of not fewer than four provinces[8] and by trial-level decisions.[9]

The justification for shifting the onus was succinctly provided in *McGhee*. Logically, their Lordships conceded, the pursuer should have failed; a scientifically proven chain of causation was impossible given the inconclusive character of the medical evidence. Fortunately for the pursuer, "the legal concept of causation is not based on logic or philosophy", but rather on "the practical way in which the ordinary man's mind works in the every-day affairs of life".[10] So, out with logic and on to more important considerations. Lord Wilberforce saw two.[11] The first was little more than a statement of a new rule.[12]

> . . . [I]t is a sound principle that where a person has, by breach of duty of

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[6] (1988), 49 D.L.R. (4th) 707, 44 C.C.L.T. 69, [1988] 2 F.C. 399 (C.A.).

[7] *Ibid.*, at p. 721 D.L.R., p. 94 C.C.L.T.

[8] *Powell v. Guttman* (1978), 89 D.L.R. (3d) 180, 6 C.C.L.T. 183, [1978] 5 W.W.R. 228 (Man. C.A.); *Nowsco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.* (1981), 122 D.L.R. (3d) 228, 16 C.C.L.T. 23, 7 Sask. R. 291 (C.A.); *Dalpe v. Edmundston (City)* (1979), 25 N.B.R. (2d) 102, 51 A.P.R. 102 (C.A.); *Delaney v. Cascade River Holidays Ltd.* (1983), 24 C.C.L.T. 6, 44 B.C.L.R. 24 (C.A.).

[9] *Meyer v. Gordon* (1981), 17 C.C.L.T. 1 (B.C.S.C.); *Edmison v. Boyd* (1985), 62 A.R. 118 (Q.B.), affd 51 Alta. L.R. (2d) 43, 77 A.R. 321 (C.A.), leave to appeal to S.C.C. refused 51 Alta. L.R. (2d) xli, 80 A.R. 320*n*, 79 N.R. 396*n*. *See also Torrison v. Colwill* (1987), 42 C.C.L.T. 51 (B.C.S.C.).

[10] *McGhee v. National Coal Board, supra*, footnote 3, at p. 1011. *See also* Lord Salmon, *ibid*, at p. 1018.

[11] *Ibid.*, at p. 1012.

[12] *Ibid.*, at p. 1012, *per* Lord Wilberforce. Most Canadian decisions adopting the *McGhee* principle have done so without exploring the underlying policy considerations. An exception is the judgment of Bayda J.A. (as he then was) in *Nowsco Well Service Ltd., supra*, footnote 8.

> 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.

The second was a frank declaration of sympathy for innocent victims and antipathy for wrongdoers.

> . . . [W]hy 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? . . . [I]f one asks which of the parties . . . should suffer from [the] inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk . . . who should bear its consequences.

II

Wilsher v. Essex Area Health Authority is exactly the type of "hard case" which tempts courts to deal pragmatically with evidentiary rules. That the House of Lords refused to do so is testimony to its resolve to re-infuse orthodoxy into negligence law. Martin Wilsher was born three months prematurely and suffered from many of the natural difficulties commonly attendant on such births. The infant may have also suffered from human error — the defendant's negligence in supplying oxygen. Wilsher alleged that that carelessness had caused the onset of retrolental fibroplasia ("RLF"), a condition which left him in near total blindness. The defendant sought to avoid liability for its negligence by denying the existence of any such causal link.

As in *McGhee*, the plaintiff in *Wilsher* was faced with an evidential gap. The uncertainties of medical science made it impossible to sufficiently tie the defendant's negligence to the RLF. The most that could be said in favour of the infant's action was that the errors had materially increased the risk of the condition developing. The defendant disputed this, arguing that the excess amount of oxygen which was administered was insufficient to cause the damage. The picture was further clouded by the fact that RLF was common even in premature babies who had not been given oxygen, particularly among those who suffered from any one of four other conditions. Martin Wilsher had been afflicted by all of them. The expert testimony, however, went no further than noting the correlation between RLF and the other conditions, and the plaintiff's RLF could not satisfactorily be causally linked to any of the four.

The trial judge, failing to understand the complexities of the

evidence before him, proceeded on the basis that the litigants were agreed that the defendant's negligence had materially increased the risk of RLF. To his mind, then, all the components needed for the application of the *McGhee* principle were present: breach of duty + material increase in risk + injury within area of risk + evidential gap = shift of onus. The defendant, unable to prove on a balance of probabilities that its conduct did not cause or materially contribute to the plaintiff's condition, was accordingly held liable in damages. A majority of the Court of Appeal affirmed the judgment.[13] The House of Lords allowed the appeal, ordered a new trial and, in the process, restored some measure of orthodoxy to the law. The *McGhee* principle, it was explained, was a fiction authored by Lord Wilberforce, and he alone. The rules governing proof of causation had not been altered in 1972 as so many had believed.

III

Lord Bridge, who gave the only reasoned opinion in *Wilsher*, considered Lord Wilberforce's judgment in *McGhee* to be an unprecedented and unjustifiable departure from tradition. He began his attack on the *McGhee* principle by emphasizing that Lord Wilberforce had misread the existing case-law, particularly *Bonnington Castings Ltd. v. Wardlaw*.[14] Clearly contrary to the new principle which it was supposed to support, *Bonnington Castings Ltd.* stands as a resounding affirmation of the traditional rules.[15] The House of Lords, in that case, adamantly denied that a burden of disproving causation ever fell upon the defendant, except where Parliament clearly stipulated otherwise.[16]

> It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury . . .[17]

Unsupported by precedent, Lord Wilberforce's judgment in *McGhee* was also unsupported by those of his brethren. In *Wilsher*, Lord Bridge sought to disabuse those who laboured under any notion

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[13] [1986] 3 All E.R. 801, [1987] Q.B. 730.

[14] [1956] 1 All E.R. 615, [1956] A.C. 613.

[15] *Ibid.*, at p. 618 All E.R., p. 620 A.C., *per* Lord Reid; at p. 621 All E.R., p. 624 A.C., *per* Lord Tucker; and at p. 621 All E.R., p. 625 A.C., *per* Lord Keith.

[16] *Ibid.*, at p. 621 All E.R., p. 625 A.C., *per* Lord Keith; at p. 621 All E.R., p. 624 A.C., *per* Lord Tucker.

[17] *Ibid.*, at p. 618 All E.R., p. 620 A.C., *per* Lord Reid.

to the contrary. That clarification was necessary is clear from the generous welcome given to the *McGhee* principle and from the explicit statements of some courts. For example, the appellate division of the Federal Court of Canada recently held that while[18]

> . . . only Lord Wilberforce explicitly reversed the burden of proof . . . it is fair to conclude that . . . Lord Reid, Lord Simon of Glaisdale and Lord Salmon were effectively taking the same position . . .

Though a sympathetic misinterpretation of the majority of the judgments in *McGhee*, Lord Wilberforce's lone dissent has come to carry far more precedential value in Canada than it warrants.

The House of Lords, speaking through Lord Bridge, did not overturn what it considered to be the true *ratio decidendi* of *McGhee*. There was no need to: the majority judgment in *McGhee* was for the most part orthodox and non-controversial. First of all, as Lord Bridge noted, it "affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff".[19] Secondly, it affirmed that the primary onus does not shift upon proof that a defendant's negligence has materially increased the risk of injury. Thirdly, however, it said that such evidence could in certain circumstances advance a pursuer's or plaintiff's case by allowing the court to draw an inference regarding causation.

It is the third proposition which is the most difficult and which is the key to understanding *McGhee*. The medical experts for both sides agreed that it was *scientifically* impossible to infer that a causal connection was more probable than not[20] and, as Lord Wilberforce noted, "to bridge the evidential gap by inference . . . [was] something of a fiction".[21] The basis of the *legal* concept of causation, however,

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[18] *Letnik v. Municipality of Metropolitan Toronto* (1988), 49 D.L.R. (4th) 707 at p. 721, 44 C.C.L.T. 69 at p. 93, *per* MacGuigan J.

[19] *Wilsher v. Essex Area Health Authority*, [1988] 1 All E.R. 871 at p. 881. See Lord Reid, in *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 at p. 1010: "It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury"; Lord Simon, *ibid.*, at p. 1014: "[The pursuer] 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"; Lord Kilbrandon, *ibid.*, at p. 1016: "The [pursuer] has to satisfy the court of a probability"; and Lord Salmon, *ibid.*, at p. 1017: "I, of course, accept that the burden rests on the [pursuer] to prove, on a balance of probabilities, a causal connection between his injury and the respondents' negligence."

[20] *McGhee v. National Coal Board, supra*, footnote 19, at pp. 1013, 1017.

[21] *Ibid.*, at p. 1013.

is common sense (not logic),[22] and consequently the law can be satisfied even where science can not. In *Wilsher*, Lord Bridge, describing the majority decision in *McGhee* as a "robust and pragmatic approach to the undisputed primary facts of the case",[23] approved of the inferential process which allowed an increased risk of injury to stand as proof of causation.[24]

> . . . [W]here the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis . . . there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body *probably* contributed cumulatively to the causation of the dermatitis. (Emphasis added.)

Through inference, then, the House of Lords in *McGhee* had found that the pursuer *had* established causation on a balance of probabilities.[25]

Wilsher, however, now restricts the scope of that mode of proof; not every plaintiff who can show that his injury fell within the area of risk created or materially increased by a defendant's negligence will be allowed to prove causation by inference. Lord Bridge, adopting the view of Sir Nicolas Browne-Wilkinson V.C. in the Court of Appeal, distinguished between the facts in *McGhee* and those in *Wilsher*. In the former, where there was only one possible cause of the dermatitis (*i.e.*, brick dust), there was common sense, if not logic, in holding that the failure to take a precaution (*i.e.*, providing showers) against the onset of the disease caused or contributed to the condition. In the latter, RLF could have developed for any one of several reasons. A failure to take the necessary precautions against one (*i.e.*, excess oxygen) did not raise any presumption or allow

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[22] *Ibid.*, at p. 1011 *per* Lord Reid, p. 1018 *per* Lord Salmon.

[23] *Supra*, footnote 19, at p. 881.

[24] *Ibid.*, at p. 880.

[25] See Lord Kilbrandon, *supra*, footnote 19, at p. 1016: "[The pursuer] 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"; Lord Salmon, *ibid.*, at p. 1017: "In the circumstances of the present case it seems to me unrealistic and contrary to ordinary common sense to hold that the negligence . . . did not materially contribute to causing the injury"; Lord Simon, *ibid.*, at p. 1014: "[A] failure to take steps which would bring about a material reduction of the risk involves . . . a substantial contribution to the injury . . . [The] employer should have foreseen that failure to take the precaution would, more probably than not, substantially contribute towards injury; this is sufficient prima facie evidence"; and Lord Reid, *ibid.*, at p. 1011: "I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury."

inferences to be drawn.[26] *Wilsher*, then, says that *McGhee* is useful when the plaintiff can point to a factor which *prima facie* caused the injury. In such cases it is open to the courts to infer that the defendant's breach of duty contributed, thereby relieving the plaintiff of doing the impossible by filling in the evidential gap, "separating the 'guilty' and 'innocent' components of the same risk".[27] It is not useful where the plaintiff can only show that the risk was materially increased by the addition of another possible cause of the injury.

IV

What does all of this mean for Canadian courts? That Lord Bridge's judgment is not binding in this country is obvious. That it is nevertheless very persuasive is also obvious — already two courts have relied on *Wilsher* to refuse recognition of the *McGhee* principle. In *Couillard v. Waschulewski Estate*,[28] Mr. Justice Dea of the Alberta Court of Queen's Bench reviewed the authorities, noted that the issue had never been directly considered by the Supreme Court of Canada or the Alberta Court of Appeal, and concluded that "*Wilsher* states what is long-settled and well-understood as the law in Canada on causation in the law of tort." In another trial-level decision, *Rayner v. Knickle*,[29] Mr. Justice Campbell of the Prince Edward Island Supreme Court, despite finding the *McGhee* principle "interesting and tempting", chose to side with Lord Bridge in scotching Lord Wilberforce's heretical views.

Whether or not future courts follow suit should ultimately turn on their own assessment of what on policy grounds would be right for Canadian tort law. Lord Wilberforce was moved to shift the onus by what he perceived to be the injustice of saddling a plaintiff with the inherent uncertainties of proving causation, and by the possibility of a defendant avoiding liability simply because of a gap in scientific knowledge. Against this, Lord Bridge sounded a note of caution:[30]

> We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.

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[26] *Wilsher v. Essex Area Health Authority, supra*, footnote 19 at p. 882.

[27] A. Boon "Causation and the Increase of Risk" (1988), 51 M.L.R. 508 at p. 513.

[28] (1988), 44 C.C.L.T. 113 at p. 131, [1988] 4 W.W.R. 642 at p. 657, 59 Alta. L.R. (2d) 62.

[29] (1988), 47 C.C.L.T. 141 at p. 181, 72 Nfld. & P.E.I.R. 271 at p. 297.

[30] *Wilsher v. Essex Area Health Authority, supra*, footnote 19, at p. 883.

(The severity of Lord Bridge's warning is, of course, tempered by his approval of the majority decision in *McGhee*. Tampering with the rules of evidence is not allowed; edging towards the outer limits of credibility by drawing inferences which even a plaintiff's expert witness would not draw is allowed.) As the *McGhee* principle has been most frequently invoked in medical negligence suits, the more restrictive view may lead to fewer awards against doctors, nurses and hospitals. Such a development might in turn lead to lower insurance premiums and consequently lower health care costs. Finally, a return to the orthodox position would restore internal consistency to the rules of causation. One can ask whether it is proper and just to treat one defendant more harshly than another simply because the facts of his case fall within an area of scientific inadequacy. It may be that he should be able to insist on *proof* of his culpability before being found liable in damages.

Until recently *McGhee* was welcomed, perhaps too readily, as providing a "benevolent principle [which] smiles on . . . factual uncertainties and melts them all away".[31] In *Wilsher*, the House of Lords wiped that smile off the face of tort law in England. The time has come for Canadian jurists to decide whether they will do likewise or whether they will continue to adhere to Lord Wilberforce's heresy. The importance of that decision must not be underestimated — it will undoubtedly be the determinative factor in many tort actions.

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[31] *Fitzgerald v. Lane*, [1987] 2 All E.R. 455 (C.A.), at p. 464, *per* Lord Justice Nourse.

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