

BARKER V CORUS PLC

WHAT HAS THE HOUSE OF LORDS DECIDED?

1. On 3 May 2006, the House of Lords handed down judgment in *Barker v Corus PLC*. In so doing, they have answered two of the questions left over from their previous decision in *Fairchild v Glenhaven*¹: first, what are the limits of the exception to the usual rules of causation which *Fairchild* represents? Second, what is the extent of the liability of a Defendant who has been found to be liable within the *Fairchild* exception?

Question 1: what are the limits of the exception to the usual rules of causation which *Fairchild* represents?

2. Before the answer to the first question can be explained, it is first necessary to remind readers of what the House of Lords decided in *Fairchild*. In general, where there has been a tortious breach of duty and it is alleged that damage has resulted, it is necessary for the Claimant to satisfy the “but-for” test of causation and prove that he would not have suffered the damage if the negligence had not occurred: as a general rule, unless the Claimant can so prove (the burden being on the Claimant to do so) then he will fail. *Wilsher*² was an example of a Claimant whose claim failed because of his inability to satisfy the “but-for” test of causation: the Claimant had been born prematurely and placed in the Defendants’ Special Care Baby Unit but unfortunately, due to negligence, he was given too much oxygen. The Claimant developed retrolental fibroplasia (“RLF”) which led to blindness and his claim was that this condition was the result of the over-oxygenation. It was proved that exposure to such high levels of oxygen increased the risk that the Claimant would suffer RLF. However, the evidence also showed that RLF may occur in premature babies without any

¹ [2003] 1 AC 32

² [1988] AC 1074

artificial administration of oxygen; indeed, the evidence went further and indicated a correlation between RLF and 4 other conditions from which the Claimant suffered. The evidence was incapable of linking the RLF with any particular one of the 5 conditions potentially associated with it to the exclusion of the others. In those circumstances, even though the Defendant had, by its negligence, increased the risk that the Claimant would develop RLF, the House of Lords held that he had failed to prove causation in that he had not proved that, absent the excessive oxygen, he would not have developed RLF.

3. However, the courts, both in this country and in other jurisdictions, have long recognised that there are certain situations in which, because of lack of scientific or medical knowledge, in requiring the Claimant to satisfy the "but-for" test, you are setting him an impossible task, yet the situation is one in which, in the interests of justice, the Claimant may deserve to recover. The simplest example is that of the Claimant who is injured when 2 huntsmen both negligently fire their guns in his direction at the same time, but he cannot prove whose pellet hit him. In those circumstances, the Claimant is unable to prove on the balance of probability that, but for the negligent act of Huntsman A, he would not have been injured, nor can he prove the same in relation to Huntsman B. So the courts are left with a quandary: should the law be that he recovers against neither, or that he recovers against both?
4. In *Fairchild*, the House of Lords held that they would allow a limited exception to the general rule that the Claimant must be able to satisfy the "but-for" test of causation in circumstances equivalent to the Huntsmen example. As a result of an analysis of the five judgments in *Fairchild*, it seemed to me at the time that the law could be stated as follows:

- (i) In general, in order for a Claimant to succeed, it is necessary for him to establish that, but for the breach of duty in question, he would not have sustained the injury complained of. Although fulfilment of the "but-for" test of causation is necessary, it will not always be sufficient.
- (ii) However, special rules apply to cases where there is, or may be, more than one contributory cause of the Claimant's injury. In general, it will be sufficient for the Claimant to show that the wrongdoing in question made a material contribution to the injury.
- (iii) In certain circumstances, as a matter of law, it will be sufficient for the Claimant to prove that the wrongdoing in question materially increased the risk of the injury occurring in order to prove that the wrongdoing made a material contribution or caused the injury. Those circumstances are as follows (following Lord Rodger's basic analysis):
 - (a) The Claimant has suffered an injury but it is impossible for him to prove exactly how his injury was caused: the highest he can put it is as in (d) below.
 - (b) The Defendant's wrongdoing has materially increased the risk that the Claimant will suffer injury: but creating a material risk of injury to a class of persons is insufficient.
 - (c) The Defendant's conduct must have been capable of causing the Claimant's injury.
 - (d) The Claimant's injury was caused by the eventuation of the kind of risk created by the Defendant's wrongdoing. It is not enough that the Claimant's injury could have been caused by

a number of different events, only one of which is the eventuation of the risk created by the Defendant's wrongful act or omission.

(e) The Claimant must show that his injury was caused by an agency that operated in the same, or substantially the same, way as was involved in the Defendant's wrongdoing.

(f) The principle continues to apply and is not excluded where the other possible source of the Claimant's injury is a similar wrongful act or omission of another person, or where it is a similar, but lawful, act or omission of the same Defendant.

5. The first issue which the House of Lords addressed in *Barker* is whether, in respect of (f) above, it is in fact necessary for the competing source to be a similar wrongful act or omission of another person or a similar but lawful act or omission of the same Defendant, or whether the exception still applies if the competing source is a similar but lawful act or omission of another person. Thus, supposing employer A exposed his employee, C, to asbestos lawfully and then subsequently employer B exposed the same person to asbestos negligently. C contracts mesothelioma. Can C successfully sue B even though he cannot prove that it was not A's exposure which caused his disease? If so, how is *Wilsher* to be distinguished?

6. The answer which the House of Lords has provided is that B is liable to Claimant and it is not necessary that, where the two potential causes come from different sources, both sources should have been in breach of duty. In other words, if Huntsman A is negligent but Huntsman B is not, the victim can still recover against Huntsman A. Lord Hoffmann³ put it this way:

³ At paragraph 17

“The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead. For this purpose, it should be irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. These distinctions may be relevant to whether and to whom responsibility can also be attributed, but from the point of view of satisfying the requirement of a sufficient causal link between the defendant's conduct and the claimant's injury, they should not matter.

So far as *Wilsher* is concerned, the distinction is that, in *Wilsher*, the other competing causes were different agents operating in different ways. As Lord Bingham said, in *Fairchild*⁴:

“It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage.”

Lord Hoffmann, in *Barker*, accepted that, in this respect, Lord Bingham had been right and he had been wrong in *Fairchild*. He said:

“In my opinion it is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect, as in Lord Rodger's example of the different kinds of dust, but the mechanism by which it caused the damage, whatever it was, must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent.”

Thus, condition (e) (see paragraph 4 above) was endorsed.

⁴ At paragraph 22

Question 2: what is the extent of the liability of a Defendant who has been found to be liable within the *Fairchild* exception?

7. However, the Lords giveth and the Lords taketh away. Having extended the *Fairchild* exception in the way described, which might be thought to be a minor extension of the principle, the House of Lords then applied a massive restriction in terms of the extent of such liability. The majority held (Lord Rodger dissenting) that a Defendant who has been found liable through the *Fairchild* portal is only liable to the extent, and in the proportion, that he increased the risk of the unfavourable outcome. Take the Huntsmen example. Each huntsman was responsible for 50% of the risk. The House of Lords has decided that, if both huntsmen are liable, each huntsman is liable for 50% of the damage, proportionate to the extent to which he increased the risk. If only one huntsman is liable, then the extent of his liability does not change: he remains liable only for 50% and the Claimant recovers only half his damages. This avoids the fiction that a Defendant who has materially increased the risk is deemed to have caused the damage of which complaint is made, even where the injury is indivisible. Thus, in *Barker*, what one sees is the House of lords doing that which they refused to do in *Gregg v Scott*,⁵ namely award damages for loss (or creation) of a chance. As Lord Hoffmann said:

“35. 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 the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterize the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for the chances of an event happening, in the way that a person who buys a whole book of tickets in a raffle has a separate and larger chance of winning the prize than a person who has bought a single ticket.

⁵ [2005] 2 AC 176

36. Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialized) was caused by that particular defendant. It will then be possible to determine the share of the damage which should be attributable to him.

8. The key to understanding the reason for this restriction is to understand that liability is being imposed not for causing the damage of which complaint is made, but for causing a material increase in the risk of such damage. At the heart of the decision is their Lordships' consideration of the answer to the quandary which I posed at the end of paragraph 3 above, namely, in the Huntsmen example, should the Claimant recover against neither or both. In answering that question, the House of Lords has said that although both are liable in terms of causation, it does not follow that they are both liable in full. On the contrary, their liability is restricted to the extent to which they were responsible for the increase in the risk of the damage. This was clearly stated by Lord Hoffmann at paragraph 43:

“In my opinion, 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 was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.”

9. This decision takes the law of personal injury into new territory, as was recognised by Lord Rodger in his dissenting judgment. As Lord Rodger put it, the decision creates an entirely separate enclave of liability, namely

liability within the *Fairchild* exception, where different rules apply to recoverability. With respect, I would suggest that Lord Rodger was correct in describing the effect of the decision of the majority in the following terms:

“The new analysis which the House is adopting will tend to maximise the inconsistencies in the law by turning the *Fairchild* exception into an enclave where a number of rules apply which have been rejected for use elsewhere in the law of personal injuries. Inside the enclave victims recover damages for suffering the increased risk of developing mesothelioma (or suffering the loss of a chance of not developing mesothelioma) while, just outside, patients cannot recover damages for suffering the increased risk of an unfavourable outcome to medical treatment (or suffering the loss of a chance of a favourable outcome to medical treatment). On the other hand, if such a claim had been recognised outside the enclave, the patient would have been entitled to recover damages for the increased likelihood that he would suffer a premature death, whereas inside the enclave a victim who suffers an increased risk of developing mesothelioma cannot recover damages unless he actually develops it. Inside the enclave claimants whose husbands die of mesothelioma receive only, say, 60% of their damages if the court considers that there is a 60% chance that the defendant caused the death and no other wrongdoer is solvent or insured. Outside the enclave, claimants whose husbands are killed in an accident for which the only solvent defendant is, say, 5% to blame recover the whole of their damages from that defendant.

10. It is difficult to dissent from the view expressed by Lord Rodger that, in reaching this decision, the majority were “not so much reinterpreting as rewriting the key decisions in *McGhee*⁶ and *Fairchild*.” I do not know how the Defendants in *Fairchild* subsequently approached the questions that remained after the decision of the House of Lords, but I would be surprised if they did not settle the cases on a 100% basis. If so, they have now learned that they were wrong to do so, but were in fact liable only for that proportion of the damages claimed as was proportionate to the extent to which they had increased the risk of the Claimants contracting mesothelioma. Whatever one thinks of the merits of this decision, it is of enormous

⁶ [1973] 1 WLR 1

significance in any case where the Claimant can only win through the *Fairchild* portal, and it represents a significant victory for the Defendants.

MARTIN SPENCER QC

On behalf of the Personal Injury and Medical Law Groups

HAILSHAM CHAMBERS