extent in the particular circumstances of the case it would be just and reasonable to award contribution, and can order contribution in variable proportions.

This is a significant change in the approach to the law of contribution both under statute and in equity and may mean that the courts will be faced with more claims in relation to which it has to make a "just and reasonable" assessment. Looking back at the principles that underlie the equitable doctrine and the considerations that have influenced the courts on previous occasions may be of assistance to the court in making its assessment in future cases. ☙

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FAIRCHILD AND THE SINGLE AGENT CRITERION

In *Heneghan v Manchester Dry Docks Ltd and others* [2016] EWCA Civ 86; [2016] 1 W.L.R. 2036, James Heneghan had been exposed to asbestos by multiple employers throughout his working life. At the age of 74, he died of adenocarcinoma of the lung. Between 1961 and 1974, he was employed sequentially by six employers, all of whom were the defendants in the instant case. Although he had worked for other employers prior to 1961, none of these was sued. Mr Heneghan was a smoker, and it is accepted that smoking is a potential cause of the cancer from which he suffered. Nevertheless, the defendants had already conceded liability on the basis that occupational asbestos exposure had increased Heneghan's risk of developing cancer fivefold during his working life. The only remaining issue for the Court of Appeal, therefore, was whether the *Fairchild* exception (see *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32), formulated to deal with mesothelioma, should apply to a case involving lung cancer, or whether there is a valid legal distinction to be made between the two conditions. Somewhat counter-intuitively, it was the defendant who was arguing here for the *Fairchild* exception to apply, despite that principle normally being advantageous to claimants. The claimant's appeal in turn was based on an argument that the trial judge should have applied the orthodox causal test of material contribution to injury. There is good reason for this: the consequence of applying *Fairchild* in cases not involving asbestos and mesothelioma is aliquot liability (*Barker v Corus* [2006] UKHL 20; [2006] 2 A.C. 572; *IEG v Zurich* [2015] UKSC 33; [2016] A.C. 509), as opposed to the joint and several nature of liability reached on orthodox causal grounds. So, on the facts of *Heneghan*, the application of *Fairchild* would mean that each defendant would be liable only to the extent of their respective contributions (£61,600 in aggregate, instead of full liability at £175,000). The Court of Appeal affirmed the result reached at trial (by Jay J. [2014] EWHC 4190 (QB)), and did so for very similar reasons, applying the exception to reach a conclusion of aliquot liability.

Given the constraints of the question posed to it, therefore, the Court of Appeal opted for the lesser of two undesirable outcomes. In effect, however, its decision extended the application of the *Fairchild* principle from illnesses caused in general

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by a single agent to those illnesses which have been found *on a particular occasion* to have been caused by a single agent. Viewed in purely conceptual terms, this is an unobjectionable modification of the infamous causal exception, and could even be regarded as a somewhat inevitable logical development. Such an extension should nonetheless be resisted: the *Fairchild* principle has already had an effect beyond that which was originally intended (see Lord Brown in *Sienkiewicz v Grief* [2011] UKSC 10; [2011] 2 A.C. 229 at [179]). As a consequence, the remaining restrictions on its application need to be very carefully preserved.

The principal problem in this case was that both courts of appeal were asked an inauthentic question: deciding whether damages should be apportioned on the basis of liability that has been already established is not what the *Fairchild* principle was formulated to do. Rather, that principle operates so as to determine whether liability should be imposed at all. Employing it only once a conclusion on liability has been reached means that it will not function as it should: it is not a divisible concept. The main reason for this is that the core of the *Fairchild* principle is its ability to function as a gatekeeper in terms of claims to which its exceptional method is appropriate. It allows a claimant to satisfy the causal element of the negligence inquiry by establishing that a defendant materially increased the risk of their injury occurring, rather than having to prove causation of the ultimate injury itself. It does so, however, *only* where several extraordinary conditions occur together: an indivisible disease caused by a single agent, the existence of multiple potential sources of that agent, and a scientific impossibility of claimants ever being able to establish on the balance of probabilities which source(s) caused their injury. Lung cancer, whilst an indivisible disease, is not one that is attributable to a single agent. As such, it should be legally distinguished from mesothelioma, meaning that *Fairchild* is not applicable to it.

As a result of s.3 of the Compensation Act 2006, the remedial effect of the *Fairchild* approach is that multiple defendants to whom it applies will be held jointly and severally liable in cases involving asbestos and mesothelioma. In cases to which the material contribution to risk (*Fairchild*) approach applies, but which do not involve asbestos and mesothelioma, *Barker v Corus* ([2006] 2 A.C. 572) operates so as to apportion liability amongst defendants according to the relative risk exposure for which they are responsible. This remedial effect is not an independent device, but a *consequence* of applying the exceptional form of the causal inquiry. This is evident not only from the *Fairchild* judgment itself, which focuses on the issue of causation rather than the nature of the resultant liability, but also from the wording of s.3 of the Compensation Act 2006, a provision which dictates that joint and several liability will be imposed in the event that "the responsible person is liable in tort", clearly presuming that the *imposition* of such liability remains the province of the common law:

> "(1) This section applies where—
>
> … (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason)."

The difficulty faced by the Court of Appeal in trying to decide whether lung cancer should be equated with mesothelioma for these purposes shows precisely why *Fairchild* should not be used for one purpose without the other. At [47], the Lord Dyson M.R. refers to the *Fairchild* criteria and concludes that the facts of *Heneghan* fit them:

> "The factors identified in the *Fairchild* case for the application of this solution exist in the present case: (i) all the defendants concede their breach of duty; (ii) all increased the risk that the deceased would contract lung cancer; (iii) all exposed the deceased to the same agency that was implicated in causation (asbestos fibres); but (iv) medical science is unable to determine to which (if any) of the defendants there should be attributed the exposure which actually caused the cell changes which initiated the genetic changes culminating in the cancer."

But this is both to mis-state one of those criteria, and to refer to all of them at the wrong stage of the inquiry. These criteria operate to identify those cases to which the Fairchild exception should apply and, had they been employed in *Heneghan* at the stage of establishing liability, they would have indicated that this was not such a case. Point (iii) in the above extract suggests that what is important for the imposition of liability on a Fairchild basis is that all defendants expose the claimant to the same agent. This is not incorrect, but neither is it complete. In fact, what is required in order for a claimant to take advantage of the wholly exceptional material contribution to risk approach is that the disease be caused by a single agent. Lord Rodger in *Fairchild* said:

> "the principle does not apply where the claimant has merely proved that his 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. *Wilsher* is an example"(at [170]).

In *Fairchild* and its progeny, it is accepted that mesothelioma is caused by asbestos (*Fairchild* at [7]). In *Heneghan*, as in similar cases, it is accepted that lung cancer can be caused by several different agents, working synergistically, additionally or multiplicatively (*Amaca Pty v Ellis* [2010] HCA 5 at [64] and *Heneghan* [2016] 1 W.L.R. 2036 at [8]). The single agent distinction is an essential element of the restrictions of *Fairchild* liability. Although, in obiter dicta, Lord Brown doubted this in *Sienkiewicz v Grief* ([2011] 2 A.C. 229 at [187]), it must nevertheless remain a necessary criterion of *Fairchild* liability. Without it, *Wilsher v Essex Health Authority* [1988] A.C. 1074; [1988] 1 All E.R. 871 would be redundant, and the House of Lords in *Fairchild* expressly preserved the rule in *Wilsher* when formulating the exceptional principle. Lord Bingham, for instance, said in *Fairchild* (at [22]; see also Lord Hoffmann at [70]):

> "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."

Wilsher is a decision of considerable significance for the tort of negligence. The issue in that case, in which the defendant's breach was one of five different potential causes of the claimant's injury, was that the *agent* of cause was indeterminate. This is not true of the mesothelioma cases, in which it is the *source* of the single causal agent which is indeterminate. In the mesothelioma cases, we know that the defendant's behaviour contributed to *the* specific risk which came to fruition in the form of the claimant's ultimate injury. In *Wilsher*, this was not known; all that was established therein was that the defendant had created *a* risk which might have resulted in the claimant's injury. Imposing liability in *Wilsher*-type situations would effectively mean imposing liability for risk creation, regardless of whether or not that risk actually resulted in injury. Not only would this rail against the law of torts' (correct) refusal to award damages for risk creation simpliciter (see *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] 1 A.C. 281) but, in practical terms, it would mean potentially crushing liability for defendants, and particularly those likely by dint of their nature to create such risks on a regular basis, such as the NHS (see Stapleton (2013) 129 L.Q.R. 39 at 58). It is crucial, therefore, that the *Fairchild* exceptional approach to causation is limited to single agent cases.

Consequently, *Heneghan* creates something of a problem in that liability therein was conceded on the basis of *general* causation (in that it was established that the amount of asbestos the claimant was exposed to throughout his working life was capable of causing his cancer) having been established in a multiple agent situation. This, referred to as the "what?" question in the judgment (Lord Dyson M.R. at [8]), was determined on the basis of the claimant's asbestos exposure during his working life having increased the risk of his developing lung cancer fivefold. But the establishment of general causation says nothing about the causal valence of a particular defendant's contribution. The claimants in *Fairchild* were able to make that forensic leap only because, on those facts: (i) it was accepted that asbestos and nothing else caused their illnesses; and (ii) on orthodox grounds, no claimant suffering from mesothelioma as a result of occupational exposure by more than one employer would ever be able to prove causation, and no defendant would ever be able to disprove the same. Neither of these applies to the facts in *Heneghan*. First, smoking was an additional possible cause of the cancer. In *Barker v Corus*, Lord Hoffmann says ([2006] 2 A.C. 572 at [24]):

> "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."

And, whilst we know from the Joint Statement of the experts in *Heneghan* that "[o]n the balance of probabilities he would not have developed the lung cancer if he had not been exposed to asbestos" (para.3, excerpted at [5]), we do not know whether the same could also be said of his smoking. A positive answer in relation to one agent does not necessitate a negative answer in relation to the other because the adversarial framework is not based on a purely mathematical calculus of probability (L.J. Cohen, *The Probable and the Provable* (1977)). This is not a single agent case. Secondly, in *Amaca Pty v Ellis* [2010] HCA 5, another case

involving the occurrence of lung cancer following both the claimant's smoking and exposure to asbestos, the defendant was able to disprove the claimant's case in causal terms. The facts of *Heneghan*, therefore, do not present a case in which liability should arise on the basis of the defendants having materially contributed to the claimant's risk and no more. Of course, the Court of Appeal in this case was not asked to decide the question of liability, but:

> "[t]he appeal is of some general importance because this is the first time that the Court of Appeal has considered whether the *Fairchild* exception should be applied to a case of multiple exposures leading to lung cancer (as opposed to mesothelioma)"(at [6]).

It is worthwhile, therefore, to explain why the exceptional principle would not have led to a finding of liability, had it been employed at an earlier stage of the inquiry. Moreover, it is the basic inapplicability of *Fairchild* to the facts of *Heneghan* that explains why both Lord Dyson M.R. and Jay J. before him had such a difficult task in trying to compare lung cancer and mesothelioma. At the stage of apportioning damages, there is indeed very little to tell between the two conditions and they do appear to be "legally indistinguishable" (at [19]), but since lung cancer can be caused by multiple agents, it is legally distinguishable from mesothelioma at the liability stage.

Beyond this point, however, both conditions are binary and indivisible, meaning that a victim either has the disease or does not, and the severity of it does not vary according to the magnitude of exposure. Also, neither disease occurs as a result of a gradual physical accumulation of the causative agent, but is triggered at some unknown point by an unknown amount of asbestos. This means that the orthodox "material contribution to injury" approach from *Bonnington Castings v Wardlaw* [1956] A.C. 613; [1956] 1 All E.R. 615 cannot be applied to either condition because that requires an increasing physical presence of silica dust in the claimant's lungs from both sources, meaning that each tangibly contributed to the condition itself. With asbestos and mesothelioma, all that can be said of each source is that it materially contributes to the risk of the illness being triggered and, as Jay J. said of lung cancer ([2014] EWHC 4190 (QB) at [63]):

> "[t]he risk of the disease eventuating is proportionate to the quantum of exposure, but that is a statistical judgment, not an assessment which may be linked to the physical presence of deposits of dust in the lung."

Whilst it may well be that more is now known about the aetiology of mesothelioma than it was when *Fairchild* was decided (see [2014] EWHC 4190 (QB) at [21]), the point remains that the exception was made on the basis that so little was then known about this particular disease that it would be impossible *in principle* for any claimant ever to prove causation on orthodox grounds. For instance, even were a particular defendant to have been responsible for 90 per cent of a claimant's asbestos exposure, this would not equate with that defendant being more likely than not to have been responsible for the "triggering" exposure. This is because, as it was put by Lord Bingham in *Fairchild* [2003] 1 A.C. 32 at [7]:

> "the condition may be caused by a single fibre, or a few fibres, or many fibres: medical opinion holds none of these possibilities to be more probable than any other."

Whilst the single fibre theory is no longer regarded as plausible, the rest of this statement remains true in relation to mesothelioma ([2014] EWHC 4190 (QB) at [22]). In the High Court in *Heneghan*, Jay J suggested that:

> "had the Claimant sued W. Blackwell, which was responsible for 56% of the deceased's total asbestos exposure. I would have seen no difficulty in principle in concluding that a 56% contribution to the deceased's overall exposure should be regarded as sufficient to prove this hypothetical claim on the balance of probabilities"([2014] EWHC 4190 (QB) at [61]).

The fact that this approach could *not* be adopted in relation to mesothelioma explains precisely why the exceptional *Fairchild* principle was deemed necessary. Although this assertion by Jay J. was questioned by counsel (see at [16] (Lord Dyson M.R.); at [54] and [55] (Sales L.J.), the Court of Appeal gave no conclusive response on the point. It remains unclear, then, whether the same uncertainty applies to lung cancer in the same way as it does to mesothelioma. What is unquestionably clear, however, is that if Jay J.'s assertion is true, then *Fairchild* is simply not applicable to cases of lung cancer; the possibility of using a balance of probabilities approach both precludes and renders unnecessary the application of the exceptional principle. The two can in no way co-exist on the same facts, and a clear resolution of this point would have been helpful.

Essentially, the Court of Appeal was asked to choose between two positions, neither of which fits the facts of *Heneghan*. It is clear on the evidence that but for causation on the balance of probabilities could not be established against any of the defendants before the court:

> "the total exposure for which the six defendants were responsible was 46.9 fibres/ml years (ie 35·2% of the whole exposure) … the doses or exposures for which the defendants were responsible range from 2·5% to 10·1%"([2016] 1 W.L.R. 2036 at [3]).

Neither, as has been shown, should the material contribution to risk principle have operated to relieve the claimant of the need to establish but for causation. The court, therefore, was presented with a false dichotomy: being asked to ascertain the remedial consequences required by a device which would have demanded no remedy at all is a little like being asked to find the way down a mountain that one has never climbed. In the context of the constraints within which the Court of Appeal was operating in *Heneghan*, the apportionment of damages was the least objectionable of its options, diluting as it does at least the consequences of liability. It would have been ideal, however, had the court clarified the strict limits of the exceptional causal device which derives (now somewhat circuitously) from

Fairchild in order to guard against the future erosion of those crucial gatekeeping criteria. ☙

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ARTICLE 8, PROPORTIONALITY AND HORIZONTAL EFFECT

After the controversial decision in *McDonald v McDonald* [2014] EWCA Civ 1049; [2015] Ch. 357, the Supreme Court has now delivered its judgment [2016] UKSC 28; [2016] 3 W.L.R. 45. The Supreme Court held that in actions for possession between private parties, although ECHR art.8 is engaged, no proportionality assessment is required, at least where an underlying statutory provision is itself compliant.

This note will consider four issues arising from the judgment: the relevance of contractual arrangements and statutory interventions to questions of horizontal effect; the consequences of art.8 being engaged; the mechanisms of horizontal effect; and the need to balance art.8 and art.1, Protocol 1 . It will be seen that despite the brief and simple-seeming judgment, delivered by Lord Neuberger and Lady Hale (with whom the rest of the court agreed), there are as many issues raised by this judgment as are solved.

The case concerned an action for possession against a tenant by receivers appointed by a mortgage lender. The tenant, Ms McDonald, had severe psychological problems such that it would be extremely disruptive to her well-being for her to lose her home. Her parents acquired the freehold to the property with the help of a mortgage and fell into arrears. Ms McDonald argued that whilst s.21(4) of the Housing Act 1988, on its face, allowed the receiver to obtain an order for possession in these circumstances, the interference with her art.8 right would thereby be disproportionate.

The trial judge held that he was unable to consider art.8 and the proportionality of any order for possession. The Court of Appeal agreed for two key reasons. First, the ECtHR jurisprudence did not require that art.8 have horizontal effect, and without such jurisprudence, common law would not allow for a proportionality assessment (at [19(i)]). Secondly, the decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48 required the Court to conclude that s.21 was Convention compliant (at [19(iii)]).

The Supreme Court outlined three questions which required to be answered (at [1]). First, when considering an action for possession by and against a private landlord and tenant, should the court consider the proportionality of eviction in light of art.8? Secondly, if so, could s.21(4) of the Housing Act 1988 be read in such a way as to allow such an assessment? Finally, was the action for possession in this case in fact proportionate? The court concluded that the answer to the first question was no, and so the remaining two issues were no longer strictly relevant (at [60]). This case note will therefore focus on the court's answer to the first question.

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