Comment

FURTHER DEVELOPMENTS TO THE *FAIRCHILD* EXCEPTION AND EXTENT OF NEGLIGENCE LIABILITY

The difficulty of establishing a causal link between wrongful exposures to an injury causing agent by successive employers and the eventual injury has, in the interests of justice, led to a radical departure from the ordinary requirement as to causation. The problem is exacerbated in a situation where some of the exposures were in consequence of breaches of duty while the other exposures did not involve any breaches of duty. Does the *Fairchild* exception to the general rule extend to such a situation? If it does, is the *Fairchild* type of defendant to be made responsible for the whole loss? This is of crucial importance when some of the defendant employers or insurers are insolvent. These and other issues are considered below.

TER Kah Leng
LLM (Bristol); Barrister (Lincoln's Inn);
Advocate & Solicitor (Singapore);
Associate Professor, NUS Business School,
National University of Singapore.

I. Introduction

1 *Fairchild v Glenhaven Funeral Services Ltd* and associated appeals[1] represents a radical departure from the ordinary requirement of proof that the defendant's breach caused the claimant's loss. It explicitly established or affirmed a new principle[2] allowing victims who have been tortiously exposed to a single noxious agent by successive employers or occupiers to be compensated, notwithstanding that it could not be proven, using the current medical knowledge, which of the tortious exposures had actually caused the ensuing injury. The application of a different and less demanding test of causation is a policy decision. It represents a pragmatic judicial response to what would otherwise have been an unfair denial of redress to the victim. In coming to this conclusion, the House of Lords weighed the potential injustices to the claimants and defendants respectively and tipped the balance in favour of

1 [2003] 1 AC 32. See KL Ter, "Successive Tortfeasors and Increased Risk of Harm: A Modified Approach to Causation" (2003) 15 SAcLJ 50–60.
2 Already emerging in *McGhee v National Coal Board* [1973] 1 WLR 1.

the claimants.[3] The result is that defendants are made liable even though they may not have caused the damage at all, simply because their breach of duty has materially increased the risk of the eventual injury. All members of the House emphasised the exceptional nature of the liability and were concerned that the new exception should not be allowed to "swallow up" the ordinary rule. They called for considerable restraint in any relaxation of the conventional test of causation and recognised that the *Fairchild* principle would be subject to "incremental and analogical development" as new cases arose. No one expected *Fairchild* to be the last word on the matter.

2 The opportunity to further define the nature and limits of *Fairchild* arose in *Barker v Corus (UK) plc* and associated appeals.[4] These three appeals raised important issues that were left undecided in *Fairchild:* first, the limits of the exception; second and by far the more important, what each defendant is liable for.

3 This article explores these issues and the bearing that these have on how far the boundaries of the exception will be extended.

II. The Limits of *Fairchild*

A Tortious exposures to a single noxious agent

4 The *Fairchild* principle was formulated in the following context: (a) exposure to a single noxious causative agent (asbestos dust) (b) all the employers (including occupiers) were in breach of duty (tortious exposure) (c) the exposure materially increased the risk of injury attributable to that agent (d) the risk materialised in injury (mesothelioma) and (d) the impossibility to identify, by any known medical science, which employer(s) actually caused the injury. Is the application of the exception restricted to the particular facts of the case? In distinguishing from multi-agent cases, Lord Walker restricted the principle to mesothelioma induced by a single causative agent and to other conditions having the same distinctive aetiology and prognosis such as dermatitis caused by brick dust as in *McGhee*.[5] A variation to the *Fairchild* facts presented itself in *Barker.*

3 Lord Bingham and Lord Rodger dealt with the competing policy considerations in *Fairchild*, *supra*, n 1 at [33] and [155] respectively.
4 [2006] UKHL 20.
5 See n 4 at [114].

B. Tortious and non-tortious exposures to a single noxious agent

5 Unlike *Fairchild,* not all the exposures in the first appeal were tortious. Barker was exposed to the noxious agent in part during his employment and in part while being self-employed. He suffered three wrongful exposures to asbestos: the first while he was employed by Corus, the second while working for Graessers Ltd and on the third occasion while he was self-employed. The question arose as to whether *Fairchild* applied to render the defendant employers liable. If it did apply, the second question was whether they were jointly and severally liable or only for an aliquot contribution to the materialised risk. Moses J, affirmed by the Court of Appeal, held that the *Fairchild* exception applied and that the defendants were jointly and severally liable but subject to a 20% reduction for Barker's contributory negligence while he was self-employed. The result was that Corus had to bear the full damages as it could not obtain contribution from Graessers Ltd which was insolvent.

6 In the other two appeals, all the exposures to asbestos were in breach of duties owed by the employers. It was not disputed that the cases fell within the *Fairchild* exception. The only question was with regard to the extent of liability, since there were insolvent employers in each of the cases of *Paterson v Smiths Dock Ltd* and *Murray v British Shipbuilders (Hydrodynamics) Ltd.* The judges and the Court of Appeal held that the solvent defendants were jointly and severally liable for the full damages.

7 The *Fairchild* principle was formulated mainly in the context of tortious exposures and the claimant's responsibility for a significant exposure did not arise for consideration. In order to make the defendants liable in a situation where the claimant himself was also at fault, it was necessary to draw an analogy with *McGhee.* The case involved two possible causes of the disease contracted during employment with the same employer. One involved a tortious exposure (the failure to provide showers to remove the brick dust after work) while the other did not (the exposure to brick dust while working in the brick kilns was held not to be a breach of duty). Notwithstanding the impossibility to prove which source of risk was more likely to have caused the dermatitis, the House of Lords allowed the pursuer to recover damages. *McGhee* has been accepted as an approved application of the *Fairchild* principle[6] in a situation where not all the exposures were tortious. Once that was accepted, Lord Hoffman found no logic in requiring that the non-tortious risk

6 *Supra*, n 4 at [13], *per* Lord Hoffman.

should have been created by a tortfeasor or by a person who should also have caused a tortious exposure. Bearing in mind that the *Fairchild* exception is to enable recovery against a defendant who has materially increased the risk of injury and may have caused it, but cannot be shown by medical science to have actually done so, it should be irrelevant in relation to causation, whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. However, these distinctions may be relevant to whether and to whom responsibility can also be attributed.

8 Lord Scott agreed with Lord Hoffman. On the basis that the *Fairchild* defendants were held liable for having materially contributed to the risk of the eventual disease, it can make no difference to liability, save as to quantum, whether there are periods of lawful exposure, or periods during which the victim had been self-employed. This does not detract from the exposure for which the negligent employers had been responsible.

9 Lord Rodger agreed with the rest of the House on the first issue, stating that as between the victim and a wrongdoing employer, lawfulness or unlawfulness of exposure by any other employer is irrelevant. The balance of potential injustice as between the claimant and the defendant in applying the exception remains in favour of the victim.

10 *McGhee* involved a single employer. In a case against different employers, what is the position of an employer who was not in breach of duty but who has, albeit lawfully, exposed the victim to the noxious agent and materially contributed to the risk of the disease materialising. It is submitted that in this hypothetical situation, the employer was not in any breach of duty in the first place and therefore falls outside the *Fairchild* exception. The wrongdoing employers will remain liable since, as *Barker* demonstrates, the lawfulness of exposure by the other employer is irrelevant in the claim against the tortfeasors.

C. Multi-agent cases

11 *Fairchild* and *Barker* each involved a single injurious agent. Does the *Fairchild* exception apply only where the victim is exposed to a single injurious agent or can it also apply in multi-agent cases? In *Wilsher v*

Essex Area Health Authority[7] a number of different agents could have caused the injury and there was no satisfactory medical evidence to show which was more likely to have been the causative agent. Lord Hoffman did not consider such a claim to fall within the *Fairchild* exception and it was in fact disallowed in *Wilsher*. Lord Scott took a similar view, stating that *Fairchild* did not establish an overarching principle but a narrow exception to the causal requirements applicable to single agent cases.[8] One reason he gave was that the identification of the proportion of risk of the eventual injury to each particular agent would be highly impossible and artificial.

D. Causation difficulty

12 The *Fairchild* exception applies where there is a causation difficulty in connecting the breach of duty to the eventual outcome. This was pointed out by Lord Hoffman in *Gregg v Scott*.[9] The question there was whether the increased risk of death caused by the doctor's misdiagnosis could constitute injury and be reflected in an award of damages. *Fairchild* was relied upon as authority that it could do so. This was rejected as *Fairchild* could not be taken to have established an overarching principle in the law of tort. It cannot be treated as an exception to the normal requirement of a proved causative link between the breach of duty and the damage for which tortious damages are claimed.[10] The majority of the House in that case held that a claim for clinical negligence required proof, on a balance of probabilities, that the negligence had caused an adverse outcome and that increase in the chance of an unfavourable outcome was not a recoverable head of damages. Lord Walker considered that the "loss of a chance" approach in *Gregg v Scott* would have gone far beyond the *Fairchild* principle. Such an extension would lead to great uncertainty in a large number of clinical negligence cases.[11]

13 In this regard, Lord Nicholls' concern bears repetition: that *Fairchild* should not lead to a relaxation of the conventional test whenever the plaintiff has difficulty in proving causation. Policy considerations will come into play whenever the court is called upon to

7 [1988] AC 1074. See also *Hotson v East Berkshire Area Health Auth*ority [1987] AC 750.
8 *Supra*, n 4 at [24], *per* Lord Hoffman; at [64], *per* Lord Scott.
9 [2005] 2 AC 176.
10 *Supra*, n 4 at [55]–[57], *per* Lord Scott.
11 *Supra*, n 4 at [114].

consider whether difficulties of proof justify departure from the conventional test.[12]

E. Claimant solely responsible

14 The extremely rare case of the victim himself being solely responsible for a material exposure to asbestos dust was posed by Lord Rodger. In weighing the potential injustices, as between the victim and the wrongdoers, of sticking to the conventional test of causation or applying the *Fairchild* exception, Lord Rodger felt that the unfairness of applying the exception in such a case would be too great. On that basis, he would have preferred applying the normal rule of causation.[13] This can also be supported on the basis that if it can be shown that the victim was himself solely responsible for a material exposure, then the normal causal requirement and not the *Fairchild* exception should apply.

III. Extent of liability

A. Significance of the issue

15 This issue is of crucial importance to a defendant employer or occupier. This is when defendants and their insurers are no longer in existence or solvent. In such cases, a single solvent employer or its insurers, faced with full responsibility for an injury which might or might not have been caused by a tortious exposure, cannot obtain contribution from the other insolvent employers or insurers. It is recognised that this possible unfairness cannot be eliminated, but it can be considerably reduced if each employer is made proportionately liable for a share of the loss (severally liable). In *Fairchild,* none of the defendant employers was insolvent and it was accepted that if held liable, the defendants should be jointly and severally liable for all the damage. It made no difference that the defendants were made liable *in solidum* because contribution was obtainable from the other solvent defendants in the ordinary way. Whether that is a correct approach was reviewed in the *Barker* appeals.

12 [2002] UKHL 22 at [43].
13 *Supra*, n 4 at [100]–[101].

B. Joint and several liability

16 Lord Devlin, in a well-known passage in *Dingle v Associated Newspapers Ltd*,[14] stated the fundamental principle that where concurrent wrongdoers are legally responsible for damage of an indivisible nature (such as mesothelioma), and it is impossible to attribute specific parts of the damage to a specific tortfeasor or tortfeasors, each is liable for the whole damage *in solidum*. The joint and several liability is based upon a finding that the breach has been a cause of the indivisible damage and if a wrongdoer causes injury, the traditional approach is that he should be jointly and severally liable. There is no reason why his liability should be reduced just because someone else causes the same harm.

C. Several liability

17 Any departure from the general rule stated above would have to be consistent with principle, authority and policy.

(1) Redefining the nature of the damage

18 It follows that apportionment of the sort proposed in *Barker* would be contrary to the general principle and the logic of imposing such liability is absent. In order to maintain consistency with the fundamental principle stated above, the majority of the House in *Barker* embarked on redefining the nature of the damage suffered by the victims.[15] Lord Hoffman characterised the damage as the risk of contracting the disease so that each defendant should be liable only for his contribution to the total risk which had eventuated.

19 Lord Scott viewed *Fairchild* as an anomalous exception to the causation requirement, and would not be surprised if consequential adjustments to other principles of tortious liability became necessary. Taking a similar view, Baroness Hale said that the common law rules that led to liability *in solidum* for the whole damage have always been closely linked to the traditional approach to causation. Following the radical departure from this approach and our perceptions of causation having expanded, she saw no reason why the rule on liability *in solidum* should not be modified to meet new situations.

14 [1961] 2 QB 162 at 188-189.
15 *Supra*, n 4 at [86], *per* Lord Rodger.

(a) The basis of a *Fairchild* type of action

20 In attempting to state the basis for several liability as an exception to the general rule, there appears to be some divergence of opinion as to the basis of liability and the nature of the damage. Baroness Hale agreed with Lord Rodger that the damage which is the gist of these actions is the mesothelioma and its physical and financial consequences. It is not the risk of harm to the victim. In none of the cases did the plaintiffs claim damages for the creation of a risk that he would develop the disease.[16] On the other hand, Lord Hoffman stated that consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which should be regarded as having been caused is the creation of such a risk or chance.[17] Such an approach, in the view of Lord Rodger, may well maintain internal consistency between the basis of liability and the nature of the damage but is inconsistent with the main body of law on personal injuries where damages are not awarded for the risk of contracting a disease.

21 It is submitted that the basis of liability where the *Fairchild* exception applies is the creation of a material risk which is regarded in law as sufficient to establish responsibility and the damage which is suffered is the injury which eventuated. If the risk does not materialise and the victim does not contract the disease, he cannot claim for the trauma of being subjected to the risk.[18] The *Fairchild* exception should not be analysed on the fictional basis that the defendant should be treated as having caused the claimant's damage by virtue of having materially contributed to the injury. The intention may be to maintain consistency with general principles but is this fictional approach necessary, bearing in mind that the *Fairchild* principle is an anomalous exception to the ordinary causal requirement.

(2) A just solution

22 The majority of the House in *Barker* held the view that contribution in proportion to the risk of the harm occurring would be a preferable, fairer, solution when the defendants are found liable for creating the risk of illness rather than for causing it, since it might turn out that such a defendant, if medical science could prove, did not in fact cause the injury. The rationale of imposing full liability where all the

16 *Supra*, n 4 at [79], *per* Lord Rodger.
17 *Supra*, n 4 at [36].
18 *Gregg v Scott*, *supra*, n 9.

defendants were in breach of duty does not apply with the same force if there are other, non-tortious causers in the picture. *A fortiori* if some of the defendant employers are insolvent. Lord Hoffman sums this up: "the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant should not be allowed to escape liability altogether. Neither should he be liable for more than the damage which he caused. As science can deal only in probabilities, the law should attribute liability according to probabilities."[19]

23 The result was that the majority of the House remitted the *Barker* cases back to the first instance judges to re-determine the damages by reference to the share of the risk attributable to the breaches of duty.

(3) Ascertaining the degree of risk

24 The majority of the House in *Barker* held that since the risks or chances of injury are infinitely divisible, the way was open to attributing liability according to the relative degree of any defendant's contribution to the risk of the disease materialising.[20] Liability should be apportioned according to the probability that one or other of the defendants caused the harm. The harm may be indivisible but the material contribution to the risk can be divided, a matter of statistics to Lord Walker. The ascertainment of the risk would be a question of fact, not law, to be determined by the trial judge. Lord Scott suggested that "the issue would depend upon the duration of the tortious exposure compared to the total duration of exposure, the intensity of the tortious exposure compared to the intensity of the exposure for which the defendant was not responsible, the exact type of agent might be relevant in assessing the degree of risk, for example, different types of asbestos might create greater risks than others. Other factors relevant to the degree of risk might be the assessment of the percentage risk for which an individual defendant was responsible and therefore the percentage of the total damage for which that defendant could be held liable." Applying this approach, Lord Scott stated that each defendant would be responsible only for his proportion

19 *Supra*, n 4 at [43]. Lord Hoffman also referred to the apportionment of liability in two American cases where the cause of the harm was uncertain: *Brown v Superior Court* (1988) 751 P 2d 470 (Supreme Court of California) and *Hymowitz v Eli Lilly & Co* (1989) 539 NE 2d 1069 (Court of Appeals of New York).

20 In contrast to Lord Devlin's statement in *Dingle* n 14 that where it is impossible to attribute specific parts of the damage to a specific wrongdoer(s), each is liable for the full damage *in solidum*.

of the total damages that would have been awarded if the whole period of exposure had occurred during the claimant's employment by a single defendant. Any contributory negligence during that period of exposure would go to reduce the damages payable.

(4) Divisible harm

25 It is apparent that the *Fairchild* and *Barker* principles were formulated in the context of *inter alia*, indivisible harm such as mesothelioma. Can these principles also apply to cases where the harm is divisible? This, together with the distinction between divisible and indivisible injury, remains difficult issues for future decision. In the meantime, Baroness Hale and Lord Walker agreed that the line between a divisible and indivisible injury (mesothelioma) may be debatable. She explained that what makes an indivisible injury distinct from asbestosis or industrial deafness or any other dose-related cumulative disease, is that it may be caused by a single fibre. This much is known, although the mechanism whereby that fibre causes the transformation of a normal into a malignant cell is unknown.

(5) Claimant's contributory negligence

26 In the *Barker* appeal, on the basis that liability was *in solidum*, the courts at first instance reduced the claimant's damages by 20% to reflect his share in contributing to the injury. However, if liability is several, Lord Hoffman stated that there is no question of contributory negligence any more than of contribution. A defendant is liable for the risk of disease which he himself has created and not for the risks created by others, whether they are defendants, other wrongdoers or the claimant himself or whether or not the other periods of exposure involved breaches of duty or contributory negligence on the part of others. However, Baroness Hale and Lord Walker did not rule out the possibility of questions of contributory negligence or contribution sometimes arising in respect of some particular period of tortious exposure by a defendant: for example, contributory negligence on the part of a claimant by failing to comply with safety measures, or contribution as between an employer and engineering consultant or specialist manufacturer who has failed to install an adequate system of protection in the workforce.

(6) A minority view on the extent of liability

27 Lord Rodger preferred to adhere to the general rule of joint and several liability which applies to defendants who are held to have materially contributed to indivisible injuries such as mesothelioma. He

disagreed with Lord Hoffman's analysis that the creation of a material risk of mesothelioma was sufficient for liability. He found it "unthinkable that the law would hold that, *vis-à-vis* the claimant, defendant A one-fifth killed the victim of mesothelioma, defendant B one-quarter killed him, defendant C forty percent killed him and so forth"[21] In support of his opinion, Lord Rodger referred to *Bonnington Casting Ltd v Wardlaw*,[22] the classic authority for the proposition that to recover full damages against any defendant, a plaintiff need prove no more than that the wrongful act materially contributed to his injury, a considerably more generous test than the "but for" test of causation. The decision in *Bonnington* was invoked in *McGhee* where the House held that in the circumstances, by proving that the defenders had materially increased the risk of injury, the pursuer had proved that they had materially contributed to his injury.[23] Lord Rodger pointed out that the plaintiff never pleaded that he had suffered damage in the form of a risk that he would develop dermatitis. It therefore followed that the basis of liability can be only that McGhee had proved that his dermatitis had been caused by the defendant's negligence.[24] It is submitted that such an analysis is consistent with the proposition for joint and several liability.

28 Lord Rodger was also concerned that the imposition of several liability would result in the risk of insolvency bypassing the other wrongdoers and insurers and to be shouldered entirely by the innocent claimant who will end up with only a small proportion of the damages which would normally be payable. "The desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me."[25]

IV. Conclusion

29 Like similar previous appeals before it, the House in *Barker* and associated appeals has had to strike the right balance of fairness between claimant and defendant in a *Fairchild* type of case. While justice and policy considerations dictate that a *Fairchild* type of claimant should recover compensation, even when there are periods of tortious and non-tortious exposures to a single injury causing agent, the House in *Barker*

21 *Supra*, n 4 at [69].
22 [1956] AC 613.
23 *Supra*, n 2. Lords Reid at 5B, Simon at 8, Simon at 11–12, 12–13 and Wilberforce at 7 appear to be describing the same approach.
24 *Supra*, n 4 at [74]–[76].
25 *Supra*, n 4 at [91].

has sought to moderate the effects by tipping the scales in favour of proportionate liability. The English Compensation Act of 2006 has since reversed *Barker* and tipped the scales back in favour of joint and several liability in mesothelioma cases. While this enables victims to recover full compensation from any wrongdoer or his insurer(s), it has implications for the insurance industry. Whichever approach the Singapore court will follow is awaited with huge interest.