Uncommon Law: The juridical Chaos Theory

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In a series of decisions, beginning with Fairchild v Glenhaven, *a theory was developed, (later formulated by a majority in the Supreme Court in* Zurich v IEG) *identifying an "enclave" within the Common Law. That enclave contains a rule that the burden of proof is weaker and broader than the common law rule of the balance of probabilities if the claimant is seeking to prove that the defendant is liable for causing mesothelioma injury to the claimant. Logically that means that the court accepts that a defendant can be liable for the injury when the greater probability is that he is not liable. Lord Neuberger calls the problems created by these decisions a sort of juridical version of chaos theory.*[1] *It is argued here that the law of the enclave should not have been created and that "justice" in a non legal understanding, that is, holding a defendant responsible for injury suffered by a claimant where the defendant exposes the claimant to risk of that injury but the defendant cannot be proved to have caused the injury, did not require the Fairchild enclave to be created.*

Introduction

Twenty judges sat in the eight HL/SC cases[2] considered here (not counting the five in *McGee v NCB*), in groups of five or seven. Three were in four of the cases (Lords Hoffman, Rodger and Mance) but not the same four cases; the remainder were in fewer. No two panels were the same; the largest match was *Sienkiewicz* and *BAI* - Lords Phillips, Dyson, Mance, and Kerr sat in both. In *Zurich v NEI* Lord Neuberger, in his only appearance in this suite of decisions, said that "*the effect of what was a well-intentioned, and may seem a relatively small departure, from a basic common law principle by a court, however understandable, can lead to increasingly difficult legal problems, a sort of juridical version of the chaos theory"*. The large number of judges who have looked at episodes in this mesothelioma saga has not assisted in avoiding the difficulties.

1. Common Law and Statute

Before the Law Reform (Married Women and Tortfeasors) Act 1935, if a victim of a tortious act pursued one of a number of joint tortfeasors to judgment, his claim was extinguished.[3] Lord Atkin said in *Clark v. Urquhart*[4],

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[1] *Zurich Insurance PLC UK v International Energy Group Ltd* [2015] UKSC 33 [191]

[2] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 A.C. 32; *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 A..C. 572; *Karen Sienkiewicz (Administratrix of the Estate of Enid Costello, deceased) v Greif (UK) Ltd and Others* [2011] UKSC 10, [2011] 2 A.C. 229; *BAI (Run Off) Ltd (In Scheme of Arrangement) (Appellant) v Durham (Respondent)* [2012] UKSC 14, [2012] 1 WLR 867; *Zurich Insurance PLC UK v International Energy Group Ltd* [2015] UKSC 33, [2015] 2 WLR 1471; are on mesothelioma. *McGhee v National Coal Board* [1973] 1 WLR 1 is relied on in *Fairchild. Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [2008] 1 A.C. 281 is on pleural plaques and *Malcolm Gregg v James Andrew Scott* [2005] UKHL 2 is on cancer, but both are considered because they review the relationship between breach of duty and injury/damage.

[3] See *Gladman Commercial Properties v Fisher Hargreaves Proctor and Others* [2013] EWCA Civ. 1466 [21-23] per Briggs L.J.

[4] [1930] A.C. 28, p. 66.

"*damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed.*"[5] In that case the plaintiff had received, in satisfaction of his claim against one defendant, the full amount of damages which he could have received on any of the causes of action against the rest. It was held that his acceptance of the money paid into court was a satisfaction of all the claims. After the 1935 statute, judgment against one tortfeasor was not a bar to an action against another joint tortfeasor and one joint tortfeasor could seek contribution from another joint tortfeasor.

Before the Law Reform (Contributory Negligence) Act 1945, if a victim of a tort contributed in any degree to the damage he suffered, he had no claim on the tortfeasor: *Butterfield v Forrester*[6]. After the 1945 Statute, contributory negligence reduced the amount of the claim, but did not extinguish it.

These two *law reform* statutes changed the *common law*. They were necessary because the common law had set, so that it could not flex to achieve what the statutes achieved.

2. Common Law and *Fairchild v Glenhaven*

In *McGee v NCB*[7], the plaintiff contracted dermatitis from dust after working in a brick kiln. The defendant was alleged to have negligently caused this by failing to provide showers at the plant, thus requiring the plaintiff to endure the skin irritation for longer – whilst he was cycling home. The defendant said that the negligence did not cause the plaintiff to suffer dermatitis. The Law Lords found that the additional time that the plaintiff had the dust on his skin materially contributed to the dermatitis and thus the defendant was liable. But additionally the Law Lords clearly said that "from a broad and practical viewpoint" there was:

> "*no substantial difference between saying that what the defendant did materially increased the risk of injury to the pursuer and saying that what the defendant did made a material contribution to his injury.*"[8]. Lord Salmon went further: "*In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the common law*".[9]

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[5] The statement that damage is an essential part of the cause of action in tort becomes important when considering the mesothelioma claims that came to be considered by the Law Lords and the Supreme Court in the 21st century.

[6] (1809) 11East 103.

[7] [1973] 1 WLR 1.

[8] Per Lord Reid at p. 5.

[9] In the context of the fact that the defendant, in breach of duty because he materially caused injury to the claimant, it doesn't matter what else one adds or if one adds nothing, so to say that it makes no difference whether one says the defendant *caused* the injury or the defendant *increased the risk* of injury occurring, doesn't affect the result, because the finding of causing the injury has been made. It matters to the result a great deal, of course, if more than one defendant exposes a claimant to risk of injury but only one causes injury, or none of them do, or there is no proof which one caused the injury, or the injury is caused by someone else.

Here, the findings were that dust caused dermatitis; because of the defendant's negligence the period of exposure to the dust was, to a material degree, longer and more severe than it needed to be; thus, there was causation. The judges could have stopped there. But they said creating risk is the same as causing injury. They said it in the context of a finding of fact that injury was in fact caused by the risk created by the defendant, but that context was not always appreciated in later cases. There was no suggestion in *Mc Ghee v NCB* that the burden of proof was other than on the balance of probabilities. The Law Lords did not claim to be finding the defendant liable on some reduced burden of proof.

Before *Fairchild v Glenhaven*[10] a victim of mesothelioma could not recover from any employer if more than one employer exposed him to asbestos, because he could not satisfy the clearly established common law burden of proof in civil actions, that on the balance of probabilities any *particular* defendant caused the injury. There was no evidence that they *all* caused the injury. They all *might* have, but there was no telling which one (or more) had in fact cause it. This situation resulted from the then state of knowledge that mesothelioma might be caused by any one or more asbestos fibre(s) inhaled at any time previously, but it was impossible to say when the inhalation of the critical fibre(s) had occurred.[11] The common law test of proof on "the balance of probabilities" was set: if there was more than one employer, it could not be determined in which employment(s) the fatal fibre(s) had been inhaled.[12] In *Fairchild*, the Law Lords, apparently thought that any statutory law reform might take decades – as had been the case with the 1935 and the 1945 statutes – and decided to flex their muscles. The common law could not be flexed because it was set – just as much as it was before the 1935 and 1945 Acts. The Law Lords decided to break the common law.[13] They decided that where claimants contracted mesothelioma, defendants who had materially exposed the victim to the risk of contracting mesothelioma had caused the mesothelioma and were liable for the actual damage even though it could not be proved on the balance of probabilities which one or more of them had caused that damage.[14] This decision was asserted to be in line with the House of Lords in *McGhee v*

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[10] [2002] UKHL 22

[11] In *Sienkiewicz* v *Greif* [2011] UKSC 10 Lord Phillips [102] said that the "single fibre" theory was discredited but still the time of the fatal attack by fibres cannot be identified.

[12] The facts are therefore different from *McGee*, where there was only one employer and all the dust caused dermatitis. But if there had been more than one employer, all the dust would still have caused the dermatitis and all would potentially have been liable.

[13] "*For the first time in our legal history persons are made liable for damage even though they may not have caused it at all."* Lord Mance, in *Zurich v IEG* [2015] UKSC 33 [30] quoting Baroness Hale in *Barker* v *Corus* [2006] UKHL 20 [126]. One would not have guessed in the year 2000, or any time before, that such a statement would be made, approvingly, by an *English* judge about English law. But on one level it is a naïve statement. It has *always* been the case that persons may be made liable for damage they may not have caused [in fact did not cause]: Having heard evidence and argument put before him, the judge reaches a decision. He may be "wrong" in the sense that he finds in favour of the claimant/plaintiff even though in fact the defendant did not cause the injury complained of. The judge "finds" the facts on the evidence, but what actually happened does not change because of what the judge decides.

[14] Subject to the six "conditions" set out in [2] of Lord Bingham's opinion. These "conditions" are really just the facts of the case that made a claim for mesothelioma different. In *McGee v NCB* in 1973, [1973] 1 WLR 1, there was no doubt that the exposure to dust caused the injury of dermatitis even though how it did so was not understood. As a matter of fact the dust did cause the injury even though other factors, for which the defendant was not legally responsible, were also causative.

NCB but there was a fundamental difference which made the *Fairchild* decision radically different from the earlier case. In the earlier case the court found that the exposure to dust *caused* dermatitis. In the later case the furthest the court could go was a finding that the exposure to asbestos *materially increased the risk* of contracting mesothelioma, but because the House of Lords in *McGhee v NCB* had said the difference was immaterial, the House of Lords found the defendants liable. They were not required to determine how that liability should be met.

The Supreme Court, the successor to the House of Lords, has recognised that the House of Lords took the law beyond *McGhee* and did not apply the requirement to prove liability for damage caused on the balance of probabilities. It describes the law within the group of decisions beginning with *Fairchild* as "the Fairchild enclave".[15] The OED defines an enclave as "a portion of territory entirely surrounded by foreign dominions". Thus figuratively the *Fairchild* enclave is a portion of law entirely surrounded by alien law." The ruling is in reality the reverse. It is an enclave of alien law within the common law. In *Zurich v IEG* the judges of the Supreme Court said that what the Law Lords decided in *Fairchild* was that a lesser burden of proof, a weak or broad test of causation, could be used if certain criteria applied. The judges in *Fairchild* did indeed assert that they should take a broader view of causation and relied on Lord Atkin in *McGhee* to support their decision. But there was no reference in *Fairchild* to this requirement of causation being *weaker*[16]. Lord Bingham said [34] that on satisfying certain conditions, the exposure of the employee to a risk he should not have been exposed to, made a material contribution to the suffering of the disease. Lord Nichols [42] said that significant wrongful exposure to asbestos dust should be regarded by law as a sufficient degree of causal connection to require the employer to assume responsibility for causing mesothelioma. Lord Hoffman [63] favoured a rule that an employer was liable for the injury because he created a significant risk to the employee's health. Lord Hutton [116] claimed to follow *McGhee* and said materially increasing the risk was a substantial contribution to the contracting of the disease. Lord Rodger [168] said that materially increasing the risk of contracting mesothelioma should be taken in law as proof of materially contributing to the illness.

Though the judges in *McGhee v NCB* said that the exposure to dust exposed the employee to the risk of dermatitis, the exposure to risk was not a necessary step in the process of finding the employer liable because it could be proved that the particular, identified, defendant had created *the dust that caused the illness*. It was exposure to the dust that resulted in liability, not the exposure to risk of dermatitis. In *Fairchild* the court found that in breach of duty the employer exposed the employee to asbestos, and that created a material risk of contracting mesothelioma, *and therefore* it materially caused the mesothelioma that the employee suffered from. In *Fairchild* the exposure to the risk was a necessary step in the process because that is what was found to constitute the causation.[17]

[15] *Zurich v IEG* [2015] UKSC 33 at [1]. Lord Mance.

[16] Lord Mance introduced this word in *BAI v Durham*, ten years later. See 8.1 below.

[17] This difference is very well set out by Lord Dyson in *Heneghan v Manchester Dry Dock*, [2016] EWCA Civ. 86, at [23].

The *Fairchild* "exception" as the Master of the Rolls (Lord Dyson) called it, was applied in *Heneghan v Manchester Dry Docks Ltd and Ors*[18]. The victim died of lung cancer caused by exposure to asbestos. He had worked for the six defendants (and others) and been exposed to asbestos in all those employments. The Court of Appeal declared that the judge (Jay J) was right to apply the *Fairchild* rule. It was not possible on the evidence to say that each defendant had made a material contribution to the contracting of lung cancer [the *McGee* finding[19]] but they did all materially contribute to the risk that the victim would contract lung cancer [the *Fairchild* finding] and therefore the defendants were all liable in accordance with the *Fairchild* decision. Since this was lung cancer, and not mesothelioma, the Compensation Act (see paragraph 7 below) did not apply, and the defendants' liability was in accordance with *Barker v Corus*[20], (see paragraph 6 below). Lord Dyson noted that lung cancer, like mesothelioma, was an "indivisible" disease, one whose severity does not depend on the extent of the exposure.

2.6 In *Fairchild* the House of Lords was not called upon to say, and did not say, how the damage/loss would be paid by the number of defendants all of whom had been found to have caused the mesothelioma damage.

3. Fact and Fiction

In brief, in *Fairchild* and *Heneghan* a breach of contract and a negligent act[21] had been proved – the material exposure of the victim to a known risk in breach of the duty to provide a safe environment. Damage itself had occurred after the breach but there was no proof, applying the common law standard of proof, that the damage had *resulted from* / *been caused by* the proven breach. The tortfeasors/contract breakers (who exposed the victim to risk) were not joint but *serial* – a sequence of employers – and it was impossible to say when the mesothelioma was contracted. The *Fairchild* judges took the view that despite the absence of proof by the common law test that any one of the defendants had caused the damage, all the defendants should all be liable, applying the new rule that they sourced from *McGhee*, for causing the mesothelioma, and despite the evidence (at that time) that only *one* of them could *in fact* have caused the damage and it was impossible to say which one had done so. They were effectively treated as joint tortfeasors.[22]

Legal language sometimes uses the word "deemed" to link two "things". Thus sometimes the knowledge/act of an agent is deemed to be the knowledge/act of the principal. The knowledge/act is not that of the principal (he doesn't know), but it is deemed to be (the law acts as if he knew). Whilst Lords Nichols and Rodger in *Fairchild* said that exposure to risk should be "regarded" or "taken" as proof of causation, it does not seem they were thinking in terms of a legal fiction. The injury was not *deemed* to be caused by the exposure of the victim to asbestos; it was *found* to be so caused. What was found was that the exposure to asbestos *had in fact* caused the injury. The Law

[18] [2016] EWCA Civ. 86.

[19] But Lord Dyson refers to *Bonnington Castings v Wardlaw* [1956] AC 613 for this finding.

[20] [2006] UKHL 20.

[21] So just the *basis* of a tort, because the tort of negligence requires damage to be caused by the negligent act, and that was the difficulty with mesothelioma – connecting the two.

[22] But the question of how the loss should be distributed among the defendants was not determined in the *Fairchild* case.

Lords found as a fact something that on the evidence was not a fact – that all of the defendants had caused the mesothelioma injury to the victim.[23]

4. Chance and Later events

It is submitted that the *Fairchild* decision was illogical and also unnecessary because the common law was able to provide a remedy for the actual breaches of duties owed by the defendants (to provide a safe environment) through the law relating to loss of a chance and assessing damages using the facts that appear after the breach of duty, as the House of Lords managed in *Barker v Corus*[24] (paragraph 6 below) by reinterpreting the decision in *Fairchild.* Before we move to *Barker v Corus* we should review chance and later events.

Because they found that the employers' breach of duty caused the mesothelioma injury, the Law Lords in *Fairchild* did not address the question of what damages might have been awarded to the victim by each of the defendants for the breach of the different duty, the duty to provide a safe working environment. Neither did the Law Lords consider damages for loss of a chance, or the impact of subsequent events on damages. But there was in fact a damage that *was* caused to the victim, by each of the defendants, as a result of the breach of the duty to provide a safe environment – the increased likelihood/chance of contracting mesothelioma, and there was one event that occurred subsequent to that breach - the contracting of mesothelioma.

The well known expression of Vaughan Williams L.J. in *Chaplin v Hicks*[25] is *"The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages……"* If a chance of benefit is lost, the court will value it despite the difficulties. The claimant receives damages that are a percentage of what they would have been if there had been loss of a certainty. The reverse of loss of a chance of benefit is receiving a chance of detriment. In *Chaplin v Hicks*, the plaintiff and 49 others reached the last round of a process to find twelve young ladies who would be given employment on the London stage by the defendant impresario. There was to be a selection process but, in breach of contract, the defendant did not give the plaintiff sufficient notice to attend that process. She claimed, and recovered, damages for that breach of contract. Suppose that before the final selection process (i) the defendant impresario had died, or (ii) all but ten of the other 49 had withdrawn. For instance (i) any damages against the estate would be reduced, perhaps to zero, because the impresario was not in a position to fulfil his offer. In instance (ii) the damages would likely be increased because the "chance" of the plaintiff appearing on the stage would have increased dramatically by the absence of so many competing young ladies. Later events would have affected the assessment of damages. Fletcher Moulton L J recognised this: "*Take the case of a tontine of 100 persons of whom only three are left; if one of the three were improperly struck out, would he not be entitled to substantial damages?"* [26]And if 99 were left? Or two?

[23] If it could have been proved on the balance of probabilities that all the defendants had caused the injury, there would be no *Fairchild* exception/rule/enclave.

[24] [2006] UKHL 20.

[25] (1911) 2 KB 786 at 792

[26] (1911) 2 KB 786 at 789

In 2007 the House of Lords decided *Johnston v NEI* [27] which is an important case in looking at probabilities and chance. The House of Lords said that a victim who developed pleural plaques had no damages to recover from the defendant who caused the plaques because no injury was suffered, or could be suffered, simply from contracting pleural plaques. Thus there was no damage to link to the breach of duty, and no tort, no loss from any breach of duty. Lord Hoffman echoing Lord Atkin, in paragraph 1.1 above, said "*proof of damage is an essential element in a claim in negligence*".[28] The asbestos scenario is different from the scenario in *Johnston* in two respects: first, damage *can* result from exposure to asbestos, and secondly, there *is* creation of a greater likelihood of contracting mesothelioma. And *that injury*, the greater exposure to risk of contracting mesothelioma, comes about by the breach of duty to provide safe working conditions. In those circumstances it is consistent with existing law for the defendant to be liable to pay the percentage of the actual damage suffered by the claimant that is represented by the chance of the defendant having caused it. The damages are then the damages for the *actual* breach of duty.

5. Subsequent Events

The law *has* to look at what happens *after* the breach of duty when deciding what damages to award. It does so both in tort and in contract. When a court considers how much to award a claimant for a breach of contract or tort, it will look at what happens after the breach or the tort and the immediate loss if it helps the court come to a more accurate figure. *British Westinghouse*[29] is an example in contract – the purchaser lost his claim for damages against a supplier of poor quality turbines because the purchaser replaced them with even more efficient turbines and overall saved money.

In *Jobling v Associated Dairies*[30] the victim had his loss of future earnings claim reduced because after his injury caused by the defendant, an unrelated illness would have required him to give up work. In sale of goods law, whilst the starting point for the seller's damages for non acceptance of goods is the difference between the sale price and the market price, the court will look at a later actual higher price if it is a sale in mitigation of loss.[31] In insolvency law, if a contingent insurance claim becomes ascertained during the course of winding up the actual amount is substituted for the assessed "value" of that claim: *MacFarlane's claim.*[32] "*Ever since contingent and unascertained claims became admissible to proof the courts have applied the hindsight principle*."[33]

In *Gregg v Scott*[34] S misdiagnosed a lump in G's arm as benign but nine months later it was found to be cancerous. G claimed damages for the injury caused by the misdiagnosis. The majority of the Law Lords (3 of 5) said that on

[27] [2007] UKHL 39.

[28] Ibid at [2].

[29] [1912] AC 673

[30] [1982] AC 794

[31] Benjamin, Sale of Goods 9th Edition 2014, 16-056

[32] (1880) 7 Ch D 337

[33] Per David Richards J. in *M F Global (In Administration), Re* [2013] EWHC 92 at [50].

[34] [2005] UKHL 2, [2005] 2 AC 176.

the judge's findings it had not been shown that the delay in commencing G's treatment which was attributable to S's negligence had affected the course of his illness or his prospects of survival, which had never been as good as even. But the majority Law Lords also said that liability for the loss of a chance of a more favourable outcome should not be introduced into personal injury claims. The two dissenters, Lord Nicholls and Lord Hope, said that the reduction in the prospects of a successful outcome for G, which S's negligence caused, was a loss for which G was entitled to be compensated even if the prospects of a successful outcome were at all times less than 50%. *Chaplin v Hicks* (Section 4 above) was one of the cases cited by Lord Nicholls in saying that if G's prospects of recovery fell from below 50% (42%) to even further below 50% (25%), there should be a remedy for the negligence of increasing the prospect of damage. Lord Hoffman, one of the majority, (agreeing with Mance LJ in the Court of Appeal) said that damages for loss of a chance could only apply to damage which it is proved is attributable to the defendant's wrongful act, and if the prospects of recovery were never as good as 50%, it was not possible to show that the defendant was the cause of such damage. The court refused to "extend" the *Fairchild* "principle" to the facts of *Gregg v Scott.* If the true ratio of *Gregg v Scott* is that before S's negligence G had zero prospects of survival or of an appreciably longer life and S's negligence made no material difference, that ratio is rational. But to say that there can be no damages for loss of a chance unless there is a better than evens chance of a successful outcome is close to contradictory: it is saying that you have a remedy if the chances are that you don't need it. The opinions of the two dissenting Law Lords are more persuasive. In particular they point out that in loss of a chance cases there is no discussion of whether the lost chance is better than 50/50. If a claimant could prove that he had a better than 50% chance of the outcome, he would claim 100% damages and succeed on the balance of probabilities.[35] In common sense one would expect loss of a chance cases to occur in the space where it was not possible to satisfy the balance of probabilities test. In *Gregg* the claimant already had cancer when he saw the first doctor, and at the time of the trial was still alive. Nonetheless, even proof that his life expectancy had been reduced gave him no remedy because he was still more likely to die than live. In *Fairchild* it could not be proved that the claimant already had mesothelioma at any stage of his employments but he did in fact contract mesothelioma which exhibited thereafter and the court gave him a remedy against all the defendants.

In *Sienkiewicz v Greif (UK) Ltd*[36] there was only one defendant but the exposure to asbestos to which the defendant had subjected the claimant, was small: it increased the normal environmental risk by some 18%, was the finding. The defendant's case was that since it was said against him that he had *increased the risk* of contracting mesothelioma, the risk had to have at least doubled by the exposure, for him to be liable.[37] The Supreme Court applied the *Fairchild* test and said that materially exposing an employee to risk *caused the injury*. There was no space in the test for arguments about how significant the exposure was once the court was satisfied that the exposure was material. Lord Phillips noted that the "double the risk" argument came from the fact that if the defendant more than doubled the risk then it was, on the balance of probabilities, more likely that the defendant caused the injury than that the existing cause did[38]. He said that such a test had no application where the two

[35] A point made by Lord Phillips in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10 at [94].

[36] Ibid.

[37] Ibid at [4]

[38] Ibid at [72]

causes operated together.[39] In fact, as he pointed out, if the defendant cannot be liable unless his action is more than twice as likely as any other possible cause, to have resulted in the employee contracting mesothelioma, the *Fairchild* causation test would not be needed.[40] The balance of probabilities test would render the defendant liable.

6. Damages and the *Fairchild* exception: *Barker v Corus*

The question not considered in *Fairchild v Glenhaven* – the question of what *is* the liability of each defendant in the case of mesothelioma claims - came for consideration four years later in *Barker v Corus*. In that case the judges seemed to accept the statement by Lord Scott that "*Fairchild* exception" means the imposition of liability for *actual causative* effect of injury on a defendant where in fact the defendant has (only) materially *increased the risk* of injury.[41] Given that, and the fact that the expression appears 28 times in *Barker v Corus*, it is surprising that in *Barker v Corus* Lord Hoffman posed the question whether in *Fairchild* the Lords had decided that the defendant was deemed to have *caused the injury*, or whether he was found liable for *creating a material risk of injury* and that was sufficient for liability.[42]

Having posed the question, and despite a seeming acceptance of what the *Fairchild* exception was, Lord Hoffman nonetheless said in *Barker* that in *Fairchild* the employer was liable in damages for *creating the risk* and that only two judges in *Fairchild* had said that liability was for causing the injury. He then used the case law set out above in Sections 4 and 5[43] to assess damages in *Barker v Corus.*[44]

However, Lord Rodger, in his speech in *Barker*, showed that Lord Hoffman was not accurate about *Fairchild*, and that in *Fairchild* employers were not found liable for *creating the risk* but were found liable for *causing the injury*. Having effectively rewritten the outcome of *Fairchild*, Lord Hoffman carried the majority with him. Lord Hoffman said that as the employer was liable for creating the risk, it was more just to attribute liability by reference to the degree of contribution to the risk - the length and severity of the exposure.[45]

Lord Hoffman also said in *Barker* that there was no conceptual objection to treating the act of increasing risk of an unfavourable outcome as actionable damage[46] One might conclude, on the basis of what Lord Hoffman said in *Barker*, that *Fairchild* was not an exception to the common law but an application of it – the imposition of damages

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[39] Ibid at [92]

[40] Ibid at [94] Lord Dyson said in *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86 at [8] that the "doubling the risk" test at least applied to the question "did asbestos cause the disease"? But he seems in fact to be talking there simply about the balance of probabilities test. If on the balance of probabilities asbestos did not cause the disease, there is no second stage of considering how liability is to attach to a number of defendants.

[41] *Barker v Corus* [2006] UKHL 20 at [52] per Lord Scott.

[42] Ibid. at [31 to [36].

[43] at [36] Ibid he refers to *Chaplin v Hicks.*

[44] Ibid. at [35] to [39]

[45] Ibid at [36] to [40]

[46] Ibid at [39]

for breach of duty in creating a risk of injury. Lord Hoffman had difficulty fitting *Gregg v Scott*[47], where risk of injury had been measurably increased by the defendant's actions, into his understanding of the *Fairchild* case. He said that in *Gregg v Scott*, first, there was uncertainty about the cause of the shortened life expectancy and second, the delay in treatment had increased the chances of premature death but the judge could not find on the balance of probabilities that death would not have occurred otherwise.[48] But in fact it is clear from the judgment in *Gregg v Scott* that the judge had determined the percentage impact of the delay on the claimant's chances of a successful outcome and determined that the percentage was too low to pass the burden of proof threshold, and no damages were given for loss of a chance.

In truth it seems likely that *Barker v Corus* made Lord Hoffman rethink *Fairchild* and conclude that there was an existing legitimate route to arrive at providing the victim with a remedy that did not require any shattering of set law or findings of facts that were not fact. Lord Rodger said that since what had been found in *Fairchild* was that causing the risk created a *causal link* to causing the disease itself, each defendant was fully liable. Lord Rodger was more right about what *Fairchild* decided than Lord Hoffman was. But Lord Hoffman carried the majority. (Only Lords Hoffman and Rodger were in both cases). So in *Barker v Corus* the House of Lords found that each defendant had committed a breach of duty over an ascertainable period, and looked at, and used, hindsight in assessing damages. There was no need to flex, or break the common law. In truth if *Fairchild* had decided what Lord Hoffman decided it had decided, it would not be an exception, or a special rule, or an enclave. Lord Rodger [85]/[90] was concerned that the combination of *Fairchild* and *Barker* meant that there was not just a fresh look at causation *(Fairchild)* but a whole new set of rules, resulting in, not an exception, but an *enclave*. This was first appearance of this word in these cases.

7. Statutory intervention after Barker

The government was not willing to take on the burden of paying mesothelioma victims where employers – and the victim for the periods he was self employed – could not pay. The Compensation Act 2006 came into being to make all employers fully liable in the *Barker v Corus, Fairchild v Glenhaven*, situations and not liable only for the portion of such loss as represented the period and severity of the exposure to risk that they had submitted the plaintiff/claimant to. Then came *Zurich v IEG*. But we should look first at the position of the employer and his employers' liability insurer.

8. Employers' Liability Insurance: BAI v Durham, the Trigger litigation

So far in this analysis we have looked only at the question of primary liability of an employer of a victim who contracts mesothelioma after contact with asbestos at work. Inevitably the question arose what was the position of the employer's insurers following the courts' decisions on the liability of the employer? This was considered in *BAI v Durham.*[49] Given that the House of Lords had found that an employer could be liable where there was a *Fairchild* style causal connection between the breach of duty and the injury (failing the balance of probabilities

[47] [2005] UKHL 2.

[48] Ibid. at [38], [39]

[49] [2012]UKSC 14

test), what was the position of the insurer of the employer? The Supreme Court found that the causal link (of the employer's breach of duty to the injury, mesothelioma), was sufficient to prove that the injury had been sustained or contracted during the whole of the employment and thus during the entire period of insurance. This is the first case in which the word "weak" appears, and it is used to describe the burden of proof accepted in *Fairchild* (decided 10 years earlier). Lord Mance used the word in [66] and [73]. In [66] he spoke of a *weak or broad* view of causal requirements, and of liability for mesothelioma following exposure of the victim, involving a *weak or broad causal link* for the disease to be regarded as having been caused during the insuring period.

In *BAI* Lord Phillips dissented from the majority. For him the "special rule" that made an *employer*, who was clearly in breach of duty, liable for mesothelioma could not make an *insurer*, who was not in breach of duty to his insured, liable as if the injury had been caused during his period of cover, when the whole reason for the special rule was *that one did not know when mesothelioma was actually contracted*. He was not willing to accept that once *Fairchild* created an alternate reality, something that was a fact within that reality could be a fact in the non-*Fairchild* universe. For Lord Philips, the claim of an employer on his insurer was in the non-*Fairchild* universe.

BAI did not consider the position of an insurer that insured only part of the period of the employer's responsibility for the employee.

9. T**he Enclave: Zurich v IEG**

In *Zurich v IEG*[50] [2015] the panel was Lords Neuberger, Mance, Clarke, Sumption, Reed, Carnwath, and Hodge. Lords Mance and Clarke had been in *BAI* and the other Lords were new to the *Fairchild* world. Lord Mance referred to the *Fairchild* decision and the cases that came after it as the *Fairchild* "enclave", seemingly thinking it a good thing, where Lord Rodger, in *Barker*, had thought it something to avoid.[51] Zurich concerned an employer and employee in Guernsey. The employer had settled the employee's mesothelioma claim. The question for the court, relevant to this note, was whether the common law about the degree of liability of each employer who *could have* caused the injury was (i) as set out in Barker, or (ii) as set out in the Compensation Act 2006 – which did not apply in Guernsey. The Supreme Court said, unanimously, that *Barker v Corus* was still the common law of Guernsey. But the judges did not stop there. The majority, Lords Mance, Clarke, Carnwath and Hodge, went on to say that *any* insurer of *any* employer for any period of the exposure of the employee to the risk of mesothelioma, and thus any employer responsible for *causing* mesothelioma on the *Fairchild* test, was liable for *all* of the sums that the insured employer was liable to pay – because the "weak" or "broad" cause of the mesothelioma occurred during the policy period. Within the *Fairchild* enclave, that was the logical conclusion. The judges said that the unpalatable consequences of this – *one* insurer for *one* day of an employer who, on the balance of probabilities did not cause the injury – may be mitigated by "existing tools"[52]. The possibility of being able to mitigate that consequence is not a legal point, so we do not consider it here. Lords Neuberger, Sumption, and Reed did not

[50] [2015] UKSC 33

[51] See text to fn 45

[52] Lord Mance at [52]. E.g. "contribution". But if the other potential contributors are not solvent, then, there will be no mitigation.

agree with Lord Mance and the others about the liability of insurers. It was pointed out that in *Wasa v Lexington*[53], the House of Lords had been strongly opposed to a suggestion that an insurer or reinsurer for an agreed period should be liable to indemnify for loss falling outside the agreed insuring period. A fine argument anywhere but within the Fairchild universe, where mesothelioma is caused for the entire period of material exposure. The same logic as was applied in *Zurich v IEG* was seemingly applied at the reinsurance level by the Lord Justice Flaux, as judge-arbitrator, in *Equitas v MMI* [54] and leave to appeal against the arbitrator's award was granted. The Arbitrator's decision cannot be faulted within the logic of the Fairchild enclave, though the consequences may be questioned on the basis of fairness. On the basis of *Zurich v IEG*, the insurer could choose his reinsurer victim. The Court of Appeal thought there was scope for argument on that point.

10. Law and Logic

Zurich puts the insurer of such employers (of victims of mesothelioma) in a worse position than where the balance of probabilities test is applied to determine an employer's liability. If it could be established on the balance of probabilities when mesothelioma was contracted by an employee, only the employer at that time would be liable. Only the insurer of that period/event would be liable to the employer. The other employers, the other insurers, at other times, would not be liable. They would not have caused the mesothelioma, or insured the employer at the relevant time. The result of *Zurich* is that the less one can prove, the better off one is. The weaker the rationale for what is being done, the wider the net of liability is cast.

Outside the *Fairchild* enclave it is illogical, irrational, to admit that it cannot be proved, even on the balance of probabilities, that a person caused an injury or when an injury was caused, and then say that on a weak, or broad, test of causation, the person against whom liability cannot be established, caused the injury. The balance of probabilities *is already* a weak test. 50.1% is not a great hurdle. Not passing the balance of probabilities test means that it is more likely than not (or for 50/50 at least as likely) that the defendant did not cause the injury.

It is illogical, irrational, to say that there is a weak or broad cause of an injury that can only be caused once, and at a particular time (but one does not know when), and say that because one does not know the "when", the injury happened continuously over an entire period of a working life in the environment of asbestos and each employer during that period and every insurer of every employer of that period, is liable in full for the entire injury.

It was entirely unnecessary for the judges, as social reformers, to reject the common law, and argue for an alternate universe, when there was a clear breach of duty by each employer who exposed the employee to asbestos, which could be compensated in damages assessed by reference to the contracted mesothelioma and to the extent of the fault of each employer, in accordance with established legal concepts of chance and hindsight.

There may be partial recoveries by victims where employers or insurers are insolvent. That has always been the case in law.[55] Why have the courts looked so hard for it not to be the case with mesothelioma? There is no need

[53] [2009] UKHL 40

[54] [2018] EWCA Civ 991

[55] The chances of it having an adverse impact on victims of mesothelioma is reduced by the Compensation Act 2006, section 3. In *RSA v Generali* [2018] EWHC 1237, RSA, had accepted 100 per cent of liability to a

for an "exception", a "special rule", or an "enclave". The doubts of Lords Neuberger and Reed expressed in *Zurich* are entirely justified. Having broken with the common law in *Fairchild*, and not taken the offered route back in *Barker*, the judges have had to leave logic further behind with each new case in order to try and maintain the inherent logic/ illiogicality of the alien law.

claimant, though it was on risk for only six months of ten years in which the claimant had been exposed to asbestos. When it became possible to find other insurers – when the ELTO was established – RSA claimed a contribution from Generali, but failed because by then the time limit for claiming contribution had expired. Had the time limit not expired, there would have been arguments about what "broad equitable principles" (an expression used by Lord Mance in *IEG v Zurich* meant and what hoops RSA had to jump through to get a contribution).