

## Is *Fairchild* a Leading case of the Common Law?

Per Laleng<sup>1</sup>

Master Treasurer, Master Reader, Ladies and Gentlemen.

When I was first invited to deliver a lecture in this series of lectures on leading cases of the Common Law, it seemed obvious to me that I should talk about *Fairchild v Glenhaven Funeral Services Ltd.*<sup>2</sup>

As many of you will recall, in that case from 2002, the House of Lords modified the test for causation in certain asbestos-related injury cases. I will return to the detail in due course.

But why was that case an obvious choice? Well, mostly because it seems to have been central to most of my published work over the last few years. But after I was asked to come up with a title, it dawned on me that just because something had been a lodestone in my research, that did not necessarily mean that it is in any way important in the grand scheme of things, let alone that it may be defined as a leading case of the Common Law. Perhaps rather than a lodestone, it had been a black hole! And given its relative youth, it also struck me that it was a bit like Liam from *One Direction* becoming a judge on *X Factor*.... As I further contemplated the notion that my research might actually be completely pointless, I thought I would square up to this possible realisation by asking the question which has become my title: is *Fairchild* a leading case of the Common Law?

In order to try to answer that question, we need to have a working definition of what it might mean to be a leading case. It might seem obvious to you what a leading case is, but there is a surprising range of definitions out there; and depending on which definition you adopt, the answer to the question may be very different.

Let's start with the student's favourite port of call when it comes to researching the law: here is the definition of the Leading Case according to *Wikipedia*:

"a reported decision is said to be a leading decision when it has come to be generally regarded as settling the law of the question involved."

As a definition, my guess is that this comes pretty close to what many would regard as a good working definition of the leading case.

But what about this one from the second edition of *West's Encyclopaedia of American Law* (2008): "An important judicial decision that is frequently regarded as having settled or determined the law upon all points involved in such controversies and thereby serves as a guide for subsequent decisions."

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<sup>2</sup> [2002] UKHL 22.

So no longer “generally regarded” – which I take to mean regarded by most, but only “frequently”, the implication being that there may be greater room for disagreement; but also the definition suggests that **all** points involved should be determined (nothing is left undecided) and yet, once these points have been settled, the decision only needs to operate as a guide to subsequent cases.

The attraction of *Wikipedia* seems clearer...

How about this definition from John Bouvier’s *Law Dictionary*:

“A case decided by a court in the last resort, which settles a particular point or question; the principles upon which it is decided are to be followed in future cases, which are similar to it. Collections of such cases have been made, with commentaries upon them by White, by Wallace & Hare.”

This definition is in fact from 1856. Although I am not going to rely heavily on this definition in what follows, the reason for including it is in order to illustrate a broader point which has been made (much better than me) by the late Professor Brian Simpson, formerly of the University of Kent:

The idea of the leading case is in fact an invention of the nineteenth century.

In his 1985 work *Leading Cases in the Common Law*, Professor Simpson explains how this came about. The potted history goes something like this: before the thirteenth century - which saw the invention of the written law report as well as a professional legal profession - records of decisions were kept on sheepskin. According to Professor Simpson, and I quote, “tons of court records survive in the Public Record Office, the contribution to legal history of an untold multitude of deceased sheep.” With law reports and professional lawyers came a shift in emphasis from a record of what the court had done to a report of *why* it did so. The purpose of the law report then was to explain the court’s decision.

The idea was simple: law reports could be read, the reader would then understand why a case was decided in the way that it was, and by imitation, that decision could then be applied correctly in a subsequent case. I say imitation because early law reports more often than not contained a record of the arguments of counsel rather than the decision of the judges and so the idea was to imitate successful arguments.

But how do we move from the 13<sup>th</sup> century to the claim that the idea of the leading case was an invention of the 19<sup>th</sup> century? Well, a simple and contemporary problem explains it: there are always too many cases – from dead sheep to dead trees. You see the problem.

So, Simpson tells us, in the 18<sup>th</sup> century reported cases become increasingly selective being confined to those containing novel points or those which are borderline or arguable. Summaries and treatises start to appear and in the 19<sup>th</sup> century the practice of those so inclined to write them became to concentrate on the so-called

Leading Cases. These were the cases which “provided the best illustrations” of the application of legal principles or where those principles were first expounded. As Simpson analogises: it was like learning the language of a country by concentrating on its best writers.

The idea of the leading case, however, went deeper than a practical response to the ever increasing proliferation of cases. It has a philosophical foundation which clearly persists in many quarters to this day. And that is the idea that cases contain principles, just as science is founded on principles. That this notion should flourish in the 19<sup>th</sup> Century is perhaps unsurprising given that the 19<sup>th</sup> Century was the age of principle: the Darwinian principle of Natural Selection in Biology; Herbert Spencer’s Principles of Psychology was published in 1855 and, lest we forget, Karl Marx’s principle of class struggle explaining the driving force of history.

The 19<sup>th</sup> Century was also the age of big beards and side burns, but that will have to form the subject matter of another lecture.

So the study of law could be like the study of science: **legal science** was to know and understand the principles of the leading cases.

Quite simply, law was derived from a set of basic principles which could be learned by lawyers whose skill lay in working out how to apply these unchanging principles to new situations.

This is of course what lies behind the creation of modern legal education as well as the very theory of legal science.

At Yale it led Edward Phelps to write in 1892:

“The very first and indispensable requisite in legal education, without which there can be none that is worthy of the name, is the acquisition of a clear and accurate perception, a complete knowledge, a strong, tenacious grasp of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs.”<sup>3</sup>

Twenty years earlier Christopher Columbus Langdell had introduced the case system of instruction at Harvard. According to him, legal doctrine was small in number although it appeared in different areas of law, so give the students a few leading cases and they too could become legal scientists. The first publicist of a book of leading cases was Samuel Warren who published “A populist and practical introduction to Law Studies” in 1835. The general consensus was that 50 or 60 leading cases was all that was needed to become a legal expert.

Although this idea of legal science and indeed legal education persists to this day, what Simpson calls iconoclastic theories soon sprung up. The legal realists in the US are perhaps the most well known, but Kent’s critical legal education could perhaps be considered another. My legal education there was certainly pretty special.

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<sup>3</sup> (1892) Yale Law Journal 1(4) 140.

According to Simpson, iconoclastic theories “purport to deal in reality, with the implication that legal science belongs to the world of myth or fiction. They tell us that the real explanation for a particular decision may not be the brooding omnipresence of the law but politics, or class, or the relentless operation of the principle of economic efficiency, or even the effects of the judge’s breakfast upon his temper.”<sup>4</sup> Within some theories, “...decisions just cannot, as a matter of logic, be determined by legal principles, because the principles are inherently indeterminate and inherently contradictory.”<sup>5</sup> If I adopt this position in my lecture then the answer to the lecture title’s question becomes an impossible one to give.

Fortunately, Ronald Dworkin came along in the mid 1980s and explained to everyone that there is a “correct” answer to all legal problems, it is just that there is no way of knowing whether it has been found.

But as Simpson points out, none of this theorizing has any effect whatsoever on what the courts actually do.

Simpson is pretty dismissive of iconoclastic theories stating that although it is, and I quote, “conceivable that iconoclastic theories may be offering alternative ways of thinking and talking about legal decisions, [and] enhance understanding of them ... I rather doubt this: it surely does not require philosophy to tell us, for example, that if a judge is in a bad temper, or has been offered a bribe, or has a hangover, or dislikes women, this may affect his decision.”<sup>6</sup>

Simpson is much more interested in legal cases as an historical event and he criticizes legal science or, I suppose, the legal method itself for excluding much of the information which could have explanatory value because it is “irrelevant” to the case and has to fit into artificially constructed legal categories. As he suggests, “even if we leave to one side the fact that litigants normally tell lies, the picture of reality presented in a law report is more or less bound to be distorted. Indeed the incidents in a law report may never in any sense, have happened at all.”<sup>7</sup> That is why Simpson was a great fan of looking at other sources in order to throw light on a case whether leading or not.

By doing this, he claimed, one might reach a better understanding of the nature of judicial decision-making within the common law system.

Simpson was a man who did not believe in drawing out generalities from cases; rather he was a man who preferred contextualizing cases in their rich historical detail.

Time precludes an in-depth consideration of the historical context of the *Fairchild* litigation, but it is worth making some general contextual points before returning to the main question of the lecture.

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<sup>4</sup> Simpson p.7

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid* p.8

<sup>7</sup> *ibid* p.11

The first point is that although the first claim to reach the House of Lords for an asbestos-related disease was as long ago as 1972,<sup>8</sup> only a few such cases reached the higher courts over the next forty years. A cursory search of *Westlaw* suggests only 16 asbestos-related cases reached the Court of Appeal before *Fairchild*. Of these, seven related to damages, three were procedural, two related to Crown Immunity, one related to costs. Of the remainder, *Margereson*,<sup>9</sup> *Jeromson*<sup>10</sup> and *Holtby*<sup>11</sup> will be familiar as potentially important cases in the development of asbestos-related liability before *Fairchild*. The first two related to the issue of breach of duty whereas *Holtby* is the case that decides that damages for divisible diseases such as asbestosis should be apportioned on a time-exposed basis. In short, asbestos-related appellate litigation was very much an undeveloped area of law prior to *Fairchild*.

The second point relates to the first: the problem with asbestos-related diseases is their long-tail nature: it takes years for symptoms to manifest, especially those of mesothelioma, an aggressive cancer of the lining of the lung. The latency period can be up to 50 years or more. So even though commercial importation of asbestos started in the 1880s (during the Age of Principle), it is likely that early asbestos-related diseases and deaths would have been lumped in with other diseases and deaths (but bear in mind that the life expectancy was generally shorter not least because of the two world wars). In fact until 1960,<sup>12</sup> there were only 31 recorded asbestos-related deaths within the asbestos industry. However, it is worth noting that whereas the mining-industry recorded 1503 deaths in the same year, there were 700,000 miners compared with 15,000 working in asbestos manufacture. Proportionately speaking, therefore, there were 0.207 deaths in the asbestos industry compared with 0.215 deaths in mining. Perhaps someone should have taken notice earlier?

At all events, the first general Asbestos Regulations were not passed until 1969 and the importation of white asbestos was not banned until 1999 and its use permitted until 2005, the same year Liverpool City Council banned smoking in public places and Liverpool Football Club won the Champions League. But I digress...

By 2002, asbestos-related diseases and deaths were taking on a whole new dimension. Today, there are more than 2000 deaths a year from mesothelioma alone and it is thought that the numbers will continue to rise peaking some time in the 2020s. There are therefore more deaths from mesothelioma per annum than there are deaths on the road. Julian Peto from Imperial Cancer Research has estimated that there will be 500,000 asbestos-related cancer deaths across **Europe** in the next 30 years.

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<sup>8</sup> *Smith v Central Asbestos Co* [1973] AC 518 an asbestosis case that revolved around the Limitation Act 1963.

<sup>9</sup> *Margereson v JW Roberts* [1996] Env. L.R. 304.

<sup>10</sup> *Shell Tankers UK Ltd v Jeromson* [2001] EWCA Civ 101.

<sup>11</sup> *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All E.R. 421

<sup>12</sup> Much of the following history is taken directly from Julian Lowe et al 'Uk Asbestos – the definitive guide' from 2004 available at <http://www.actuaries.org.uk/research-and-resources/documents/uk-asbestos-definitive-guide>.

And if we rewind to 2002, for further context to *Fairchild*, there was already a perceived asbestos crisis caused primarily by US asbestos claims - many of which involved UK insurers. It has been suggested that the Lloyd's of London Insurance market almost collapsed as a result of US asbestos claims which came on top of other liabilities arising from the Piper Alpha disaster as well as US and European storms.

But Asbestos-related claims dwarf anything else.

The US hurricanes in the 1980s and 1990s cost somewhere between \$6 and \$21bn dollars each. The cost of the more recent Hurricane Katrina has been put at \$108bn.

In 2001 *The Economist* reported that Lloyd's alone had "lost" \$8bn to asbestos claims in the five years up to 1992.<sup>13</sup>

But this is small fry:

The estimated total cost of US asbestos-related litigation has been put at \$120bn.

The future cost of UK asbestos-related litigation up to 2040 has been put at somewhere between £5bn and £11bn (these are 2004 figures).<sup>14</sup>

But let's return to 2002. That year, an English insurance company by the name of *Chester Street* published statutory accounts which suggested that it had negative resources of £1.3 bn. Chester Street was the new name for Iron Trades Holdings Ltd which had been set up in 1997 following a restructuring of the Iron Trades Employers Assurance Association. This Association was a UK mutual that specialized in Employers Liability insurance. It was owned and operated by some of the UK's largest companies such as British Steel and the Central Energy Generating Board. These are hot businesses. Literally. And where you have heat, asbestos is very useful. I am sure it is pure coincidence that the establishment of this Association in 1880 overlaps with the start of the commercial importation of asbestos the same year.

Anyway, the point is that Chester Street effectively took on all historic asbestos liabilities and a new company, Iron Trades Insurance Company Ltd, could continue to write new business protected from historic liabilities. Chester Street had set aside £192m for disease liabilities whereas Iron Trades was sold to QBE Insurance, an Australian company, in 2000 for £175m.

In 2001, in the middle of the *Fairchild* litigation, the TUC published a paper which suggested that ½ of all mesothelioma claims over the next 20 years could have been underwritten by the former Iron Trades insurance mutual.

Because of Chester Street's effective insolvency, in May 2001, the ABI set up a scheme whereby claims against Chester Street made by public sector employees would be met by government and those made by private sector employees would be

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<sup>13</sup> <http://www.economist.com/node/486998> accessed 16 January 2014.

<sup>14</sup> Institute and Faculty of Actuaries.

met by the private insurance sector. The latter would be funded by a levy on insurers over the next 20 years to cover the estimated £1bn cost of pre-1972 claims.

Hopefully you are beginning to see the relevance of this context: because of the long-tail nature of the diseases, there is a strong possibility that either a former employer or insurer has gone bust. If so, who pays any damages that may be found due? And on what basis? Whereas *Holtby* had decided that divisible conditions should be compensated on an apportionment basis which could mean a claimant being left short in the event of insolvency, what should happen in the case of indivisible diseases such as mesothelioma? The basic distinction between a divisible and a indivisible disease being that in the former case the greater the exposure to a noxious agent the worse the symptoms of the disease whereas in the case of an indivisible disease, there is no relationship between extent of exposure and extent of symptoms. Examples of indivisible diseases would be brain damage, heart attacks, cancers, including mesothelioma. There is conflicting authority on whether psychiatric harm is an indivisible disease.<sup>15</sup>

In fact, *Fairchild* did not concern itself with the question of apportionment of damages. Perhaps for strategic reasons, the insurers (Aviva & Zurich – incidentally, Aviva are still trying to sell a £1bn toxic tort book mostly asbestos related) decided to go “all in”, win all or bust. Given that the Court of Appeal had accepted their argument that where a Claimant had been negligently exposed to asbestos dust by several employers that Claimant could not prove causation of an indivisible disease such as mesothelioma on the balance of probability, the insurers may have felt buoyed onwards.

However, the House of Lords overturned the Court of Appeal’s decision. Their Lordships decided that a modified approach to proof of causation was justified in the circumstances of the case: proof that each defendant’s wrongdoing had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements for liability. In other words, a Claimant did not need to prove that the Defendant’s breach was a **probable** cause of his disease, it was sufficient to prove that that breach was a **possible** cause, a possible cause in the sense that the Defendant’s actions had *increased the chances*, the risks that the Claimant might contract the disease.

If we take a definition of the Leading Case such as that offered by *Black’s Law Dictionary* which defines leading cases as those which

“have demanded more than usual attention from the judges, and from this circumstance are frequently looked upon as having settled or determined the law upon all points involved in such cases” as well as cases that act as “guides” for future cases, then surely *Fairchild* comes close to satisfying the definition. Although it plainly does not settle all the points involved in such cases (I will return to this) it has demanded more than usual attention from the judges. It was applied in the House of Lords in *Barker v Corus*, applied and followed in the Supreme Court in *Sienkiewicz v*

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<sup>15</sup> *Rahman v Arearose Ltd & another* [2001] QB 351; *Dickins v O2* [2008] EWCA Civ 1144.

*Greif*. It has been applied, cited and considered several times in the Court of Appeal in this country; cited and considered by the High Court of Australia several times, cited in the Eastern Caribbean Supreme Court, the Court of Sessions, the Courts of Appeal in Singapore and Hong Kong; it has been considered by the House of Lords in *Chester v Afshar*, by the Supreme Court in the *Trigger litigation* where it was also explained, and finally by the Supreme Court of Canada. In headline terms, according to *Justcite*, *Fairchild* has received positive treatment 6 times, neutral treatment 70 times and negative treatment twice.

If you compare these latter stats with another arguably leading case of the Common Law, namely *Alcock v Chief Constable of South Yorkshire*,<sup>16</sup> part of the Hillsboro litigation, which comes in at 8 positive, 77 neutral and 2 negative treatments, then it is clear that *Fairchild* is a case that has “demanded more than usual attention from judges” within Black’s definition of a leading case. The stats are almost identical even though *Alcock* is ten years older.

But I am not sure I am convinced that mere “judicial attention” to a case should by definition make it a leading case. Positive treatment is perhaps a better yardstick. By that measure, *Fairchild* pales into insignificance when compared with such landmarks as *Donoghue v Stevenson* (with 115 positive treatments) or *Bolam* with 74. I assume you all know these! Averaged out, *Donoghue* comes out at 1.40 positive citations per annum and *Bolam* at 1.29. And lest we forget, *Bolam* is a mere first instance decision. *Fairchild* comes in at a paltry 0.5 positive citations per year.

It is no answer to say that the other cases are older and so will naturally have more positive citations because compared with *Rylands v Fletcher*, a case I also assume everyone has heard of, at forty positive treatments since 1868, it averages only 0.27 per year, which is slightly worse than *Bolton v Stone*’s 0.30.

So perhaps not such a bad showing for *Fairchild* after all.

Incidentally, I think I’m right in saying that no-one has yet succeeded in establishing liability under *Rylands v Fletcher*. The Claimant in *Gore v Stannard (t/a Wyvern Tyres)* came close until the Court of Appeal overturned a decision in his favour in 2012<sup>17</sup> in a case involving the escape of fire – the Court noted that it would difficult to establish liability under *Rylands v Fletcher* in fire damage cases since it would be unlikely that a defendant would have brought fire as a “thing” onto his land likely to cause mischief if it escaped. We have moved on from the days described by William Golding in *The Inheritors*.

*Fairchild* does not satisfy the second part of Black’s definition, however, because it does not “settle all points involved in such cases.” In particular, it did not settle the apportionment question. To be fair, as we have seen, this wasn’t raised in the case. But it is clearly highly relevant in mesothelioma cases involving more than one substantial exposure to asbestos dust. This is where *Barker* fits in, and also why I have

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<sup>16</sup> [1992] 1 AC 310.

<sup>17</sup> [2012] EWCA Civ 1248.

argued elsewhere that it is probably more accurate to talk of the *Fairchild-Barker* exception rather than *Fairchild* on its own.

Whereas in *Fairchild* it was admitted that the mesotheliomas were caused as a result of some Defendant's wrongdoing, in *Barker* the Claimant had two sources of exposure: one by a negligent employer and the other during the course of his self employment. He negligently exposed himself. The Defendants therefore argued that the *Fairchild* exception did not apply as not all sources of exposure were as a result of wrongdoing by a Defendant. In the alternative, they argued that if *Fairchild* had modified the law in relation to causation out of a sense of justice to innocent Claimants, then the law of damages, specifically in relation to apportionment in indivisible mesothelioma cases ought to be modified in fairness to Defendants; particularly as otherwise solvent insurers and employers would be picking up the full bill as Claimants could choose any employer to sue under the *Fairchild* exception in mesothelioma cases.

The House of Lords rejected the first argument: *Fairchild* applied whether or not the other source was negligent, by reason of contributory negligence, or *obiter*, according to Lord Hoffmann, by environmental exposure. However, the preconditions for the application of the material increase in risk rule were refined so that **first**, harm within the area of risk had to have eventuated (in other words, it would be insufficient to prove mere exposure to a risk without any physical harm following. This point has been confirmed by the House of Lords in the pleural plaques litigation<sup>18</sup>). **Second**, the competing causal agents or mechanisms had to be the same or operate in substantially the same way (this condition was of course satisfied in both *Fairchild* and *Barker*: the competing causal agents were asbestos albeit from different sources). **Thirdly**, the state of scientific knowledge was such that it was impossible for Claimants to succeed on the basis of the conventional "but for" test. In the case of mesothelioma, scientific knowledge remains unclear on the medical aetiology of causation and so it is impossible for a Claimant to prove causation on "but for": if one fibre causes mesothelioma, the Claimant cannot prove which employer was responsible for the guilty fibre; on the other hand, if there disease requires a certain threshold of exposure, medical science cannot say whether it was the first exposure or the last or indeed to what extent someone has to be exposed.

The reason for imposing the second precondition appears to relate to the need to distinguish mesothelioma cases from other clinical negligence cases such as *Wilsher*. There, medical science was unable to say which of five potential causes including the hospital's negligence in inserting the oxygen reading catheter into Martin Wilsher's vein rather than his artery. But *Wilsher* would not fall within *Fairchild* because the causal agents were all different: the negligent insertions, and four other potential causes associated with premature birth. Equally, *Fairchild* would not currently apply to a **lung cancer** case where there had been exposure to asbestos as well as cigarette smoke as the agents are different. Whether the causal mechanisms are similar

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<sup>18</sup> *Johnston v NEI International Combustion Ltd* [2007] UKHL 39.

remains a moot point, because it has always struck me that the third part of the test is very odd: if science doesn't really know how mesothelioma is caused, how can courts compare causal mechanisms? Arguably very little.

However, in *Barker*, the House of Lords accepted the Defendant's alternative argument in relation to apportionment and held that defendants would be liable to the extent to which they had contributed to the risk of damage. Lord Hoffmann went so far as to suggest that *Fairchild* had created a new tort of negligent increase in risk, and until the Trigger litigation this theory held some sway.

In any case, within three weeks of *Barker*, Parliament passed the Compensation Act 2006 which contained a hastily drafted amendment effectively over-turning the apportionment ruling in *Barker*. Defendants would remain liable in full to any Claimant who could prove a material increase in risk of mesothelioma by reason of negligent exposure to asbestos. At one stage I have argued that the former would be proved automatically by proof of the latter because, by definition, a failure to take reasonable precautions in the face of a foreseeable risk is to materially increase the risks of harm by failing to reduce them. Conversely, if those risks weren't significant enough to warrant precautions then presumably they would not be material?

And yet, *Barker* was not the end of the *Fairchild* saga. In *Sienkiewicz*, the Supreme Court was yet again asked to distinguish *Fairchild* in a mesothelioma case. This time, the deceased had been exposed to asbestos in very small quantities at work but had also suffered normal environmental exposure to asbestos fibres, **as we all are**, every day. The occupational exposure represented 18% of total exposure.

18% of not very much is even less.

So whereas the mesothelioma in *Fairchild* was agreed to be caused by a Defendant's wrongdoing, and the mesothelioma in *Barker* was either caused by a defendant's wrongdoing or the Claimant's own fault; *Sienkiewicz* looks like a case where the mesothelioma could have been caused by wrongdoing or as a result of environmental exposure. It looks that way because the Supreme Court did not deal with or failed to understand the Defendant's central argument to the effect that the mesothelioma was **idiopathic**, that is to say of unknown cause. That is different from saying that it was caused by reason of environmental exposure. It is to say that it might be environmental, it might be as a result of wrongdoing or it might have another cause. Granted, there aren't many other potential causes of mesothelioma apart from asbestos exposure and the vast majority have that cause. However, not all other causes have been ruled out.

Be that as it may, framed as a competing cause case as between wrongful exposure and environmental exposure, and based on Lord Hoffmann's *obiter* comment in *Barker*, it was hardly surprising that *Sienkiewicz* would decide that *Fairchild* should apply provided that the exposure was more than *de minimis* or minimal. According to the Supreme Court, the question of whether exposure is more than *de minimis* is a question of fact for the trial judge. Which, if you think about it, is a bit odd given

that it is still unknown what level of exposure is required to trigger the genetic mutations that initiate the cancerous growth. The only guideline the Supreme Court proffered was that the conjoined case of *Willmore* could have been decided differently. Whether that was in reality because the Defendant there was a local authority and the exposed victim was a school pupil remains a matter of speculation.

The combined effect of *Fairchild*, *Barker*, *Sienkiewicz* & the Compensation Act 2006 therefore is that where a mesothelioma sufferer has been exposed to more than one source of asbestos dust and there is no other explanation for the cause of the mesothelioma, then that person can sue **any** of the exposers for the full amount of damages provided that the exposure was more than minimal. Whether the exposure was *de minimis* is a question of fact.

However, I need to add one rider to this: the Claimant also needs to prove that the Defendant was in breach of duty.

You may recall my earlier point that proof of breach will automatically prove causation thereby actually rendering the concept of causation redundant in these types of cases; but it does not necessarily work the other way round *ie* proof of causation does not necessarily prove breach.

This is because the breach question is a function of foresight in a way that causation is not.

Exposure to a *risk* of harm either is or isn't material irrespective of foresight whereas asking whether a Defendant is in breach of duty depends on foresight, which in turn depends on knowledge, which may vary depending on when the risky activity took place.

The point is well demonstrated by *Williams v University of Birmingham*<sup>19</sup> where the Court of Appeal decided that although the deceased's exposure to asbestos dust in the basement of the University when he was a phd student was more than minimal, and thereby satisfied *Fairchild*, (this, in any event, being a question of fact for the trial judge), the Defendant was **not** in breach of duty because, applying the Supreme Court decision in *Baker v Quantum Clothing Group Ltd*,<sup>20</sup> the reasonable conduct that the University ought to have adopted had to be judged by reference to the state of knowledge and practice as at 1974. The Court of Appeal held that the University was entitled to assume that a Factory Inspectorate document from 1970 entitled "Technical Data Note 13" contained the best guide as to unacceptable levels of asbestos exposure in 1974. The Deceased's exposure to asbestos had not exceeded those levels and therefore he had not been exposed to a foreseeable risk of harm judged by reference to 1974 standards.

It has probably not escaped your attention that nearly all the cases I have referred to have involved asbestos. It might therefore be reasonably suggested that it would not

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<sup>19</sup> [2011] EWCA Civ 1242

<sup>20</sup> [2011] 1 WLR 1003.

be right to include *Fairchild* within the exclusive club of leading cases of the Common Law. After all, it has nothing to say outside its own enclave of law. Indeed, if you consider attempts to use it outside the context of mesothelioma litigation thus far, they have all failed.<sup>21</sup> Some might even say, it is in danger of disappearing up its own enclave!

However, even if *Fairchild* has become a *de facto* exception to the ordinary proof of causation in **mesothelioma** cases, there is nothing within the *Fairchild-Barker* preconditions to its application that confines it to mesothelioma. It must be remembered, of course, that the case from which *Fairchild* borrowed the material increase in risk test, *McGhee v National Coal Board*,<sup>22</sup> was not a mesothelioma case but involved dermatitis. But as things currently stand, you will need to be dealing with a competing cause case involving the same or similar agents or causal mechanisms for *Fairchild* to get off the ground. But I have previously mentioned in other work the Court of Appeal decision in *Fitzgerald v Lane*<sup>23</sup> which involved a Claimant suffering partial tetraplegia after being struck by two cars. *McGhee* was successfully used there when medical evidence could not apportion causation as between the two negligent drivers who struck the Claimant. So the doors are not completely shut on non-mesothelioma cases, and apportionment also remains open because the Compensation Act only applies to mesothelioma.

But I want to conclude by returning to the notion of the Leading Case as containing some fundamental principle which goes beyond the rule. If the *Fairchild-Barker* rule is that the test of causation is modified if certain pre-conditions are met, and that causation will be proved by a proof of a material increase in risk, the question what is the principle at work here? And can we jump into another area of doctrine and see a similar principle at work.

According to the nineteenth century definition we are supposed to cross-refer to different areas of law, and it is possible to do that, but I will confine myself to tort doctrine. And I think there are two quite different areas where you can find echoes of the underlying principle. One relates to vicarious liability for sex abuse and the other, perhaps surprisingly and notwithstanding *Wilsher*, relates to clinical negligence.

In recent years, the doctrine of vicarious liability has been extending beyond the strict employment relationship. This has been happening in the context of sex abuse particularly involving various religious orders. The first step was taken by the Court of Appeal in *Maga v Archbishop of Birmingham*<sup>24</sup> in 2010 but the Supreme Court

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<sup>21</sup> *B v Ministry of Defence* [2010] EWCA Civ 1317 (radiation poisoning, atomic veterans litigation); *Wootton v J Docter Ltd* [2008] EWCA Civ 1361 (contraceptive pill failure); *Sanderson v Hull* [2008] EWCA Civ 1211 (infection); *Clough v First Choice Holidays & Flights Ltd* [2006] EWCA Civ 15 (slip by pool on holiday); *West v Ministry of Defence* [2006] EWHC 19 (QB) (PTSD following conviction and imprisonment for cannabis possession).

<sup>22</sup> [1972] 3 All E.R. 1008

<sup>23</sup> [1987] Q.B. 781

<sup>24</sup> [2010] 1 WLR 1441

completed the process in *Various Claimants v Catholic Child Welfare Society*.<sup>25</sup> In this case, the Supreme Court closely followed Canadian jurisprudence on vicarious liability which is predicated on the notion of **risk creation** as the justification for the imposition of vicarious liability in sex abuse cases. In fact, the test in Canada is called the “material increase in risk” test; and it is instructive to note that in deciding that risk creation is a relevant factor in holding someone vicariously liable in this country, Lord Phillips explained that “vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which *has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse*. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.”<sup>26</sup> So Lord Phillips is saying that it is the causal link which justifies the imposition of vicarious liability.

There are two problems with this: first, vicarious liability is traditionally conceived of as liability in the absence of fault; once you bring causation back into the equation then you are re-entering the realms of fault in the sense that you usually blame people by following the causal chain. But even if you ignore the causation aspect of fault, then the very idea of fault is linked strongly to the idea that we have the right not to be exposed to certain types of risk. So vicarious liability becomes a sort of fault liability after all.

But the second problem is that Lord Phillips’ “strong causative link” relies on the language of increased risk which is supposed to be an exception to the normal causation rules. And whatever else you might say about the material increase in risk test for causation, it cannot be that it is a strong causative link: because, as we have seen, we are in the realms of the possible, not the probable.

The second case in which the material increase in risk idea has been used, albeit obliquely, is the Court of Appeal case of *Wright v Cambridge Medical Group*.<sup>27</sup> In that case, the Court of Appeal, by a majority, found that a GP who had negligently delayed referral of a child to hospital, which in turn provided negligent treatment, was a contributory cause of the permanent injuries resulting from a bacterial super-infection. The reasoning of interest is that provided by Dame Janet Smith towards the end of her judgment when discussing whether or not the GP’s negligence was too remote a cause of the Claimant’s injury. She said “I have found this value judgment a difficult one. In the end, I think that the crucial point is the extent to which the defendants’ negligence shortened the period available to the hospital to provide effective treatment and increased the risk that she would suffer permanent harm.”<sup>28</sup> So in the very different context of clinical negligence we see the material increase in risk idea being used in support of a finding that it is fair, just and reasonable to hold the defendants liable under the remoteness limb of the causation

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<sup>25</sup> [2012] UKSC 56.

<sup>26</sup> At [86].

<sup>27</sup> [2011] EWCA Civ 669

<sup>28</sup> At [131].

inquiry, which incidentally, seems to be morphing into the third limb of the *Caparo* test for the imposition of a duty of care.

So what? Well, I think the short point is this: even if *Fairchild-Barker* is supposed to provide an exceptional test for causation and is, for the moment, a *de facto* mesothelioma exception, there can be no doubt that it has opened up the possibility of a much wider notion of liability predicated on the idea of risk liability. In a way, risk liability is a reaffirmation of fault in the sense that we have the right not to be exposed to certain types of risk from harm. This is a fundamental underlying principle of the law of negligence. However, conventional doctrine continues to link risk to the Defendant's actual or constructive knowledge or foresight of that risk. *Fairchild* may in fact represent something else and that it the foreshadowing of the precautionary principle into tort law. It may signal a shift away from conventional notions of responsibility and providence, away from solidarity and prevention,<sup>29</sup> towards precaution in the face of increased uncertainty. As Francois Ewald has suggested: "precaution, to a certain extent, brings us out of the age of insurance companies. It creates a world in which, in principle, compensation no longer has meaning, because the only rational attitude is to avoid the occurrence of a threat with irreversible consequences. Precaution is an attitude of protection rather than compensation."<sup>30</sup>

But if this is the direction in which tort law is heading, it is probably the beginning of the end, leading case or not.

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<sup>29</sup> T Baker et al ed. *Embracing Risk: the changing culture of insurance and responsibility* p298 (University of Chicago Press, 2002).

<sup>30</sup> *Ibid.*