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CAUSATION IN THE TORT OF NEGLIGENCE – A DISPENSABLE ELEMENT?

Fairchild v. Glenhaven Funeral Services Ltd and others[1]

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I. INTRODUCTION

One of the key requirements for a successful action in negligence is the ability of the claimant to prove that the defendant caused his damage. The usual touchstone is the "but-for" test, under which liability is established only if it can be shown that the claimant's damage would not have occurred but-for the defendant's negligence. It has, however, long been recognised that this test, while perfectly adequate in cases in which there is just one potential cause in the hands of a single defendant, is too simplistic to cater for more complicated situations involving multiple potential causes and/or more than one wrongdoer. As a result, during the past fifty years, the English courts have relaxed the rigidity of the causation requirement to allow actions by claimants who, due to the impossibility of proving causation under the but-for test, would otherwise be left without a remedy. In *Bonnington Castings Ltd v. Wardlaw*,[2] for example, the House of Lords held that in certain circumstances a claimant need only prove that the defendant's act materially

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1 [2002] U.K.H.L. 22; [2002] 3 W.L.R. 89 (House of Lords) [*Fairchild* cited to W.L.R.].

2 [1956] A.C. 613 [*Bonnington Castings*]. In *Bonnington Castings*, the claimant contracted pneumoconiosis from inhaling air containing silica dust in his workplace. The principal source of the dust was from pneumatic hammers in respect of which there was no negligence (the "innocent" dust), but some came from improperly maintained swing grinders (the "guilty" dust). Even though the evidence suggested that the majority of the dust had come from the innocent source, the House of Lords nevertheless found the employer liable for the full extent of the damage on the ground that the guilty dust had materially contributed to the claimant's condition.

contributed to his damage, and in *McGhee v. National Coal Board*[3] their Lordships went even further and allowed a claimant to succeed when he could show only that the defendant had materially increased the risk of damage.

Although the liberality of *McGhee* was subsequently questioned in *Wilsher v. Essex Area Health Authority*[4] (in which their Lordships struggled to explain *McGhee* as an application of the normal rules of causation to exceptional facts, as a result of which the case spent over a decade in something of a juristic no man's land),[5] the House of Lords has now, in the landmark case of *Fairchild*, revived its fortunes. For in *Fairchild*, which involved a particularly complex scenario where damage was triggered at an indeterminate moment by one of several consecutive wrongdoers, their Lordships held that a claimant whose damage is caused in such circumstances may nevertheless bring a successful action against one or all of those wrongdoers based on the principle that each of them had materially increased the risk of him sustaining damage.

The decision of the House in *Fairchild* is particularly significant, not merely because of its recognition that legal rules which result in unjust and

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3 [1972] 3 All E.R. 1008 [*McGhee*]. In *McGhee*, the claimant contracted dermatitis as a result of exposure to brick dust at his place of work. Part of the exposure to the dust was due to the inherent (and non-tortious) nature of the working conditions, but the claimant's employer also negligently failed to provide adequate washing facilities, which increased his exposure to the dust. The House of Lords held that even though this additional exposure to the dust could not be proved to have contributed to the claimant's condition, he could claim in full against his employer, whose negligence in failing to provide showers had materially increased the risk that he would contract the disease.

4 [1988] A.C. 1074 [*Wilsher*]. Although *Wilsher* (which involved several potential causes of blindness in a premature baby, only one of which could be attributed to fault of the defendant hospital) was factually distinguishable from *McGhee* (involving only one source of harm, controlled entirely by the defendant, although divided into tortious and non-tortious elements—see *supra* note 3), their Lordships in *Wilsher* were nevertheless implicitly critical of *McGhee*. Lord Bridge, in particular, held (at 1090) that *McGhee* was merely an example of a "robust and pragmatic" approach being taken to the facts of a case, that it had not established any new principle of law, and that it was still incumbent on the claimant to prove, on the balance of probabilities, that the defendant's act had caused his damage (or at least, as *per Bonnington Castings*, that it had materially contributed to that damage). While all five of their Lordships in *Fairchild* agreed that *Wilsher* had been correctly decided, several of them questioned its interpretation of *McGhee*. See, *e.g.*, the judgments of Lord Bingham, *supra* note 1 at 110, and Lord Rodger, *ibid.* at 162–163.

5 *McGhee* continued to be cited in argument after the decision of the House of Lords in *Wilsher*, but in most cases (and particularly in the context of medical negligence actions involving several potential causes of harm) it was seen as having been so restricted and qualified by *Wilsher* that it had little role to play. For examples of recent, pre-*Fairchild*, medical cases in Singapore and Malaysia in which *McGhee* was considered in this light, see *Pai Lily v. Yeo Peng Hock Henry* [2001] 2 S.L.R. 569; *Payremalu a/l Veerappan v. Dr Amarjeet Kaur & Ors* [2001] 3 M.L.J. 725 and *Dr Soo Fook Mun v. Foo Fio Na & Anor and another appeal* [2001] 2 M.L.J. 193.

unacceptable outcomes are likely to cause irreparable harm to the system within which they operate, but also because of its extensive reference to, and use of, decisions from a wide range of jurisdictions,[6] including several from the civil law tradition. Its exposition of the reasons for varying the rules of causation in special cases is open and generally clear. In spite of this, however, the decision has (as their Lordships recognised was to some extent inevitable) left unresolved questions about when and to what extent this modified approach to causation should be applied in future cases.

II. Background

Fairchild involved three appeals which were heard together.[7] All three actions concerned employees who had developed mesothelioma after being exposed in their places of work to asbestos dust containing minute asbestos fibres.[8] Mesothelioma is a condition which causes a malignant tumour of the pleura or peritoneum. It can remain latent for 40 years or more, but once the tumour develops, death usually occurs within two years.[9] The mechanism for triggering mesothelioma is unknown. The trigger could equally be inhalation of asbestos dust containing one fibre, a few fibres or a number of fibres, although the chances of developing the disease increase with the number of fibres inhaled. Even though the trigger is unknown, it *is* known that, once triggered, the condition cannot be aggravated by further exposure. In this respect, mesothelioma differs from asbestosis or

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6 See *infra* note 19.

7 *Fairchild, supra* note 1; *Fox v. Spousal (Midlands) Ltd.*; and *Matthews v. Associated Portland Cement Manufacturers (1978) Ltd and another*. For ease of reference, all three cases will be referred to simply as *Fairchild*.

8 It was accepted in *Fairchild* that the condition is extremely rare, except in cases of occupational exposure due to asbestos dust, and that all three claimants could therefore be regarded as having contracted mesothelioma through their exposure to the dust during the course of their employment (*infra* note 14 and accompanying text). See, however, Jane Stapleton, "Lords a'leaping evidentiary gaps" (2002) 10 Torts Law Journal 276 [Stapleton], who, when considering *Fairchild* and its implications, argues (at 277) that it is in fact "well known that people can contract mesothelioma even though they are not 'asbestos workers' and do not live with such people or near asbestos-handling industry." She cites various examples (*ibid.* at 278) of studies which support this conclusion, and of individuals who have contracted the disease through environmental exposure to asbestos dust. Stapleton concludes (*ibid.* at 281) that it is therefore "very odd" that their Lordships in *Fairchild* accepted that all forms of exposure other than those in the workplace could effectively be discounted.

9 Most sufferers are in fact dead within eight months, although some survive for considerably longer. See Stapleton, *ibid*., who (at 277–278) cites the case of Professor Stephen Jay Gould. Professor Gould died of mesothelioma just days after the decision in *Fairchild*, having been diagnosed with the disease in 1982.

pneumoconiosis, where exposure to harmful dust has a cumulative effect on the sufferer.[10]

Two of the actions (those relating to Mr. Fairchild and Mr. Fox) were initiated by their widows, since both men had already died from the disease; the third was brought by the employee, Mr. Matthews, on his own behalf. In each of the three actions, exposure to the harmful dust had occurred during consecutive periods of employment with at least two employers, and all three actions were brought against one or more of the employers (or, in Mrs. Fairchild's case, against the owner of the premises in which her husband had worked for part of his career). All three claimants sought damages from the defendant employers (or occupiers, a distinction which their Lordships did not regard as significant),[11] arguing that they had breached their duty to protect the employees from the risk of contracting mesothelioma by exposing them to substantial inhalation of asbestos dust and fibres.

In the two cases brought by Mrs. Fairchild and Mrs. Fox, the claims at trial were dismissed on the basis that the claimants could not, on the balance of probabilities, establish which of the potential tortfeasors had exposed their husbands to the damage-causing dust, since it was impossible to determine during which period of employment the disease had struck. The claimants in these actions appealed. In the third case, Mr. Matthews won at trial on the basis that, by exposing him to asbestos fibres, each defendant had materially contributed to the mesothelioma. The defendants in this action appealed.

In holding that all three claims must fail, the Court of Appeal applied the reasoning of Lord Bridge in *Wilsher*. The court noted that Lord Bridge had observed in that case that the decision in *McGhee* could not extend to situations involving more than one causative agent, and they concluded that by parity of reasoning it could not extend either to cases involving more than one tortfeasor.[12] Without the more relaxed approach to causation which *McGhee* offered, the but-for test must be applied and there was no way for the actions to succeed. Since it was impossible to determine the precise moment at which the disease had been initiated in each of the claimants, there was nothing to prove that the trigger had occurred during their periods of employment with any of the individual defendants. And given that (notwithstanding the recognised connection between the level of

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[10] For this reason the facts of *Fairchild* resemble those of *McGhee* (*supra* note 3) far more closely than they do those of *Bonnington Castings* (*supra* note 2), since in *Bonnington Castings* the silica dust had a cumulative effect in causing the pneumoconiosis, whereas in both *McGhee* and *Fairchild* although the respective conditions (dermatitis and mesothelioma) were both more likely to be triggered by exposure to large quantities of brick dust or asbestos dust, once triggered, those conditions could not be made worse by subsequent exposure.

[11] *Fairchild, supra* note 1 at 95.

[12] [2002] 1 W.L.R. 1052, at 1080-1081. See *infra* note 37 and accompanying text for their Lordships' views in *Fairchild* on this point.

exposure to asbestos dust and the likelihood of contracting the disease) it was not known whether the disease was triggered by a build up of fibres or by a single fibre, it could not even be said that the employers who had employed the claimants for the longest periods or at particular stages were more likely to be responsible than those who employed them for shorter periods or at different stages. Moreover, since, once triggered, the progress of the disease was unaffected by future or prolonged exposure to the dust and fibres, it could not be argued either that the cumulative effect of long-term exposure by the defendants had worsened or exacerbated the condition. The claimants' appeals in the first two cases were therefore dismissed and the appeal by the defendants in the third case was allowed. All three claimants then appealed to the House of Lords.

III. The Decision of the House of Lords

In the House of Lords, their Lordships[13] framed the question in this way:

> If (1) C was employed at different times and for differing periods by both A and B, and (2) A and B were both subject to a duty to take reasonable care to . . . prevent C inhaling asbestos dust because of the known risk . . . [of] mesothelioma, and (3) both A and B were in breach of that duty . . . and (4) C is found to be suffering from a mesothelioma, and (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together, is C entitled to recover damages against either A or B or against both A and B?[14]

Their answer was that C *is* entitled to recover damages against either A or B or against both of them. The consensus was that such claims should be allowed since, as Lord Nicholls observed: "Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands."[15]

The difficulty, however, lay in elucidating a clear and appropriate principle.[16] In attempting to develop such a principle, their Lordships examined the existing English cases on relaxing the rules of causation (including

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[13] Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hutton and Lord Rodger of Earlsferry.

[14] *Fairchild, supra* note 1 at 92, *per* Lord Bingham.

[15] *Ibid.* at 121.

[16] See, *e.g.*, Lord Nicholls, *ibid.* at 121, and Lord Hoffmann, *ibid.* at 126.

Bonnington Castings, *McGhee and Wilsher*),[17] as well as cases from Australia and the United States which dealt specifically with mesothelioma claims. While no clear pattern could be discerned from the mesothelioma cases,[18] they found the more general jurisprudence from countries such as Germany, Austria, the Netherlands, France, Norway, Greece and Canada to be of considerable assistance, since in each jurisdiction there was evidence to support the view that the basic rules of causation should be modified in circumstances where it was impossible to determine which of several wrongdoers had actually caused a claimant's damage.[19] Having examined these authorities, their Lordships concluded that, although the fact that most other jurisdictions had adopted more relaxed rules of causation was not in itself sufficient to justify a change in English law, and although (in the words of Lord Bingham) "[t]he law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice,"[20] there was nevertheless a strong argument that:

> [i]f . . . a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a

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17 Other cases to which their Lordships referred included *Nicholson v. Atlas Steel Foundry and Engineering Co Ltd* [1957] 1 W.L.R. 613 and *Gardiner v. Motherwell Machinery and Scrap Co Ltd* [1961] 1 W.L.R. 1424.

18 In *Bendix Mintex Pty Ltd v. Barnes* (1997) 42 N.S.W.L.R. 307 a majority of the Court of Appeal of New South Wales—applying *Wilsher*—rejected the claimant's action, with a strong dissent from Stein J.A. Although the decision was followed in *Wallaby Grip (BAE) Pty Ltd v. Macleay Area Health Service* (1998) 17 N.S.W.C.C.R. 355, the claimant prevailed—on different medical evidence—in *E M Baldwin & Son Pty Ltd v. Plane* [1999] Aust. Torts Rep. 81–499. And in the American case of *Rutherford v. Owens-Illinois Inc* (1997) 67 Cal. Rptr. 2d 16, the claimant's action was also successful, with Baxter J. (at 19) concluding, in the Supreme Court of California, that claimants "need not prove with medical exactitude that fibres from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy."

19 See, *e.g.*, Lord Bingham's references to, *inter alia*, the German BGB §830.I, which provides: "if several persons have caused damage by an unlawful act committed in common each is responsible for the damage. The same rule applies if it cannot be discovered which of several participants has caused the damage by his act"; to Art. 936 of the Greek Civil Code under which: "If damage has occurred as a result of the joint action of several persons, or if several persons are concurrently responsible for the same damage, they are all jointly and severally implicated. The same applies if several persons have acted simultaneously or in succession and it is not possible to determine which person's act caused the damage"; and to the Austrian Civil Code 1302 under which "If the portions of the individuals in [causing] the injury cannot be determined, all are liable . . ." His Lordship also referred to the American Law Institute, Restatement of the Law, Torts 2d., section 433(3) which provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm". In addition, he cited decisions such as the Canadian case of *Cook v. Lewis* [1951] S.C.R. 830, for discussion of which see *infra* note 27 and accompanying text.

20 *Fairchild, supra* note 1 at 119.

> different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world . . . there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome;[21]

or as Lord Rodger put it:

> At the very least, the cross-check with these systems suggests that it is not necessarily the hallmark of a civilized and sophisticated legal system that it treats cases where strict proof of causation is impossible in exactly the same way as cases where such proof is possible.[22]

Their Lordships did not see the issue as involving only questions of principle. They were just as concerned with matters of policy,[23] and, in particular, the "obvious and inescapable clash of policy considerations,"[24] represented, on the one hand, by the argument that the defendants ought not to be made liable for damage which they might not in fact have caused and, on the other hand, by:

> . . . the strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so . . . when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.[25]

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[21] *Ibid. per* Lord Bingham.

[22] *Ibid*. at 170. See, however, Tony Weir, "Making It More Likely *v*. Making It Happen" [2002] C.L.J. 519 [Weir]. In considering the decision in *Fairchild*, Weir observes (at 521) that when their Lordships considered the law in other jurisdictions they omitted: "the salient fact that in almost none of the jurisdictions glanced at would the claimants in *Fairchild* have succeeded: in most places an employee simply cannot sue his employer in tort, since workmen's compensation or social security takes its place." He makes the point that in the United Kingdom there is also some social security, but "the fact that these claimants were entitled to industrial disablement benefit was not mentioned in the speeches: indeed, the speeches rather suggest that unless claimants could get damages in tort, they would get nothing at all. This might affect one's view of the unfairness of the rule now overturned."

[23] All the judges referred either specifically or tangentally to the role of policy. Lord Hoffmann, for example, expressed the view (*supra* note 1 at 127) that "the question of principle is this: . . . which rule would be more in accordance with justice and the policy of the common law . . .?" while Lord Nicholls referred (*ibid*. at 122) to the need for "good reason policy reasons . . . for departing from the usual threshold 'but-for' test," Lord Hutton (*ibid*. at 146) spoke of the need for the cases to be assessed from "a broad and practical viewpoint," and Lord Rodger referred (*ibid*. at 170) to there being "obvious policy reasons why . . . a different approach is preferable".

[24] *Ibid*. at 119.

[25] *Ibid*. at 120.

Faced with these two opposing policy arguments, Lord Bingham favoured the latter. He took the view that "such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim."[26] Lord Nicholls was of a similar opinion. He examined the "simultaneous shooting" cases (such as the Canadian case of *Cook v. Lewis*[27] and the American one of *Summers v. Tice*[28] in which two hunters fire their guns at the same time and injure a victim in circumstances where it is impossible to determine from whose gun the relevant bullet has been discharged), and observed that in such cases the courts carry out a balancing exercise in deciding that "the unattractive consequence, that one of the hunters will be liable for an injury he did not in fact inflict, is outweighed by the even less attractive alternative, that the innocent plaintiff should receive no recompense."[29] His Lordship concluded that such a balancing exercise must necessarily involve a value judgment. Applied to the circumstances of the cases at hand, this value judgment would lead the court to hold the defendant employers responsible, even though this might result in one or more of them being liable for acts which did not actually cause the claimants' damage. Such an outcome could be justified as the lesser of two evils, since "the unattractiveness of casting the net of responsibility as widely as this is far outweighed by the unattractiveness of the alternative outcome."[30]

Their Lordships all approved of applying the principle in *McGhee* to cover the facts of *Fairchild*.[31] The Court of Appeal had taken the view that to allow claims in which there was a risk that the defendants might be made liable for harm which they had not in fact caused was "far too weighty an edifice to build on the slender foundations of *McGhee* . . ."[32] and that in acceding to the claimants' arguments the court would be "distorting the law to accommodate the exigencies of a very hard case."[33] Their Lordships, however, saw things

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26 *Ibid*.

27 See *supra* note 19.

28 (1948) 199 P. 2d. I.

29 *Fairchild, supra* note 1 at 121.

30 *Ibid*. at 122. Indeed, when compared with the simultaneous shooting cases, one could argue that the outcome in *Fairchild* is less unfair to defendants, since in cases such as *Cook v. Lewis and Summers v. Tice* the negligent act of one of the defendants was clearly unconnected with the harm which the claimant sustained, whereas in *Fairchild* the acts of all the wrongdoers *might* have been connected with the damage given the known link between the level of exposure to asbestos dust and the likelihood of contracting mesothelioma. For further discussion of this point, see Stapleton, *supra* note 8 at 290.

31 It is interesting that counsel for the employers conceded that if the principle recognised in *McGhee* was to be revived (following its period in the wilderness as a result of the decision in *Wilsher*) it would lead to the claims being successful: see the comments of Lord Rodger, *Fairchild, supra* note 1 at 163.

32 *Supra* note 12 at 1080.

33 *Ibid*.

differently. Although they accepted that, in the appeals before them, the chance of injustice being done to the defendant employers was arguably even greater than it had been in *McGhee* (since, as Lord Bingham pointed out,[34] the only risk to the single defendant in *McGhee* was that he might be held liable for damage which he had not caused *negligently*, whereas the risk to each of the defendants in these cases was that they might be held liable for damage which they had not caused *at all*—a potential injustice exacerbated by reason of the fact that not all the employers were before the court)[35] they were nevertheless willing to accept this risk as necessary in order to compensate the claimants.[36]

Lord Hutton rejected the Court of Appeal's finding that the reasoning in *Wilsher* precluded the application of *McGhee* not only where there was more than one causative agent but also where there was more than one tortfeasor,[37] and expressed the opinion that *McGhee* could—and should—apply to cases such as the ones at hand. As long as there was only one agent of harm (in this case the asbestos dust) it did not matter that exposure to this agent of harm might have been due to the negligence of more than one tortfeasor.[38] Lord Rodger also considered the distinction between a single tortfeasor and multiple tortfeasors on which the Court of Appeal had placed such weight to be immaterial: ". . . if the principle applies to permit the pursuer to recover in *McGhee*, it should similarly apply to allow the claimants to recover in these cases"[39] "by proving that the defendants individually materially increased the risk [of] . . . mesothelioma . . . the claimants are taken in law to have proved that the defendants materially contributed to their illness."[40] And Lord Hoffmann, whose approach in *Fairchild*—building as it

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34 *Fairchild, supra* note 1 at 119.

35 This was because in all three cases one or more of the negligent employers had gone out of business—thus reducing the number of potential defendants from whom compensation could be sought. This was hardly surprising in view of the long period of latency between contracting the disease and it taking effect, but it increased the burden on the remaining defendants.

36 Lord Rodger observed that the relative injustice being done to the respective defendants in *Fairchild* and *McGhee* could, in fact, be looked at the other way round—since in *Fairchild* the damage was certainly caused by a tortious act (even if there was uncertainty over *whose* tortious act was to blame) whereas in *McGhee* the damage might not have been caused by a tortious act at all. (See *Fairchild, supra* note 1 at 164).

37 For discussion of the views expressed in the Court of Appeal, see note 12 and accompanying text.

38 *Fairchild, supra* note 1 at 147-8. See, too, the judgments of Lord Bingham (*ibid.* at 92 and 102), and (implicitly) Lord Nicolls (*ibid.* at 122).

39 *Ibid.* at 164.

40 *Ibid.* at 170. In this respect, their Lordships *could* be seen as having made a double presumption—in presuming firstly that by negligently exposing the claimants to asbestos dust the defendants had materially increased the risk of damage, and in presuming secondly that this material increase in risk could be equated with a material contribution to the damage. On the facts of *Fairchild*, given the lack of scientific knowledge as to how mesothelioma was

did on the purposive approach to causation which he had already displayed in cases such as *Environment Agency (formerly National Rivers Authority) v. Empress Car Co (Abertillery) Ltd*[41] and *Kuwait Airways Corpn v. Iraqi Airways Co (Nos 4 and 5)*[42]—was the most policy-based of all the judges, expressed the view that, as applied to the specific circumstances of *Fairchild, McGhee* offered "powerful support for saying that . . . the law should treat a material increase in risk as sufficient to satisfy the causal requirements for liability".[43] Indeed, both Lord Rodger and Lord Hoffmann went further and indicated that the *McGhee* principle need not even be confined to cases involving a single agent of harm—although these observations were, in the circumstances, *obiter*.[44]

After the confusion which had resulted from the interpretation of *McGhee* in *Wilsher*, their Lordships were particularly determined in *Fairchild* to acknowledge openly that their decision involved a variation of the rules of causation. Lord Bingham stressed the importance of transparency, and in this respect, he referred with approval to the warning of Lord Wilberforce in *McGhee* against resorting to fictions.[45] Lord Nicholls was of the view that, in cases like *McGhee* and the present appeals, the courts apply "a different and less stringent test. It were best if this were recognised openly."[46] Lord

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caused, it was *assumed*—because of the known link between the quantity of dust inhaled and the likelihood of the disease being contracted—rather than actually *proved* that the dust to which the defendants had exposed the claimants did in fact materially increase the risk that they would contract the disease.

41 [1999] 2 A.C. 22. In this case, Lord Hoffmann observed (at 29): "The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked."

42 [2002] 2 W.L.R. 1353, where his Lordship stated (at 1388): "One cannot separate questions of liability from questions of causation. They are inextricably connected. One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability."

43 *Fairchild, supra* note 1 at 128.

44 Lord Hoffmann, *ibid*. at 129-130, suggested that the principle would apply even if there were two agents of harm, both of which created the same risk. And Lord Rodger observed (*ibid*. at 171) that the injury would usually be caused "if not by exactly the same agency . . . at least by an agent that operated in substantially the same way" (see, too, *infra*, note 52). His Lordship gave as an example a workman suffering injury from exposure to dusts coming from two sources, each of which could have caused the injury in the same manner. He said that in this respect he considered the decision of the Court of Appeal in *Fitzgerald v. Lane* [1987] Q.B. 781 (where two drivers who hit a pedestrian in rapid succession were held jointly and severally liable for his injuries) to be correct notwithstanding doubts which had been expressed about it following the decision of the House of Lords in *Wilsher*. For further discussion of Lord Rodger's views on sources of harm, see *infra* note 64.

45 *Ibid*. at 121, quoting Lord Wilberforce in *McGhee, supra* note 3 at 1090. On this point, Lord Bingham disagreed with Lord Hutton, who interpreted *McGhee* as having merely been based on a factual inference.

46 *Ibid*. at 123.

Rodger referred to *McGhee* as having "undoubtedly involved a development of the law relating to causation"[47] which should now be espoused without resorting (as the House of Lords in *Wilsher* had done when interpreting *McGhee*) to talk of factual inferences or mere appeals to common sense.

Yet all five judges understandably sounded a warning as to the circumstances in which this variation should apply, and, while acknowledging that the approach to causation now being recognised was bound to be "the subject of incremental and analogical development,"[48] and that it was "capable of . . . application in new situations"[49] they observed that it was an area in which the courts must tread carefully. Lord Hoffmann, for example, considered that "caution is advisable"[50] and both Lord Bingham and Lord Hutton specifically confined the application of the approach to the cases at hand.[51] Lord Rodger gave a long and detailed analysis of the limited circumstances in which he would see the principle as being applied,[52] while Lord Nicholls observed that:

> . . . considerable restraint is called for in any relaxation of the threshold 'but-for' test of causal connection. The principle applied [in] these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty . . . in discharging the burden of proof resting on him. Unless closely confined in its application, this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold "but-for" test. The reason must

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47 *Ibid.* at 164.

48 *Per* Lord Bingham, *ibid.* at 120.

49 *Per* Lord Hoffmann, *ibid.* at 130.

50 *Ibid.* His Lordship indicated (*ibid.* at 126) five crucial features which would have to be present before the *McGhee* principle could be extended to a *Fairchild* scenario. These were that (i) there was a specific duty to protect against a particular disease; (ii) the duty was intended to create a civil right to compensation for its breach; (iii) the greater the exposure to the damage-causing agent the greater the chance of contracting the disease; (iv) medical science could not determine whose act had caused the disease; and (v) the clamant contracted the disease against which he should have been protected.

51 *Ibid.* at 120 and 148.

52 *Ibid.* at 170–171: "First, the principle . . . applies . . . where the claimant has proved all that he possibly can, but . . . the current state of the relevant science leaves it uncertain how the injury was caused and, so, who caused it . . . Secondly . . . it is . . . essential . . . that the defendant's conduct . . . created a material risk of injury to the claimant himself. Thirdly, it follows that the defendant's conduct must have been capable of causing the claimant's injury. Fourthly, the claimant must prove that his injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing . . . Fifthly, this will usually mean that the claimant must prove that his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way . . . Sixthly, the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where, as in *McGhee*, the other source of the injury is a similar, but lawful, act of the same defendant . . ."

> be sufficiently weighty to justify depriving the defendant of the protection this test normally and rightly affords him, and it must be plain and obvious that this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific.[53]

IV. Discussion

There is much to be said for a decision which enables innocent parties who have suffered severe harm at the hands of negligent defendants to recover damages in tort law. Public sentiment clearly balks at the idea of refusing compensation to employees, or their widows, for a deadly disease which they contracted through unnecessarily dangerous working conditions simply because technical rules of causation cannot be satisfied.[54] However, the law cannot be guided merely by the attractiveness of individual outcomes in particular cases or by the likely reaction of the public to those outcomes. In order to mete out justice even–handedly, it must, as Lord Bingham pointed out in *Fairchild*, develop in a coherent and principled manner[55] and one which is supported by sound and defensible considerations of policy. In this respect, *Fairchild* might give rise to understandable concern in some quarters.

Concern arises at three levels. The first is whether it is ever acceptable in principle to depart from the established rules of causation in order to achieve a "fair" result, simply because a person has sustained injury in circumstances where it is scientifically impossible to determine which of several wrongdoers has actually caused that damage. Proponents of *Fairchild* will argue that—just as *McGhee* did—the decision produced a common-sense solution to what would otherwise have been an intractable problem. If the only way to achieve a morally acceptable outcome in specific circumstances is by modifying the law, then so be it. Opponents—or even those who accept the inherent justice of the decision in *Fairchild* but question its legal basis—are likely, on the other hand, to point out that, whatever their Lordships actually said in this respect, their decision (like that in *McGhee*, which they resurrected) amounted in practice to an abandonment of the recognised rules of causation. Although their Lordships were, as has been observed, admirably

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53 *Ibid*. at 122–123.

54 See in this respect Stapleton's reference (*supra* note 8 at 289, note 68) to the adverse reaction which the (subsequently reversed) decision of the Court of Appeal in *Fairchild* received in December 2001. The description here of the disease being contracted "through unnecessarily dangerous working conditions" of course assumes that one accepts that the condition must indeed have been caused by those conditions—which, as Stapleton points out (*ibid*.), in the case of mesothelioma might not be as easy to establish as the courts tend to assume.

55 See *Fairchild, supra* note 1 at 119.

open in admitting that they were applying a "different and less stringent" test[56] for causation in *Fairchild*, they did not fully examine just how different that test was or what its full impact might be. This they might have been expected to do, given that, if nothing else, the cost to defendants—and thus their insurers—in future multiple-defendant, disease-compensation claims (claims which, before *Fairchild*, would have failed due to the inability to prove causation) is likely to be enormous.[57] In view of its wide-reaching implications, there will be those who see a decision as radical as *Fairchild* as overstepping the acceptable limits of common law development.[58] Others, however, will see the decision as being what the development of the common law is all about. The side of the fence on which one falls in this respect will depend in part on whether one is generally pro-plaintiff or pro-defendant, although, given the subtlety and variety of the issues which the decision raises, it would be too simplistic to suggest that this will be the only determining factor.

The second cause for concern (and one which to an extent overlaps with the first) is whether, even if one acknowledges the legitimacy of modifying or sidelining the rules to accommodate special cases, the parameters established in *Fairchild* are sufficiently defined to prevent it being over-extended in future cases. The danger of the "material contribution to risk" principle as formulated in *McGhee* and now developed in *Fairchild* being applied too widely is not great, particularly since all five of their Lordships in *Fairchild* called for restraint in its future application.[59] Indeed, given that some of their Lordships specifically limited the application of the extended principle to the facts at hand, and the others expressly indicated that under no circumstances should it be used simply to aid claimants facing ordinary problems of causation, fears that it will be over-used are probably unfounded. Although such fears are natural when a new or unusual principle is developed, the inherently cautious attitude of the courts renders it unlikely that *Fairchild* will prove the jumping off point for a wholesale departure from the established rules of causation.

On the other hand, the inevitable prospect of incremental development was acknowledged in *Fairchild*, with Lord Nicholls observing that it was "impossible to be . . . specific" about the situations in which it might be

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56 See *supra* note 46.

57 Stapleton, *supra* note 8 at 277, refers to a piece in *The Telegraph*, published on 17 May 2002, suggesting that the cost will be between £6 and £8 billion.

58 See, in this respect, Weir, *supra* note 22, who ends his note (at 522) by referring to the observation of Lord Bridge in *Wilsher* (*supra* note 4 at 1092) that: "whether we like it or not the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort."

59 See *supra* note 50 and accompanying text.

applied.[60] *Fairchild* extended *McGhee* by allowing claims where more than one tortfeasor was involved and by allowing occupiers as well as employers to be sued.[61] Moreover, the decision of their Lordships in *Fairchild* has already been considered by the Court of Appeal in *Gregg v. Scott*[62] in connection with the argument that the law should recognise loss of a chance, so one cannot say with certainty that there is *no* possibility of its principles being extended still further. And although further extension, should it occur, will not necessarily be inappropriate or excessive, it is worth noting that some potentially significant issues were left unresolved by their Lordships in *Fairchild*—issues which courts in subsequent cases might well be required to decide upon. Perhaps most notable of these is the question of whether the principle can be applied when there is more than one agent (or source) of harm. For although three of their Lordships in *Fairchild* were of the view that, while *McGhee could* be extended to cover situations which (like *Fairchild* itself) involved more than one defendant, it should *not* be extended to situations which involved more than one damage-causing agent,[63] two of their number, Lord Hoffmann and Lord Rodger, left the door open in this respect.[64] For a number of reasons, therefore, it can be argued that in reviving and extending *McGhee* in *Fairchild* their Lordships might have opened a can of worms.

The third concern is whether, assuming that it is acceptable to relax the rules in particular cases and assuming, too, that there is no danger of this relaxation being extended too far, it is really appropriate in such circumstances to place the entire liability for a claimant's damage on the shoulders of the defendant or defendants who are still in being when the case comes to court. In this respect, even commentators who accept the need to change the rules of causation in special cases might consider the outcome of *Fairchild* to

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60 *Fairchild, supra* note 1 at 122–123. (See, too, *supra* note 53).

61 See *supra* note 11.

62 [2002] E.W.C.A. Civ. 1471. In this medical negligence case, involving a misdiagnosis which reduced from 42% to 25% the claimant's chances of being cured of non-Hodgkin's lymphoma, the Court of Appeal was asked to reconsider the decision in *Hotson v. East Berkshire Health Authority* [1987] A.C. 750 (which had held that no claim could be brought for loss of a chance) in the light of the decision of their Lordships in *Fairchild*. Although the majority held that the claim could not succeed, the decision contained considerable discussion of both the ambit and implications of *Fairchild* and arguably left open the possibility that the principle might in future be applied in appropriate circumstances to claims for medical negligence.

63 See *supra* note 38 and accompanying text.

64 See *supra* note 44. And as well as observing that the principle would apply where the other possible source of the claimant's injury was a similar wrongful act or omission by another person (or by the same defendant, as in *McGhee*), Lord Rodger (*Fairchild, supra* note 1 at 171) also left open the possibility of the principle applying where the other possible source of injury was "a similar but lawful act or omission of someone else or a natural occurrence". (See, too, *supra* note 52).

be rather harsh on defendants. Under the principle established in *Fairchild* just one or two of several potential defendant employers—who cannot be proved as individuals to have caused the damage suffered by the employee and whose acts cannot be said to have exacerbated that damage once it has occurred—can be held liable for the employee's damage in its entirety. This is so even when the defendant or defendants who end up footing the bill may be statistically less likely to have caused the damage (because, for example, they exposed the employee to the risk of harm for comparatively shorter periods of time than other potential defendants who have since gone out of business). This is a new potential injustice and one which, as their Lordships acknowledged, did not exist under *McGhee*, where a single defendant was before the court.[65]

Given that the House of Lords in *Fairchild* recognised the scope for injustice to defendants inherent in its decision,[66] it is perhaps somewhat surprising that no consideration was given to alleviating its extent by means of apportionment. The reason for the failure of their Lordships seems to have been the fact that it was not argued before them.[67] However, while it is true that questions of apportionment are usually only raised in response to arguments by the parties, it would—given the significance of the decision in *Fairchild*—have been open to their Lordships to consider whether or not damages should be apportioned in these circumstances. Since they were willing to adopt the notion that all of the negligent employers for whom each employee had worked were causally responsible for the employee's harm when in fact only one of them was responsible for the damage-triggering event, there is no reason why they should not also have adopted the notion that each of the employers ought to be held causally responsible only for the period during which he had exposed the employee to the relevant risk. To have taken such an approach would at least have been less unfair to the few defendants who happened still to be in existence by the time proceedings were initiated (although it would, of course, have deprived the claimants of full compensation, since they would have received nothing for periods of employment with employers who were no longer in being). While such a system of apportionment would not have been a technically accurate analysis—given that *Fairchild* involved no cumulative or

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65 See the judgment of Lord Bingham, *ibid.* at 119, quoting from the decision of the Court of Appeal, *supra* note 12 at 1080.

66 See *supra* note 30 and accompanying text.

67 See *Fairchild, supra* note 1 at 120 (*per* Lord Bingham) "No argument on apportionment was addressed to the House" and at 147 (*per* Lord Hutton): "I observe that no argument was addressed to the House that in the event of the claimants succeeding there should be an apportionment of damages . . . Therefore each defendant is liable in full for a claimant's damages . . .". Note that in the case of Mr. Matthews (the only one of the three to succeed at trial) the trial judge *did* apportion liability equally between the defendants.

divisible damage—it would have been no less accurate than holding, as their Lordships did, that each of the employers was responsible for the entire damage when that damage was actually triggered at a single moment while the employee was in the employment of only one of them.

In *McGhee*, when the House of Lords recognised liability based on a "material contribution to the risk of harm" it was faced with a single defendant, and, perhaps for that reason, the idea of apportioning damages to make that defendant compensate only for the part of his conduct which had negligently increased the risk of harm was not considered. And since it followed, and extended the reasoning of, cases such as *Bonnington Castings*, where apportionment had not been discussed, the failure of their Lordships to consider apportioning damages in *McGhee* is not particularly surprising. However, quite recently, in *Holtby v. Brigham & Cowan (Hull) Ltd*,[68] the Court of Appeal held that in a *Bonnington Castings* situation where material contribution to harm is proved, the defendant should be responsible only for that part of the damage to which his negligence has contributed.[69] By parity of reasoning, their Lordships in *Fairchild* could have held that the "material contribution to the risk" for which each defendant was to be held liable was to be assessed based on the period of exposure to which he, when compared with the other employers, had subjected the employee.[70] Had their Lordships discussed the possibility of apportionment, it is, of course, possible that they would ultimately have rejected it on the basis that the need to provide full compensation to the claimants outweighed issues of fairness to the defendants (particularly given that the notion of apportionment was no less artificial in the circumstances than was the notion of holding all the wrongdoers jointly and severally liable), but it is interesting that their Lordships did not even consider the issue.[71]

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[68] [2001] 3 All E.R. 421 [*Holtby*].

[69] Stuart-Smith L.J. in *Holtby* (*ibid*. at 428–429) suggested that apportionment was not considered in either *Bonnington Castings* or *McGhee* simply because it was not argued by the defendants, since in both cases the defendants founded their argument exclusively on the assertion that they were not liable *at all*. (Interestingly, this seems to mirror exactly the situation which subsequently occurred in *Fairchild*—see *supra* note 67). Another possible explanation for the failure to consider apportionment in *Bonnington Castings* (given by Stapleton, *supra* note 8 at 283) is that, at the time it was decided, there might have been insufficient medical knowledge to offer a basis for arguing that damages should be apportioned.

[70] Although note that in *Gregg v. Scott* (*supra* note 62) Mance L.J. in discussing the issue of apportionment in the context of *Fairchild* observed (at para. 53) that while "... the courts should, wherever possible, assign and apportion responsibility on a balance of probabilities"—in which respect his Lordship referred to the decision in *Holtby*—" this is not the same as apportioning liability according to the risk that a particular defendant's negligence has actually led to an injury."

[71] Stapleton, *supra* note 8, also questions the wisdom of their Lordships in failing to consider apportionment in *Fairchild*. (See discussion commencing at 299).

V. Conclusion

Those who approve of the decision in *Fairchild* will applaud it as a breath of fresh air, a recognition that the law is as much about common sense and instinctive fairness as it is about the unyielding application of rigid rules. Its detractors will see it as a potentially drastic departure from established conventions, and one which heralds the slippery slope where principles of causation are concerned.

In spite of the concerns expressed above, this writer is of the view that—on balance—the decision represents a humane and progressive approach to this area of the law. That it presents the risk of injustice to defendants is undeniable, and, until the courts have had the opportunity to define its parameters in future cases, there may be some anxiety about its potential scope. However, as their Lordships observed in *Fairchild*, sometimes doing the right thing comes down to opting for the lesser of two evils. Concerns about lack of apportionment aside, it is suggested that their Lordships were right to acknowledge that there are times when it is better to dispense with some of the normal rules than to see the law become an illogical and inflexible instrument incapable of offering remedies for obvious wrongs. In recognising that the time has come for the English courts to embrace the approach to causation which has already been accepted in many other jurisdictions, their Lordships have reminded us that the law cannot—and should not—operate in a vacuum. If it fails the members of society whom it is designed to protect then it fails itself.