The End of the Road?

The current state of play in asbestos claims and consideration of the future

a presentation by

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A. Types of asbestos disease and relationship between dose and response .......... 2
B. Causation after fairchild .................................................................................. 3
C. Exceptions to fairchild? .................................................................................. 4
D. Apportionment after fairchild .......................................................................... 7
E. Contributory negligence ................................................................................... 9
F. Set off ................................................................................................................ 9
G. The way ahead .................................................................................................. 9
A. TYPES OF ASBESTOS DISEASE AND RELATIONSHIP BETWEEN DOSE AND RESPONSE

1. Asbestos related diseases broadly comprise the following:
   - Pleural plaques
   - Pleural thickening
   - Asbestosis
   - Lung cancer
   - Mesothelioma

2. Dose and response
   - Pleural plaques
     The prevalence of plaques increases with increasing dose.
   - Pleural thickening
     The extent of pleural thickening is less clearly dose related than in the case of pleural plaques.
   - Asbestosis
     There is good evidence that the severity of asbestos is related to the amount of the dose.
   - Lung cancer
     There is good evidence that there is an approximately linear relationship between dose of asbestos and the risk of contracting lung cancer.
   - Mesothelioma
     All the available evidence supports the view that the risk of mesothelioma increases with the dose of asbestos.
B. CAUSATION AFTER FAIRCHILD

1. Cause or material contribution to the disease

(1) Subject to damage not being too remote, if a person has caused or materially contributed to the damage which the Claimant has suffered, he is liable for it.

(2) In relation to asbestosis, pleural plaques and (probably) pleural thickening, any material exposure to asbestos dust will be said to have caused or materially contributed to the contraction or extent of the disease.

(3) But as regards mesothelioma and lung cancer, contemporary medical understanding is such that the situation is different.

(4) The mechanism by which a normal mesothelial cell mutates and becomes a malignant cell, thereby commencing the tumour development process, remains unknown. At one time, a respectable school of medical thinking attributed the mutation to the moment when the body’s defence mechanism finally capitulated to an assault upon it carried out by asbestos fibres. If that were correct, then one could and did argue that each asbestos fibre had materially contributed to that damage caused to the body’s defence mechanism and had thus been a cause of the resultant mesothelioma (see Bryce v Swan Hunter Group [1988] 1 All ER 659, 665j). Contemporary medical knowledge does not accept such an explanation. All that can be said on current evidence is that a single fibre, or a few fibres, or many fibres may cause the condition. None of these possibilities is more probable than any other and the condition, once caused, is not aggravated by further exposure (see the explanation of the aetiology of the disease by Lord Bingham in Fairchild [2002] 3 WLR 89, 95g-h).

(5) Since the onus of proving causation is upon the Claimant, and given that a Claimant cannot prove that exposure to asbestos fibres during employment with Employer “A” rather than Employer “B” caused the mutation of the cell, it follows that a Claimant cannot prove that Employer A’s breach of duty caused the damage.

2. Contribution to the risk of incurring the disease

(1) Prior to March 1988, the problem of proving causation in such cases was met by using the “McGhee device”. Utilising the principles enunciated by the House of Lords in McGhee v National Coal Board [1972] 1 WLR 1, the Courts would simply say that the exposure of the Claimant by Employer A to asbestos dust had contributed to the risk of damage, namely the contraction of mesothelioma, and that this was sufficient to “bridge the gap in medical knowledge” and amount to proof of causation of damage (see e.g. Bryce v
Swan Hunter Group [1988] 1 All ER 659, where Phillips J adopted this device).

(2) The problem came in March 1888 when the House of Lords reversed the Court of Appeal’s decision in Wilsher v Essex Health Authority [1988] 1 AC 1074. In the course of their speeches, their Lordships suggested that McGhee did not constitute any exception to the normal rule on causation; on proper analysis it was a case where causation of damage had been made out.

(3) Hence in Fairchild v Glenhaven Funeral Services Ltd and others [2002] 3 WLR 89, the point was taken that the Claimant could not rely upon the discredited McGhee principles and, that being so, was bound to fail because she could not prove causation. The Judge at first instance and the Court of Appeal agreed with that approach. The House of Lords did not and confirmed that McGhee was good law.

(4) Current law is thus that, in cases of mesothelioma and in lung cancer caused by exposure to asbestos disease, a Claimant need prove no more than contribution to the risk of contracting those diseases.

C. EXCEPTIONS TO FAIRCHILD?

1. The Claimant whose work history with asbestos includes a period of self-employment

(1) A number of passages in the speeches in Fairchild suggested that the principle only applied where the other possible source of the claimant’s injury is a similar wrongful act or omission of another person (see, e.g. speech of Lord Rodger at paragraph 170). Thus, when one had a number of employers, each of whom had wrongfully put a claimant at risk of contracting mesothelioma, it is deemed fair and just that each should be found liable to the claimant.

(2) But what if the Claimant has exposed himself to asbestos during a period of self-employment as well as having been subjected to asbestos during other periods of employment? Given that it may have been during that period of self-employment that the Claimant inhaled the fibre responsible for his contracting mesothelioma, should another person be held liable for an injury that may have been self-inflicted?

(3) That was the liability question faced by the Court of Appeal in Barker v Saint Gobain Pipelines plc [2004] EWCA Civ 545. The deceased had contracted mesothelioma. He had been exposed to asbestos during three stages of his working life. Firstly, whilst employed for 8 years by the Defendant’s
predecessor in title. Secondly, whilst employed for 6 weeks by a company known as Graessers. Thirdly, on three distinct occasions whilst he had been a self-employed plasterer between 1968 and 1989.

(4) The Court of Appeal endorsed without reservation the judgment of the trial judge, Moses J. His approach was to consider first the position of the claimant had he been negligent in inhaling asbestos fibres when self-employed. In those circumstances, Moses J said that the just outcome would be a finding of contributory negligence with damages thus reduced in accordance with conventional principles. He could discern no justice in depriving a claimant of compensation altogether in such circumstances. Otherwise a distinction would have to be made between a contributorily negligent self-employed person and a contributorily negligent employee. The former would recover nothing, because he would not cross the Fairchild threshold, whereas the latter would recover a sum, albeit reduced to take account of his contributory negligence.

Turning to a claimant with such a work history who had blamelessly subjected himself to asbestos fibres during his period of self-employment, Moses J reasoned that it would be absurd if the law deprived the claimant of any compensation in those circumstances if it was to allow some compensation in the case of a blameworthy self-employed claimant.

(5) The Court of Appeal was unmoved by the argument that this could lead to a situation where a Claimant recovered in full even where 99% of his asbestos exposure was during periods of self-employment and in circumstances where he was not blameworthy in respect of such exposure. The Defendant, responsible only for 1% of asbestos exposure would be liable in full because there would be no contributory negligence. The Court of Appeal said “Look at it the other way round. If a non-blameworthy Claimant was responsible for 1% of his asbestos exposure and a guilty employer responsible for 99% of exposure, it would be manifestly unjust for such a Claimant to recover nothing.

(6) So a period of self-employment in a Claimant’s work history is no bar to recovery in mesothelioma cases.

1. **Loss of a chance**

(1) An argument could be constructed that the true nature of a mesothelioma claim is one for loss of a chance or, put slightly differently, the loss of the benefit of being protected from exposure to asbestos dust.

(2) In *Hotson v East Berkshire HA* [1987] 1 AC 750, their Lordships recognised that such an argument could arise in personal injury cases:
Lord Bridge: “.whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a statistical chance which is less than even that, but for the defendant’s breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure of damages for the lost chance. … But I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy can ever be applied (p.782/3)”

Lord Mackay: “…I consider that it would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case. ..In these circumstances I think it unwise to do more than say that unless and until this House departs from the decision in *McGhee* your Lordships cannot affirm the proposition that in no circumstances can evidence of loss of a chance resulting from the breach of a duty of care found a successful claim of damages (p.786).

2. Superficially, there is attraction in applying the “loss of a chance” argument to mesothelioma cases. Fairness and justice increasingly representing the yardstick against which factual circumstances are to be measured, is it not reasonable for a defendant to be liable only to the extent to which a Claimant has lost the chance of being protected from contracting mesothelioma?

3. As the law currently stands, the loss of a chance doctrine will not assist a Defendant in mesothelioma cases. That the Claimant has contracted mesothelioma is a question of past fact. As such it is a fact to be determined on a balance of probabilities and *Fairchild* tells us that it is sufficient for a Claimant to prove causation on the basis that it is probable that the Defendant contributed to the risk of the Claimant contracting mesothelioma.

4. The House of Lords decision in the clinical negligence case of *Gregg v Scott* is awaited. In that case a negligent 9-month delay in referral allowed a tumour to advance in a way that had reduced 5-year survival prospects from a 42% chance to a 25% chance. The Court of Appeal upheld the trial judge’s decision that the Claimant could not recover. Non-negligent referral would still have resulted in the Claimant having a less than 50% chance of survival at 5 years. The loss of a chance doctrine did not apply. One hopes that the House of Lords will use the opportunity to look at loss of a chance cases across the spectrum.
D. APPORTIONMENT AFTER FAIRCHILD

1. The legal effect of a correlation between dose and response

   (1) If the damage suffered by a Claimant is divisible such that one can estimate to a reasonable degree the amount of damage that a tortfeasor has caused, then the Claimant is entitled to be compensated only for that part of the damage rather than the whole (Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] QB 405 and The British Coal Respiratory Disease Litigation, [LTL 23.1.98].

   (2) On the other hand, if damage is truly indivisible, then any tortfeasor who has materially contributed thereto is liable for the whole of the damage (Bonnington Castings v Wardlaw [1956] AC 613, Dingle v Associated Newspapers [1961] 2 QB 162, Rahman v Arearose Ltd [2001] QB 351).

   (3) Hence in asbestosis cases, the Court will find that there has been divisible damage and will only order a Defendant to pay for that amount of the damage as he has been responsible for – see Holtby v Brigham & Cowan (Hull) Ltd [2000] 3 All ER 421.

   (4) The same is true in relation to cases involving pleural plaques and is probably true in cases of pleural thickening – see Milner v Humphreys and Glasgow [QBD unreported, 24.11.98], referred to in Holtby, in which Longmore J recorded the evidence of both sides that asbestos induced pleural disease (i.e. both pleural plaques and pleural thickening) was a disease that “can get worse with cumulative exposure”.

   (5) The same cannot be true in relation to both mesothelioma and lung cancer. They can only be indivisible. The analogy with pregnancy is compelling. Just as one cannot be a bit pregnant, neither can one have a bit of mesothelioma or a bit of cancer.

2. Can there be any argument for apportionment of mesothelioma damages post Fairchild?

   (1) Within the speeches of Lords Bingham and Hutton in Fairchild, there appeared what many considered to be a possible lifeline being thrown to beleaguered asbestos insurers:

      Lord Bingham:  “It was not suggested in argument that C’s entitlement against either A or B should be for any sum less than the full compensation to which C is entitled, although A and B could of course seek contribution against each other or any other employer liable in respect of the
same damage in the ordinary way. No argument on apportionment was addressed to the House.” (para 34).

Lord Hutton: “I observe that no argument was addressed to the House that in the event of the claimants succeeding there should be an apportionment of damages because the breaches of duty of a number of employers had contributed to cause the disease and therefore the damages awarded against a defendant should be a proportion of the full sum of damages which the claimant would have recovered if he (or the claimant’s husband) had been employed by only one employer for the whole of his working life. Therefore each defendant is liable in full for a claimant’s damages, although a defendant can seek contribution against another employer liable for causing the disease”. (para 117).

(2) The question of apportionment in mesothelioma cases post Fairchild was first considered in Phillips v Syndicate 992 Gunner and others [2003] EWHC 1084, 14th May 2003. Eady J there held that the insurer defendants were not permitted to restrict the monies they paid out under a policy to a proportion of the damages corresponding to the proportion which their period of insurance bore to the total period of the Claimant’s employment with the assured. The defendant company had been dissolved and hence the Claimant relied upon the Third Parties (Rights against Insurers) Act 1930, under which she could enjoy no better rights than the assured itself. Eady J found that the insurers were liable in full for the entire indivisible damage, material contribution to that entire damage having been made by the employer during the time that the insurers were on risk.

(3) In Barker v Saint Gobain Pipelines plc [2004] EWCA Civ 545 on the question of apportionment, the Defendant accepted that mesothelioma was an indivisible injury and that, under normal tort rules, it should be liable in full for the damage sustained by the Claimant, subject to a contributory negligence argument. But, argued the Defendant, it was only being found liable to the Claimant by virtue of a legal device that treated “contribution to risk” as “cause”. Fairness thus dictated that balance should be restored by importing a further device of treating mesothelioma as apportionable.

(4) The Court of Appeal would have none of it. According to Kay LJ, the indivisibility of damage rule is essentially one for the protection of the person to whom the wrong has been done.
E. CONTRIBUTORY NEGLIGENCE

1. It is clear from Barker v Saint Gobain Pipelines plc that the doctrine of contributory negligence applies in mesothelioma cases but its scope is limited. There have been few cases where claimants have been (or have admitted being) exposed to asbestos during periods of self-employment as well as employment.

2. For what it is worth, Moses J marked down the Claimant by 20% to reflect his contributory negligence.

F. SET OFF

1. One aspect that did not arise in Phillips is the employer company which had insurance cover for, say, one year of the claimant’s employment but had no insurance cover at all for the other nine years. If that employer company is dissolved, what rights does the employee have under the Third Parties (Rights against Insurers) Act 1930? Would he be met by the insurer saying that it would have had a right of set off against its assured’s claim for an indemnity in respect of those years that the assured was self-insured? The answer is all probability is that the insurer would not have a set-off as such. He would have the right to seek contribution from his assured for the periods when the latter was self-insured. But that is a liability of the assured and a Claimant does not assume liabilities of the assured under the 1930 Act. That being so, the insurer would have to pay out in full to the Claimant under the 1930 Act.

G. THE WAY AHEAD

1. One inescapable fact is that there will be more insurance company demises before the asbestos claims peak.

2. The Courts have painted themselves into a corner on breach of duty. Having spent years dismissing Defendants’ assertions that hindsight is a wonderful thing and that pre-1965 the reality was that Factory Inspectors were quite happy with the precautions they were taking, there is no turning back on the question of “dates of knowledge”.

3. Fairchild has seen off causation arguments, subject to any extension of the loss of a chance doctrine.

4. In theory, it is open to a Defendant in a mesothelioma case to raise credible evidence that exposure during that employment was to pure chrysotile. It is interesting to note that the Control of Asbestos at Work Regulations 2002 makes a significant distinction
between chrystolite/mixtures of chrystolite with any form of asbestos and other asbestos minerals when examining exposure levels. This reflects at least an acceptance that the former is less harmful. But it is hard to imagine Defendants having a breakdown of the exact contents of asbestos used decades ago.

5. It is probable that any development in terms of restricting asbestos claims will have to come from the Government.

6. The United States government is currently in the throes of seeking to introduce a Scheme that puts a cap on asbestos claims.

7. It is fair to say that the USA problem is greater than UK, a contributor to this being the recoverability in the USA for damages in respect of one’s fear of developing a serious illness. Norfolk and Western Railroad are challenging a $5.8m award granted to 6 healthy employees who claimed emotional distress (not psychiatric injury) caused by fear that they might develop cancer from past exposure.

8. The proposed solution lies in “the Fairness in Asbestos Injury Resolution” Bill (SB 2290), originally the “Asbestos Fairness Bill (SB 1125). The scheme proposed is that a national trust be created and corporations that used asbestos and their insurance companies donate $124 billion over the next 27 years (a proposal last month reduced this figure to $109 billion). The money will go into a government monitored fund which would pay awards to those injured by asbestos. Victims of asbestos would be barred from pursuing claims in court during that time. It sounds a lot but it is claimed, by way of example, a victim of lung cancer after having been exposed to 15 years of asbestos will receive as little as $25,000. It is, as one can well imagine, a highly emotive subject. Concern is being expressed not just for the rescue and recovery workers at the World Trade Centre but also the thousands of people caught in the dustcloud that enveloped Lower Manhattan on September 11.

9. The American model appears crude and undoubtedly contains serious flaws. On 22.4.04, the Senate voted by a slim majority of 50 to 47 in favour of forcing a vote on the Bill, short of the 60 votes need to carry such a motion. But the principle cannot be ignored and it will not go away. It is difficult to see how the UK government is going to be able to avoid grasping the nettle at some stage as more businesses and insurance companies go bust.