Sienkiewicz v Greif (UK) Ltd: a cautionary tale for causation

In *Sienkiewicz v Greif* [1] (joined with *Knowsley Metropolitan Borough Council v Willmore*[2]) the Supreme Court addressed the latest issue to arise in relation to proof of causation of mesothelioma and extended the *Fairchild*[3] exception to impose liability on a defendant who was responsible for only a small proportion of the claimant's exposure to asbestos even though the far greater source of exposure was innocent and therefore not before the court. At the same time the court showed a keen desire to limit the scope of the *Fairchild* exception to cases of mesothelioma, reflecting reticence to adopt flexible approaches to future causal problems.

In *Sienkiewicz* the claimant's mother had been exposed to asbestos from 1966 to 1984 due to the negligence of the defendant employer. Unlike the claimant in *Fairchild* she had not been exposed to asbestos by any other employers but during her lifetime she had also been exposed to asbestos in the general atmosphere of the area where she lived. This 'environmental exposure' was an innocent source of asbestos, that is, it was not attributable to negligence. The risk created by the environmental exposure was assessed at 24 cases per million, and the risk created by the defendant's negligence was assessed at 4.39 cases per million. The defendant was therefore said to have increased the claimant's risk of contracting mesothelioma by 18 percent. The legal issues to be resolved were which test of causation to apply and whether the 18 percent increase in risk attributable to the defendant's negligence was sufficient to satisfy the relevant test. The defendant argued that the 'but for' test should apply because the fact that there was only a single defendant meant that the case did not involve the same uncertainty as *Fairchild*. They argued that the 'but for' test would only be satisfied on the balance of probabilities if the defendant had more than doubled the risk of mesothelioma. Alternatively, if the *Fairchild* test of material contribution to the risk of harm applies then the defendant argued that a contribution should only be regarded as 'material' if it more than doubles the risk of harm. Given that the defendant had only increased the risk by 18 percent, it was argued that whichever test is applied the claim should fail.

The Supreme Court confirmed that the test of material contribution to the risk of harm applies in all mesothelioma cases, and that a 'material contribution' is anything more than *de minimis*. The outcome is favourable to claimants, imposing a heavy burden on defendants who may have exposed the claimant to a relatively small quantity of asbestos. This effect of the application of

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[1] *Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) v Greif (UK) Ltd, Knowsley Metropolitan Borough Council v Willmore* [2011] UKSC 10; [2011] 2 WLR 523

[2] The appeal in *Willmore* related to the trial judge's finding of fact that the defendant had exposed the claimant to asbestos. Consequently it does not form the focus of this comment.

[3] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32

the test is, however, attributable to the impact of the Compensation Act 2006. At a scientific level, the decision as to the scope of application of the test is logically correct since the evidentiary gap regarding the aetiology of mesothelioma in this case is the same as the gap in *Fairchild*. Any attempt to attenuate the effect of the test by modifying the circumstances in which it should apply would have compromised the coherence of the test. With regard to ideas of responsibility, however, this case differs significantly from *Fairchild* because it cannot be said that the claimant's illness was definitely caused by a breach of duty, indeed by far the greatest source of asbestos was innocent and therefore not before the court. The extension of the already heavy burden of joint and several liability in *Fairchild* to a scenario involving a single negligent source of asbestos is therefore a severe result for the defendant. This comment will therefore address the scientific and legal aspects of this decision, as well as addressing some of the more general points that were made regarding the relationship between statistical probabilities and the balance of probability standard of proof.

The scientific perspective: 'material contribution to risk of harm' as a response to an evidentiary gap

The test of material contribution to the risk of harm was developed in response to the 'evidentiary gap' faced by the claimants in *Fairchild* due to the particular gap in the understanding of the aetiology of mesothelioma. Mesothelioma is known to be caused by inhalation of asbestos fibres, but the precise aetiology of the disease remains unknown. It is an 'indivisible disease' meaning that the extent of the disease is not dose related. The uncertainty surrounds whether the disease is caused by inhalation of a single fibre, or an accumulation of fibres. As Lord Phillips explained '[i]t is believed that a cell has to go through 6 or 7 genetic mutations before it becomes malignant, and asbestos fibres may have causative effect on each of these. It is also possible that asbestos fibres have a causative effect by inhibiting the activity of natural killer cells that would otherwise destroy a mutating cell before it reaches the stage of becoming malignant'.[4] This scientific uncertainty regarding the aetiology of the disease prevented claimants negligently exposed to asbestos by numerous former employers from being able to prove on the balance of probabilities that asbestos exposure from a particular former employer was a cause of their disease. If the disease was known to be caused by a single fibre then the claimant would be required to prove on the balance of probabilities that the defendant exposed him to the 'guilty fibre'; if it was known to be caused by an accumulation of fibres the claimant would have to

[4] n1 above at [19]

establish that the defendant had made a material contribution to the disease.[5] Indeed, if asbestos fibres have causative effect at a number of stages in the mutation of the cell, then the claimant should prove that the defendant was responsible for asbestos exposure at one or more of these stages. The difficulty is that scientific understanding of the process of mutation of the cell is incomplete, so it is not possible to say what the claimant needs to prove.

The defendant, however, had advanced the argument that where there is only one negligent source of asbestos the claimant is not faced with the same difficulties of causal attribution as claimants (such as those in *Fairchild*) who have been exposed by multiple defendants, so the appropriate approach was to apply the traditional 'but for' test of causation.

In the Court of Appeal, Smith LJ had side-stepped the question of whether it was appropriate to apply the *Fairchild* test in this case, holding that the Compensation Act 2006 had established that the requirement of causation could be satisfied by proof that the defendant had materially increased the risk of harm in cases of mesothelioma. The decision of the Supreme Court rightly recognised that the Compensation Act does not in fact provide a test of causation. The provisions of the Compensation Act 2006 apply where the defendant is liable in tort 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".[6] As Lord Phillips correctly explained "[s]ection 3(1) does not state that the responsible person *will be* liable in tort if he has materially increased the risk of a victim of mesothelioma. It states that the section applies *where* the responsible person is liable in tort for materially increasing that risk. Whether and in what circumstances liability in tort attaches to one who has materially increased the risk of a victim contracting mesothelioma remains a question of common law'.[7] It therefore remained for the Supreme Court to assess the relative strength of the arguments relating to the tests on their own merits.

As explained above, since *Sienkiewicz* involved mesothelioma the scientific barriers to proof of causation were identical to those in *Fairchild* so the Supreme Court was right to apply the same test of causation. Lord Phillips correctly noted that as and when more is understood about mesothelioma and the uncertainty surrounding the aetiology is removed the test may no longer apply since there would be no need for an exceptional approach to causation if the 'rock of

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[5] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613
[6] s3(1) Compensation Act 2006
[7] n1 above at [70]

uncertainty' no longer existed.[8] But while the gap in the understanding of the aetiology of mesothelioma persists, the coherence of the test as a test of factual causation requires that it should apply in all cases where the claimant has been exposed to more than one source of asbestos. This is because the normative question of the characterisation of individual asbestos fibres as innocent or negligent has no bearing on the biological process by which the individual fibre was or was not a cause of the claimant's mesothelioma. Whether there was a single negligent source or multiple negligent sources is, therefore, irrelevant in terms of the establishing factual causation which is a purely factual question of 'involvement'.[9] This had already been explained by Lord Hoffmann in the earlier case of *Barker v Corus*: "it should be irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. These distinctions may be relevant to whether and to whom responsibility can also be attributed, but from the point of view of satisfying the requirement of a sufficient causal link between the defendant's conduct and the claimant's injury, they should not matter".[10] Yet this statement highlights the more controversial aspect of the decision in *Sienkiewicz* because the court here was bound by s3. Compensation Act 2006 to impose joint and several liability and was therefore unable to engage with the questions of 'whether and to whom responsibility can also be attributed' and unable to build on the progress that had been made in *Barker*.

The moral and legal perspective: 'material contribution to risk of harm' imposes a choice between corrective justice and utilitarianism.

Although the legal requirement of factual causation ought properly be regarded as a scientific question of causal involvement, we must not lose sight of the role that causation plays within corrective justice as a basis for attributing responsibility. Corrective justice derives its correlativity from the doctrine of causation because the causal relationship is what links the defendant to the claimant in a bipolar relationship.[11] As Nolan has explained, 'from a corrective justice viewpoint, we need an explanation of why *this* defendant ought to be liable to *this* claimant' in order to justify the requirement that the particular defendant compensate the particular claimant's loss.[12] Following traditional principles the defendant is liable only for what he has caused. If he was a cause of an indivisible injury then he is responsible for the whole injury, even if there were other

[8] n1 above at [70]
[9] See J. Stapleton, 'Choosing what we mean by "Causation" in the Law' (2008) 73 Missouri Law Review 433
[10] *Barker v Corus* [2006] UKHL 20 at [17]
[11] See for example E. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); D. Nolan 'Causation and the Goals of Tort Law' in Robertson & Tang, *The Goals of Private Law* (Oxford: Hart Publishing, 2009)
[12] D. Nolan, n11 above 174

causes that operated alongside his, because each was necessary to bring about the outcome, therefore joint and several liability reflects causal responsibility.[13] Where the injury is divisible then apportionment will occur and again the defendant is liable only for that portion of the loss for which he is responsible.[14] The *Fairchild* test is difficult to reconcile with corrective justice because it allows a claimant to recover when he has proven only the possibility of causation, in other words when it is only possible that the defendant was responsible for the loss. Indeed the outcome in *Fairchild* was inconsistent with corrective justice principles because it imposed joint and several liability on the defendants, so there was a mismatch between liability and responsibility because each defendant was liable for the whole of the loss even though there was only a possibility that he was causally responsible for the loss.

One reason motivating the decision in *Fairchild* was the perceived injustice of leaving the claimants without a remedy when their illness had been caused by somebody's negligence but it was not possible to say whose because of scientific uncertainty. On balance it was considered preferable for the guilty employers rather than the innocent claimants to bear the risk of insolvency of other defendants and to bear the burden created by the scientific gap in understanding of the disease.[15] This preference for the claimant whose illness has been caused by *somebody's* negligence, Nolan says, has an 'intuitive appeal' but is incompatible with corrective justice:

> "while it seems reasonable to say that, as between the claimant and the *defendants*, the equities favour the claimant, unless there is some good reason why we should 'collectivise' the defendants in this way, we still do not have a justification for the imposition of liability as between the claimant and each individual defendant."[16]

In contrast, the decision in *Barker* to modify the effect of the test by imposing proportionate rather than joint and several liability was compatible with a corrective justice framework. If the most that can be said is that the defendant contributed to the overall risk of the disease rather than to the disease itself, then the gist of the negligence action ought to be the contribution to risk and proportionate liability ensures that the defendant is only liable for the harm he has caused. Even if we do not accept that risk rather than harm was substituted as the gist of the action in *Barker,* meaning that the decision did not seek to achieve corrective justice, then at least it could be seen as pursuing a solution that was fair to both claimants *and* defendants in a context of scientific uncertainty.

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[13] Contribution enables apportionment of responsibility among defendants, but vis-à-vis the claimant each defendant is responsible for the whole of the loss.
[14] *Holtby*
[15] E.g. n3 above [155] per Lord Rodger
[16] D. Nolan, n11 above 174

The effect of s.3 Compensation Act, however, was to firmly reject any corrective justice basis for liability and to pursue the utilitarian goal of compensation of victims of mesothelioma. Its application in *Sienkiewicz* is even more claimant-focused and harsh to defendants than *Fairchild* because in *Fairchild* it could at least be said that the loss had been caused by *somebody's* negligence, but in *Sienkiewicz* the majority of the asbestos was innocent. Furthermore the defendant has been 'collectivised' with a natural occurrence rather than with other defendants and there is no clear reason why this should be the case.

Once we see the *Fairchild* test combined with joint and several liability as a departure from corrective justice which must be justified in utilitarian terms, we can understand the defendant's argument in *Sienkiewicz* that a 'material' contribution is one which doubles the risk of the disease as an attempt to reinstate some focus on fairness to defendants. This requires a more detailed explanation of the alternative arguments that the defendant made based on doubling of risk. The defendant had first argued that the correct test to apply was the 'but for' test and that this could be satisfied, on the balance of probabilities, by showing a doubling of the risk. The idea that doubling of risk is synonymous with the balance of probabilities is clearly wrong and was rejected by the Supreme Court. As Lady Hale explained, '[r]isk is a forward looking concept – what are the chances that I will get a particular disease in the future? Causation usually looks backwards – what is the probable cause of the disease which I now have?'[17] Furthermore, epidemiological evidence of risk looks at risk across a population, so it does not say anything about the individual. This is made clear by Gold who explains the difference between the balance of probabilities and probabilistic assessments of risk.[18] The balance of probabilities concerns the degree of belief in a fact, in this instance it should be believed that it is more likely than not that that this defendant's negligence was *definitely* a cause of this claimant's disease. Raw evidence of statistical probability of causation can only establish that it is more likely than not that the defendant's negligence was *probably* a cause of the claimant's disease. This can be seen clearly in Brachtenbach J's example,[19] referred to by Lord Phillips,[20] of a town with two taxi companies, one with three blue cabs and one with one yellow cab where a victim was knocked down by a taxi whose colour had not been observed. Before the accident occurred it might be right to say that if a person is knocked down by a taxi there is a 75% chance that it was a blue taxi, but once the victim has been knocked down then although we can say that it was 'probably' a blue taxi that injured him, we need more specific evidence before we are willing to conclude that it is

[17] n1 above [170]
[18] S. Gold, 'Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence' (1986) 96 Yale LJ 376
[19] *Herskovits v Group Health Cooperative of Puget Sound* (1983) 664 P 2d 474
[20] n1 above [95]

more probable that a blue taxi definitely caused the accident. As Lord Rodger explained "since, by its very nature, the statistical evidence does not deal with the individual case, something more will be required before the court will be able to reach a conclusion, on the balance of probability, as to what happened in that case."[21]

The defendant in *Sienkiewicz* then put forward an alternative argument which also drew on the idea of a doubling of risk. It was suggested that if the appropriate test is the *Fairchild* test of material contribution to the risk of harm, a contribution should only be regarded as 'material' if it more than doubles the risk. The Supreme Court treated this argument as being incompatible with the previous one, with Lord Phillips holding that "if one were to accept [the defendant's] argument that the 'doubles the risk' test establishes causation, his de minimis argument would amount to saying that no exposure is material for the purposes of the *Fairchild/Barker* test unless on balance of probability it was causative of mesothelioma".[22] But if one rejects the argument that the 'doubles the risk' test establishes causation on traditional principles, then it is surely possible to propose an alternative role for the doubles the risk test. As argued above, the decisions in *Fairchild* and *Sienkiewicz* have abandoned corrective justice in pursuit of utilitarian objectives, notably compensation. If we accept that 'doubles the risk' carries no connotations of proof on the balance of probabilities, then it may play a role in the goal of promoting the fairness between claimants and defendants. A preferable solution, which would be compatible with the result in *Fairchild*, may have been to insist that the negligent source(s) of asbestos double the background risk and then to apply the doctrine of joint and several liability among the defendant(s) responsible for the negligent asbestos. While this is arbitary from a scientific perspective because the evidentiary gap is so deep that it is impossible to obtain proof of causation, it does place some emphasis on fairness to defendants in a context where liability is based on ideas of fairness rather than on factual causation and corrective justice. It is, however, arguable that this would add a layer of complexity that the *de minimis* rule avoids and would be short-lived in an area where Parliament has shown a clear preference for compensation over balancing concerns of fairness.

Conclusion: does the law tamper with the "but for" test at its peril?

The effect of the application of *Fairchild* in this case was labelled 'draconian' and this has led to a general sense of reticence to adopt exceptional approaches to causation in the future.[23] Lord Brown suggested that "[s]ave only for mesothelioma cases, claimants should henceforth expect

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[21] n1 above [163]
[22] n1 above [107]
[23] n1 above *Per* Lord Phillips at [58], *per* Lord Brown at [184]

little flexibility from the courts in their approach to causation."[24] However the harsh effect of the application of *Fairchild* is a consequence of the departure from principles of corrective justice in pursuit of the goal of compensation of victims of mesothelioma which was led by Parliament and cemented by the decision in *Sienkiewicz*. It would be unfortunate if the *Fairchild* experience deterred courts from taking novel approaches to causation where they would be justified and would form part of a coherent corrective justice framework. Moreover, it should be remembered that the *Fairchild* test was derived from the decision in *McGhee* which involved a different disease but an equivalent gap in scientific understanding of its aetiology. The *Fairchild* test ought to continue to apply in such cases, and the coherence of negligence law would be promoted if it were applied in conjunction with the *Barker* principle of proportionate liability as explained above.

Finally, Lord Brown cautioned against "adding yet further anomalies in an area of law which benefits perhaps above all from clarity, consistency and certainty in its application".[25] This is an important proviso in the future development of novel approaches to causation. Confusion persists surrounding 'basic' issues such as whether the *Bonnington* test of material contribution to harm is an exception to the 'but for' test.[26] Lord Phillips called it "an important exception to the 'but for' test".[27] In contrast Lord Brown correctly says it is not a true exception.[28] Even at a basic terminological level Lord Rodger refers to *Sienkiewicz* as a 'single exposure' case when clearly the problem of causation arises because it involves multiple exposures, it is just that there is a 'single *tortious* exposure'. So while it is desirable and possible for the courts to adopt flexible approaches to causation consistent with principles of corrective justice, until the courts can be sufficiently clear and accurate in addressing these basic issues then they do 'tamper with the "but for" test at its peril'.

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[24] Ibid. at [187]
[25] Ibid. at [187]
[26] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613
[27] n1 above at [17]
[28] n1 above at [176]. See S. Bailey, 'Causation in negligence: what is a material contribution?' (2010) 30 LS 167