# ENGLAND LOOKS TO OTHER JURISDICTIONS WHEN MODIFYING CAUSATION IN MESOTHELIOMA CASES

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Traditionally the English courts have applied the "but for" test of causation by which a claimant will only succeed if, but for the negligence of a particular defendant, the injury probably would not have occurred.

In **Fairchild v Glenhaven (2002) 3 All ER 305** three conjoined appeals involved claims for negligent exposure to asbestos dust, which had caused mesothelioma (malignant tumour). In each case the following factors existed:

1. the claimant had been employed at different times and for differing periods by more than one employer.
2. the employers were under a duty to take measures to prevent the claimant from inhaling asbestos dust.
3. the employers were in breach of that duty.
4. the claimant suffered from mesothelioma.
5. any cause other than inhalation at work could be discounted.
6. the claimant could not, because of the current limits of human science, prove on the balance of probabilities that his mesothelioma was the result of inhaling asbestos dust during any particular employment.

Unlike asbestosis and pneumoconiosis, which conditions are aggravated by the inhalation of increased quantities of dust, mesothelioma is an indivisible disease which can be caused by the inhalation of a single fibre, which then lies dormant for 30-40 years before giving rise to symptoms which are invariably fatal. Once the seed is sown it is not aggravated by further exposure, whatever the intensity. There is no way of identifying the employment during which the process was initiated culminating in the malignant tumour. It was on this rock of uncertainty that the Court of Appeal found against the claimants. They appealed to the House of Lords asserting that such cases, as well as principle and authority, required or justified a modified approach to proof of causation.

Lord Bingham put the matter succinctly. The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another. Here the employers had a duty to protect the claimants against a risk of a particular and very serious kind. They failed to perform that duty. As a result that risk eventuated. Had there been only one employer the claimant would have been able to recover, but because the duty owed to him had been broken by more than one employer, was he to be held unable to recover because of his inability to prove what is scientifically unprovable? In order to discover an acceptable solution he considered the approach of other jurisdictions when wrestling with the problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several candidates is the culprit who caused him harm. In a shrinking world he

considered that there was virtue in uniformity of outcome, whatever the diversity of approach in reaching that outcome.

He noted that the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 considered that the application of the "but for" test as an exclusive criterion of causation yielded unacceptable results which must be tempered by the making of value judgments and the infusion of policy considerations. In *Snell v Farrell* (1990) 72 DLR ($4^{th}$) 289, the Supreme Court of Canada accepted that the traditional approach to causation was also challenged in cases dealing with non-traumatic injuries such a man-made diseases resulting from widespread diffusion of chemical products, including product liability cases in which the product was widely manufactured and marketed by a large number of corporations.

The German, Greek, Austrian and Netherlands civil codes all impose liability where several persons are at fault but it is not possible to determine which persons act caused the damage. Case law involving hunting accidents is to the same effect. In *Litzinger v Kintzler* (Cass civ 2e, 5 June 1957) where the plaintiff was shot when a group of huntsmen fired a salvo to mark the end of a deer hunt, the French Cour de Cassation held the whole group liable having created a risk through its negligent conduct and the injury was the realisation of that risk. In Spain the Hunting Act 1970 makes all members of the hunting party jointly and severally liable in such a situation. In *Summers v Tice* (1948) 199 P 2d 1 two defendants shooting quail fired towards the plaintiff at the same time and he was shot. The Supreme Court of California held both liable as to hold otherwise would be to exonerate both from liability, although each was negligent. The Supreme Court of Canada came to a similar decision in *Cook v Lewis* (1951) SCR 830.

Although Italy, South Africa and Switzerland the plaintiff might fail altogether on causation grounds, Lord Bingham found that in most jurisdictions the problem of attribution would not constitute a fatal objection to the claimants in Fairchild and**,** whether by treating an increase in risk as equivalent to a material contribution, or by putting a burden on the defendants or on policy grounds, they would be afforded a remedy.

When looking to existing UK case law, their Lordships relied heavily on their decision in the Scottish case of *McGhee v National Coal Board (1973)* 1 WLR 1052. There the pursuer worked inside a kiln in very hot and dusty conditions. His employers were in beach of their duty by failing to provide him with shower facilities at work and he would cycle home covered in brick dust. He developed dermatitis, which the medical experts considered could have begun with a single abrasion, which might have been caused when he was cycling home or equally could have been caused when he was working in the kiln; in the latter event the failure to provide showers would have made no difference. Lord Wilberforce asked why, from an evidential point of view, a man who is able to show that his employer should have taken certain precautions, because without them there was an increased risk of injury or disease, and who in fact suffers precisely that injury or disease, should have to prove more: namely that it was the addition to the risk which caused the injury. Where there was an inherent impossibility of segregating between compound causes, as a matter of policy and justice it should be the creator of the risk who should bear the consequences. Lord Simon

considered that a failure to take steps that would bring about a material reduction of the risk involved, in this type of case, a substantial contribution to the injury. He regarded “material reduction of the risk” and “substantial contribution to the injury” as mirror concepts. To hold otherwise would mean that defenders could, on the present state of medical knowledge, ignore their legal duties.

Their Lordships in Fairchild followed these sentiments They held that it would be just, and in accordance with common sense, to treat the conduct of the employers, in exposing the claimants to a risk to which they should not have been exposed, as making a material contribution to them contracting a condition against which it was the duty of the employers to protect them. Any injustice in imposing liability on a duty-breaking employer was heavily outweighed by the injustice of denying redress to the victim. Policy considerations favoured allowing the employee to recover against all the employers being sued, even if there were other employers not before the court. It was not suggested that the claimant’s entitlement against any employer should be for less than the full compensation to which he was entitled, although they could seek contribution against each other.

Lord Bingham concluded his speech by postulating that it was unrealistic to suppose that this principle would not over time be the subject of incremental and analogical development. I suspect that this will prove to be an entirely accurate prediction!