causal responsibility for damage that was not in fact proved to have been caused by the defendant; the courts were simply satisfied that the damage was of the very kind for which the defendant ought to be held liable. In *Gregg*, on the other hand, causal responsibility for the damage—loss of chance—could clearly be established on the orthodox test. Unfortunately, the damage was not recognized. While there is some resistance, there has not been a clear rejection of such claims by the higher courts in the major common law jurisdictions. The House of Lords and the High Court of Australia have avoided the issue, with individual judges sending out conflicting signals (*Hotson; Chappel* v. *Hart* (1998) 195 C.L.R. 232 and *Naxakis* v. *Western General Hospital* (1999) 197 C.L.R. 269), while the Canadian decision of *Laferrière* v. *Lawson* [1991] 1 S.C.R. 541, which did reject loss of chance in medical negligence, was actually based on the civil law of Quebec. The Chief Justice of Canada has since kept the issue alive by stating that the *Laferrière* ruling was not necessarily applicable to the common law; and there are several jurisdictions in the United States that have recognized loss of chance (see H. Luntz, above, pp. 180–181).

There have also been intermediate and lower court decisions in England and Australia allowing loss of chance claims in medical negligence (*Judge* v. *Huntingdon Health Authority* (1994) 27 B.M.L.R. 107; cf. *Tahir* v. *Haringey Health Authority* [1998] Lloyds Rep. Med. 104; *Gavalas* v. *Singh* (2001) 3 V.R. 404). Following the purposive approach to causation in *Fairchild* and *Chester*, it is suggested that a court should now be obliged to allow claims for loss of chance in appropriate circumstances. In cancer cases like *Gregg*, the sole purpose of the general practitioner's duty of care is to give the patient a chance to be cured by timely referral to a specialist. The gist of damage is loss of chance and nothing else; failure to recognize this thwarts the purpose of the law and is, therefore, contrary to the clear authority of *Fairchild* and *Chester*. If *Chester* survives the current appeal to the House of Lords, there is more than a remote possibility that *Gregg* will also find itself in that House—hopefully not as a lost cause.

KUMARALINGAM AMIRTHALINGAM

VICARIOUS LIABILITY IN ENGLAND AND AUSTRALIA

THE impact of the Supreme Court of Canada's decisions in *Bazley* v. *Curry* [1999] 2 S.C.R. 534 and *Jacobi* v. *Griffiths* [1999] 2 S.C.R. 570 continues to be felt across the common law world.

In those cases, the Supreme Court ruled that an employee's tort would be held to have been committed in the course of her employment if there was a "sufficiently close connection" between the employee's tort and what she was employed to do to make it "fair and just" that the employer should be held vicariously liable for the employee's tort. The Supreme Court went on to rule that such a connection would exist if and only if the work the employee was employed to do created or increased a risk that the employee would commit the kind of tort that she committed. The House of Lords adopted the "sufficiently close connection" test in *Lister* v. *Hesley Hall Ltd.* [2001] UKHL 22, [2002] 1 A.C. 215 (noted by Hopkins, (2001) 60 C.L.J. 458), but, unlike the Supreme Court, did not explain *when* it would be "fair and just" to hold an employer vicariously liable for an employee's tort; it did, however, find that a "sufficiently close connection" was established in that case.

In *Dubai Aluminium Ltd.* v. *Salaam* [2002] UKHL 48, [2002] 3 W.L.R. 1913 the House of Lords affirmed its decision in *Lister* but did little to explain further when the "sufficiently close connection" test would be satisfied. Meanwhile, in *New South Wales* v. *Lepore*, *Samin* v. *Queensland*, *Rich* v. *Queensland* [2003] HCA 4, a majority in the High Court of Australia refused to depart from the old Salmond test ("an unauthorised mode of doing an authorised act") for determining whether an employee committed a tort in the course of his employment.

Dubai Aluminium

This case concerned a company ("Dubai") that was defrauded of $50m by its chief executive, acting in concert with a number of other individuals. A, a partner in a firm of solicitors, assisted the executive and his cronies to commit the fraud by drawing up some legal documents. On discovering the fraud, Dubai sued A's firm for compensation, claiming that A had committed an equitable wrong in drawing up the documents and that A's firm was vicariously liable for A's wrong under section 10 of the Partnership Act 1890, which makes the partners in a firm vicariously liable for any wrongs committed by one of the partners "in the ordinary course of the business of the firm".

A's firm settled the claim against it, paying out $10m to Dubai. A's firm then sought to make a claim in contribution against the participants in the fraud. To succeed in this claim, they had to show that had the "factual basis of the claim against [the firm been] established", the firm would have been held liable to Dubai: Civil Liability (Contribution) Act 1978, section 1(4). The factual basis of the claim against the firm here was that A had acted

dishonestly in drawing up the documents and that A acted in his capacity as a partner in drawing up the documents. The House of Lords held that the firm was entitled to make its claim for contribution: had those facts been established, A would have committed an equitable wrong in drawing up the documents (the wrong of dishonestly assisting someone to breach a fiduciary duty) and there would have been a "sufficiently close connection" between A's wrong and the business of the firm to justify the firm's being held vicariously liable for that wrong. The House of Lords went on to hold that the firm was entitled to recover from the participants in the fraud all the money that it had paid out to Dubai: as the participants in the fraud were still enriched by $50m as a result of their fraud, it was only fair that they should bear the full burden of compensating Dubai for the losses that that fraud had caused it to suffer.

The House of Lords gave very little guidance as to when the "sufficiently close connection" test would be satisfied, seeming to think that the issue of whether it would be "fair and just" to hold an employer vicariously liable for an employee's tort would have to be resolved on a case by case basis. However, their Lordships did offer the following guidance:

(1) The fact that an employee committed a tort by doing the kind of thing she was employed to do will not of itself make it "fair and just" to make the employer vicariously liable for the employee's tort. However, if the employee was acting for the benefit of her employer at the time, it might well be "fair and just" to make the employer vicariously liable for her tort.

(2) If B intentionally committed a tort for her own benefit while she was employed by A, it will be "fair and just" to hold A vicariously liable for B's tort if: (*a*) B, in committing her tort, failed to discharge some duty that A was subject to and which A had given B the job of discharging (the situation in *Lister*); or (*b*) A is estopped from denying that B was acting on his behalf at the time she committed the tort. If neither (*a*) nor (*b*) holds true, it will be difficult to establish that it is "fair and just" to hold A vicariously liable for B's tort, but not impossible: "the circumstances in which an employer may be vicariously liable for his employee's ... misconduct are not closed" (*per* Lord Millett, at [129]).

(3) Lord Nicholls took the view (at [21]) that the basis of the law on vicarious liability is that justice demands that businesses which create a risk that their employees will

commit torts should be held liable when those risks materialise. This suggests that he thinks that it would be "fair and just" to hold an employer vicariously liable for an employee's tort if the nature of the employee's employment created or increased a risk that the employee would commit the kind of tort that she committed. (This is, of course, the position taken by the Supreme Court of Canada.)

New South Wales v. *Lepore*

In each of the three conjoined appeals dealt with in this case, A, a teacher, sexually abused B, a pupil, while she was at school. B wanted to sue C, A's employer, for damages. B argued, first, that C was liable to pay her damages in *negligence* because A's acts of sexual abuse put C in breach of the non-delegable duty that C owed B to take reasonable steps to see that she would be safe from harm while at school. B argued, secondly, that C was liable to pay her damages because C was *vicariously liable* for A's acts of sexual abuse.

The High Court ruled, by six to one (McHugh J. dissented), that the claim in negligence could not suceed. Kirby P. held that as A was C's employee, the question of whether C should be held liable for the harm done by A should be resolved by reference to the law on vicarious liability, not the law on negligence. Callinan and Gaudron JJ. thought that some carelessness on C's part would have to be shown before C could be held to have breached the duty of care it owed B—so the mere fact that A sexually assaulted B could not have put C in breach of that duty of care. Gleeson C.J., Gummow and Hayne JJ. admitted that C owed B a non-delegable duty of care and that C gave A the job of discharging that duty. However, they held that A could only have put C in breach of that duty if B had been physically harmed through a *lack of care* on A's part; but here, A *intentionally* harmed B. This distinction is hard to justify. It threatens to revive *Cheshire* v. *Bailey* [1905] 1 K.B. 237, which ruled that a bailee of goods who gave the goods to an employee to look after would be liable for the loss of the goods if they were lost through the employee's carelessness, but not if they were stolen by the employee—a proposition which was condemned as "clearly contrary to principle and common sense" by Lord Salmon in *Port Swettenham Authority* v. *T. W. Wu & Co.* [1979] A.C. 580, at 591.

The High Court was more divided on the issue of whether C was vicariously liable for A's acts of sexual abuse. As McHugh J. had held that B could sue C in negligence, he declined to express a view on this issue. Kirby P. held that the court should use the

"sufficiently close connection" test to determine whether A's acts of sexual abuse were committed in the course of his employment. However, he declined to express a view on whether such a connection was made out, preferring to leave that issue to be resolved by a new trial.

The other members of the Court were unwilling to depart from the old Salmond test in determining whether A's acts of sexual abuse were committed in the course of his employment. Gummow, Hayne and Callinan JJ. thought that under this test, A could not possibly be held to have sexually abused B in the course of his employment. Gleeson C.J. and Gaudron J. preferred to allow the issue to be settled in a new trial. Gleeson C.J. in particular thought it was arguable that A's acts of sexual abuse could have amounted to a form of excessive chastisement.

Why did the majority in the High Court not follow the example of the Supreme Court of Canada and the House of Lords? A number of reasons were given.

(1) None of the majority thought they were compelled by authority to adopt the "sufficiently close connection" test. The authorities—such as *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716, *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, and *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827—which are normally instanced as examples of the "sufficiently close connection" test at work were all distinguished as resting on estoppel or as not being vicarious liability cases at all but rather cases where an employer was put in breach of a non-delegable duty of care by the actions of his employee.

(2) Gaudron J. thought that the Supreme Court of Canada's decisions in *Bazley* and *Jacobi* did not provide a "clear basis for determining whether a person should be held vicariously liable for the deliberate criminal acts of an employee" (at [126]); in particular, she found it hard to draw a distinction between cases where an employee was given an *opportunity* to commit a particular tort (which everyone agrees should not necessarily give rise to vicarious liability) and cases where an employer *created or increased a risk* that an employee would commit a particular tort (which the Supreme Court ruled should give rise to vicarious liability). Gummow and Hayne JJ. shared this worry, expressing themselves concerned that if *Bazley* and *Jacobi* were followed, an employer would be held vicariously liable for an employee's tort whenever the tort "could not have

occurred but for the employment" (at [223]). What the employee was actually employed to do would become irrelevant.

(3) Gaudron, Gummow and Hayne JJ. also thought that the law of negligence was a more appropriate vehicle for determining the scope of an employer's liability for creating or increasing a risk that his employees would do wrong than the law on vicarious liability.

(4) Callinan J. was strongly critical of the suggestion that the courts should determine whether an employee's tort was committed in the course of his employment by *simply* asking whether it is "fair and just" to hold the employee's employer vicariously liable for the employee's tort. He thought that the law would be thrown into a state of intolerable uncertainty if such an approach were adopted in Australia, as different judges would take different views of what is "fair and just". Of course, this is exactly the approach that has now been adopted in England and, as a result, the law on vicarious liability in England has indeed become intolerably uncertain. It is regrettable that the House of Lords in *Dubai Aluminium* did very little to remedy this uncertainty.

NICHOLAS J. MCBRIDE

SALE OF GOODS—RELIANCE ON A THIRD PARTY'S SKILL AND JUDGMENT

IN *Britvic Soft Drinks Ltd.* v. *Messer UK Ltd.* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368, affirming Tomlinson J. [2002] Lloyd's Rep. 20, carbon dioxide produced by Terra Nitrogen (UK) Ltd. was sold to Messer and resold to Britvic, who used it in the manufacture of sparkling drinks. The carbon dioxide was contaminated by benzene, but in such small quantities as to pose no danger to health. Even so, because of adverse publicity the drinks as a practical matter were unsaleable. Damages were awarded to Britvic against Messer under the Sale of Goods Act 1979, s. 14(3) as being unfit for the buyer's particular purpose. The case raises a couple of points of interest.

First, although we are taught that "goods" are "chattels personal", which Halsbury (and, much earlier, Blackstone) defines as "things which are at once tangible, movable and visible", there has never been any doubt that gases (and even air itself, *e.g.* as compressed air) are "goods" within the Sale of Goods Act, despite