SMOOTHING THE ROUGH JUSTICE OF THE FAIRCHILD PRINCIPLE

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THE long-awaited decision of the House of Lords in *Barker v Corus (UK) Plc.* [2006] UKHL 20; [2006] 2 W.L.R. 1027 answers some of the questions posed by the House's earlier decision in *Fairchild v Glenhaven Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32 (noted (2004) 120 L.Q.R. 233), and throws up a few new ones.

As many readers will be aware, in *Fairchild*, by way of exception to the ordinary rules of causation, the House of Lords held employers who had carelessly exposed three workers to asbestos liable for the mesothelioma (a deadly form of cancer) that the workers contracted, even though each worker had been exposed to asbestos by more than one employer and it was impossible (given the current state of scientific understanding) to prove which fibre from which period of exposure had actually caused each particular claimant's mesothelioma.

The three appeals in *Barker v Corus* also concerned ultimately fatal mesothelioma caused by inhalation of asbestos, and raised two main questions on the scope of the *Fairchild* principle:

The claimant's own carelessness as a possible cause

The first question was only raised by the first appeal, which was from the Court of Appeal decision in *Barker* v *Saint Gobain Pipelines plc* [2004] EWCA Civ 545; [2005] 3 All E.R. 661 (noted (2004) 120 L.Q.R. 566). Mr Barker had been negligently exposed to asbestos by two different employers at different times, the defendant and a now-insolvent company, but had also carelessly exposed himself to asbestos during a period as a self-employed plasterer. Moses J. held, and the Court of Appeal agreed, that the *Fairchild* principle nevertheless applied.

The House of Lords had little difficulty with this question, unanimously dismissing this part of the appeal (although their Lordships' decisions depended in varying degrees on their answer to the second question, below). In particular, Lord Hoffmann noted that it had already been found in *McGhee v National Coal Board* [1973] 1 W.L.R. 1 (interpreted in *Fairchild* as an application of the *Fairchild* principle) that the *Fairchild* principle applied even when the harm might have been caused by a non-tortious exposure to the harmful agent (in that case brick dust causing dermatitis). He therefore held the principle did still apply where one possible cause was the claimant's own carelessness, it being "irrelevant whether the other exposure [which may also have caused the harm] was tortious or non-tortious, by natural causes or human agency or by the claimant himself".

Apportionment

The second question was raised by all three appeals, because in all three at least one of the tortious employers and its insurers were insolvent, and, indeed, in the second and third appeals (*Smiths Dock Ltd v Patterson* and *Murray v BS Hyrodynamics*) more than half of the asbestos exposure was by now-insolvent employers. The question that arose was whether, in such circumstances, those tortfeasors that were still solvent and traceable should be liable to compensate for the entire harm caused? It should be remembered that in the ordinary case of tortfeasors who concurrently cause an indivisible harm the one or more solvent and traceable tortfeasors that remain are liable for the full harm (subject to apportionment among themselves under the Civil Liability (Contribution) Act 1978 and between themselves and a careless claimant under the Law Reform (Contributory Negligence) Act 1945). This is liability *in solidum*: joint and several liability. In contrast, in the ordinary case of tortfeasors who have materially contributed to a divisible harm, the tortfeasors are liable only for the proportion of the harm they caused, and so if some tortfeasors are insolvent or untraceable the claimant will not obtain compensation for the entire loss: in *Holtby* v *Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421 (CA) the defendant was liable for only 25% of the claimant's asbestosis (the other tortfeasor not being in court); in *Allen* v *British Rail Engineering Ltd* [2001] EWCA Civ 242, the defendant was liable for only 50% of the claimant's vibratory white finger (the other 50% having been caused by the defendant's own non-negligent action). This is several liability.

The *Fairchild* principle concerns neither tortfeasors who have concurrently caused indivisible harm nor tortfeasors who have materially contributed to a divisible proportion of harm. Rather it applies to possible causes of indivisible harm, none of which can be proven to have in fact caused any harm, and nevertheless holds liable those that breached a duty of care to the claimant. It was therefore argued that, in the very special circumstances in which the principle operates, if a particular employer was only responsible for a fraction of the total asbestos exposure then they should only have to compensate for the same fraction of the mesothelioma, and so liability should be several and apportioned.

In *Barker v Saint Gobain* at first instance, Moses J. rejected such calls for apportionment but reduced damages by 20% for the contributory negligence of Mr Barker in exposing himself to asbestos during his self-employment . The Court of Appeal dismissed the appeal against this decision, Lord Justice Kay stating "I can think of no approach to the problems that arise in a case such as this that would achieve a more just solution if consistently applied."

In the House of Lords only Lord Rodger of Earlsferry, dissenting, rejected the arguments for apportionment. On his view *McGhee* and *Fairchild* clearly bent the rules of causation to make the employers liable for the mesothelioma, but once that had been done the usual rules of liability *in solidum* must apply. At the other end of the scale, Lord Hoffmann saw the Fairchild principle as creating a special category in which the "rough justice" created by joint and several liability should be smoothed by apportionment. In his view, the damage for which compensation is granted within the Fairchild principle, although not in other cases, is not the disease itself but rather the "risk or chance of having caused the disease". As a result, the harm caused is not the mesothelioma but is in fact a particular percentage chance of having caused the mesothelioma, and therefore is indivisible harm and so apportionment must

logically follow. The other three of their Lordships agreed with Lord Hoffmann that apportionment should be imposed, although none of them went as far as Lord Hoffmann in saying that the relevant harm was the divisible harm of exposure to a risk of mesothelioma. Baroness Hale of Richmond in particular, although with the majority on whether apportionment should take place, expressly disavowed Lord Hoffmann's approach and took the view that the harm being compensated for is the mesothelioma itself, and not the chance of having caused it.

Their Lordships declined to stipulate how apportionment should be carried out, preferring to leave it to the insurers and the lower courts. Dicta, however, indicated that duration and intensity of exposure would be most important, with the type of asbestos (*i.e.* its potency) being also relevant where quantifiable.

Subject to the new legislation discussed below, the result is that within the *Fairchild* principle each defendant will be liable in proportion to the share of the total exposure to a risk of the claimant's disease for which it is responsible, with claimants only recovering compensation for all of their disease when (i) all of their exposure to the risk of contracting the disease was caused by negligence of others (rather than by non-tortious circumstances or their own negligence) and (ii) all of those who exposed the claimant to the risk of contracting the disease (or their insurers) are traceable and solvent. Given the time it take for the disease to manifest itself, this latter requirement will rarely be satisfied and so most claimants will receive only partial recovery. However while it is clearly unfortunate that the victims are not fully compensated, arguably this is a result of tortfeasors becoming insolvent and not of the apportionment rule itself. It should be remembered that if scientists were able to trace the mesothelioma (or other disease) to a particular fibre and a particular exposure, as one day they may be able to do, then there would be no apportionment and many claimants would receive nothing, as the particular exposure would often be caused by an insolvent employer or a non-tortious cause or the claimants themselves. At least under the *Fairchild* principle the claimants recover something. Further, it is difficult to argue with the end result whereby, once the effects of the principle of apportionment are averaged out over a large number of claims, each negligent employer will end up paying the same amount of compensation as it would if each fibre were in fact traceable to it (assuming, as we must at present, that each fibre has an equal chance of having caused the mesothelioma).

A further word should be said about the implications of this decision for our understanding of the contributory negligence principle. Moses J. and the Court of Appeal had found in *Barker v Saint Gobain* that Mr Barker's period of self-exposure to asbestos gave rise to a reduction in damages of 20% for contributory negligence. Under the approach of the majority of the House of Lords, any period of self-exposure now has the effect of reducing the responsibility of the other defendants by reducing the proportion of total exposure for which each is responsible. In such cases the principle of contributory negligence under the 1945 Act will now not be applied to periods of pure self-exposure, but rather will apply (as befits the nature of the principle) to periods of exposure that were concurrently caused both by the negligence of the defendant and by the carelessness of the claimant. (It should be noted that both Lord Walker of Gestingthorpe and Lord Rodger thought that the self-exposure in *Barker v Saint-Gobain* may actually have fitted this description, doubting whether the employer who

had engaged the self-employed Mr Barker was not also concurrently liable.)

Back to rough justice: the Compensation Act 2006

In response to an outcry by victim groups, section 3 was inserted into the recent Compensation Act 2006, a statute primarily dealing with claims management serivces. The detail of the Act will need to be examined elsewhere, but, in summary, the clear effect of section 3 is to reverse, in mesothelioma cases in England and Wales and Scotland, the apportionment rule introduced by ***Barker***.

The single agent rule

It is clear enough that the ***Fairchild*** principle will only apply where the uncertainty over which defendant actually caused the harm results from inabilities of science rather than other evidential uncertainty (although the limits of this requirement and the reasons for it are not themselves entirely clear). What is less clear is the other limit on ***Fairchild***, which received further comment in ***Barker***, namely the 'single agent' rule: how similar must causes be to fall within the ***Fairchild*** principle, and should the principle apply where only some of the possible causes are beyond the comprehension of science?

The single agent rule was supported implicitly or explicitly by most of their Lordships in ***Fairchild***, with Lord Rodger notably stating that the possible causes must show "substantial similarity" to fall within ***Fairchild***. However, Lord Hoffmann in ***Fairchild*** could not see why there should be such a rule. In ***Barker*** he changed his mind, holding that the ***Fairchild*** principle only applies where the possible causes operated through the same "mechanism", although they "may have been different in some causally irrelevant respect, as in Lord Rodger's example [in Fairchild] of the different kinds of dust." Lord Hoffmann added, by way of example, that the principle would not apply "when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent." Lord Scott of Fosscote emphasised that the principle should only apply in "single agent cases" but that as presently advised he would regard different types of asbestos as constituting a single agent. The other three judges in ***Barker*** did not discuss this issue.

The lack of clarity as to what constitutes a single agent and as to the reasons for the rule (Lord Scott in ***Barker*** unconvincingly justified the rule by citing the practical difficulty of apportionment if there were no single agent) are likely to lead to further litigation. The importance of the single agent rule is twofold. First, it is needed to distinguish ***Wilsher*** v ***Essex Area Health Authority*** [1988] 1 A.C .107, in which the House of Lords found no liability where retrolental fibroplasias was caused by either the defendant's negligent administration of excess oxygen or by one of various non-human causes (hypercabia, intraventicular haemorrhage, apnoea and patent ductus arteriosus). Second, it is the only thing preventing the ***Fairchild*** principle from spawning an expansive mass tort industry in the United Kingdom.

If the single agent rule were abandoned altogether, then the ***Fairchild*** principle would

encompass what is known as the 'indeterminate plaintiff' problem: this arises where incidence of a fairly common disease (*e.g.* a type of cancer) rises as a result of the careless exposure by an industry (or other group of defendants) of a town or larger population to an arguably dangerous agent such as radiation or a chemical (*e.g.* water pollution, mobile phone masts, mobile phones themselves, hydrogenated vegetable oil, cigarettes, etc.). As in *Fairchild* cases, although it can be proven that a particular defendant caused some people to contract the disease, no claimant can prove that a particular defendant caused their disease. The difference between *Fairchild* and this example, however, is that in this example no claimant can even prove that the particular *agent* caused their disease, and so they fall foul of the single agent rule.

In *Wilsher* it was found that there was "no satisfactory evidence that excess oxygen is more likely than any of [the] other four candidates to have caused RLF", so it may be possible to distinguish Wilsher and open the door to mass torts by arguing that the single agent limit on the *Fairchild* principle is actually a requirement that the particular agent or mechanism was more likely than not to have caused the harm. This has the benefit of realism, since in the sort of cases where *Fairchild* will apply, *i.e.* cases in which there is limited understanding of a disease's aetiology, the disease is likely to be linked to more than one different agent. Under such a refinement of the single agent rule, indeterminate plaintiff mass torts may be possible where the agent increased the incidence of the disease by more than 100% (*i.e.* was more likely than not to have caused the particular claimant's disease). However these are far-reaching matters of policy that will need to be worked out in future cases.

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