Causation in Occupational Cancer Claims: An Overview

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The law adopts a nuanced approach to causation in occupational cancer claims. Practitioners dealing with such claims must be alive to the distinctions and difficulties that may arise in this area. This post provides an overview of the application of the different tests for causation, when they apply and their practical implications on case preparation.

The legal status of cancer

Cancer is an indivisible disease. As noted in *Ministry of Defence v AB* [2010] EWCA Civ 1317 at [150],

> "*one either gets [cancer] or one does not. The condition is not worse because one has been exposed to a greater or smaller amount of the causative agent.*"

An indivisible disease is distinguishable from a divisible disease, the onset/severity of the latter being dose-related. Causation of divisible diseases is approached very differently, the test being whether the exposure by the defendant made a material contribution to the claimant's injury (*Bonnington Castings Ltd v Wardlaw* [1956] AC 613). The *Bonnington Castings* approach is widely accepted as inapplicable to cases involving indivisible diseases (although the authorities have not always spoken with one voice on this point - see *Williams v Bermuda* [2016] AC 888) and is considered no further in this article.

The process of carcinogenesis is not yet fully understood. An overview of the process – as understood at that time – is set out in *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) at [584]-[589]. This is a useful starting point for practitioners who are new to this area.

Mesothelioma: a cancer apart from all others

Whilst this article deals with causation of occupational cancers more broadly, it is necessary to begin by considering the courts' approach to mesothelioma. Mesothelioma is a particularly debilitating and invariably fatal form of cancer caused by exposure to asbestos fibres.

As medical science was (and still is) unable to identify the 'guilty' fibre or fibres which triggered the process of carcinogenesis, claimants who contracted mesothelioma, having been wrongfully exposed to asbestos by multiple employers, faced an insurmountable hurdle in proving causation against any single employer on the balance of probabilities. This was Lord Bingham's "*rock of uncertainty*" in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at [7].

The solution adopted in *Fairchild* was to lower the evidential burden upon the claimant in respect of causation: it was thus sufficient for the claimant to show that a defendant employer had materially increased his *risk* of contracting the disease. This was not an entirely new approach; a similar course was taken in *McGhee v National Coal Board* [1973] 1 WLR 1.

Lord Rodger in *Fairchild* at [170] set out five elements which must be present if a claimant is to prove causation on the basis of a material increase in risk (the *Fairchild* exception). This passage warrants careful reading for those dealing with occupational cancer claims. In summary, a claimant must show that:

1. Medical science is unable to determine how the injury was caused and who caused it.
2. The defendant's wrongdoing has materially increased the risk that the claimant (as opposed to a general class of persons) would suffer injury.

3. The defendant’s conduct was capable of causing the claimant’s injury.
4. His injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing. It is insufficient to show that his injury might have a number of different causes, only one of which is the eventuation of the risk created by the defendant's wrongful act or omission.
5. Therefore, his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way.

The bold text becomes highly relevant when addressing the appropriate test for causation in non-mesothelioma occupational cancer claims (returned to below).

Presumably because this was uncharted territory, the issue of apportionment was not explored by the defendant in *Fairchild* and joint and several liability followed [125]. However, that issue was addressed squarely in *Barker v Corus UK Ltd* [2006] 2 AC 572, another mesothelioma case. The deceased had been exposed to asbestos during three periods of his life: while working for the defendant, while self-employed and while working for an insolvent company (which was not pursued). The court held that the defendant was liable only in respect of the extent to which it increased the deceased’s risk of contracting mesothelioma. As Baroness Hale observed, the harm might have been indivisible but the *risk* of causing that harm *was* divisible [126]. Whether the other exposures were tortious, non-tortious, caused by the claimant or by natural causes was held to be irrelevant [17].

That position was promptly reversed by section 3 of the Compensation Act 2006 which – <u>in claims for mesothelioma alone</u> – provided for joint and several liability. Claims for contribution and reductions for contributory negligence remain open to defendants.

Causation in non-mesothelioma occupational cancer claims

Initially, the *Fairchild* exception was thought to apply only to mesothelioma claims. However, there has been a slow expansion in the application of the exception to non-mesothelioma claims which meet the necessary criteria (see *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86 at [47-49]; *Zurich Insurance PLC UK Branch v International Energy Group Limited* at [109], [127] and [191]).

That expansion has, however, been accompanied by increasing levels of judicial disquiet at what was originally seen to be a very narrow exception to the orthodox principles of causation decided on the specific facts of a single case. It therefore remains likely that the majority of cases will instead be pursued and decided under the (arguably more orthodox) approach of 'doubling the risk' (see below). Non-mesothelioma *Fairchild* arguments are likely to continue to be met with both opposition from defendants and wariness from the courts, and present an uphill struggle for many claimants.

It is nevertheless important that both claimant and defendant practitioners are aware of the strict confines and criteria within which *Fairchild* can arise.

Key to this is Lord Rodger’s test in *Fairchild* at [170]: the exception applies only where the “*injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way.*” Lord Rodger gave the example of “*a workman [who] suffered injury from exposure to dusts coming from two sources, the dusts being particles of different substances each of which, however, could have caused his injury in the same way*”.

Key questions when considering *Fairchild* are therefore:

1. Am I dealing with a single or multiple agency case?
2. If a multiple agency case, do all the agencies operate upon the body in substantially the same way?

Expert assistance and ultimately expert evidence will be required to answer these questions. The answers will dictate the appropriate approach to causation in each case.

Single agency cases

In single agency cases the *Fairchild* exception may apply – provided that the other *Fairchild* criteria are satisfied. The claimant need only show a material increase in the risk of their contracting the cancer as a result of the exposure. If successful, damages will be apportioned according to all sources of exposure (per *Barker* at [17]). Issues of contribution will not arise between defendants and there will be no reduction for contributory negligence (any exposure by the claimant himself being accounted for in the apportionment of risk).

This is not a silver bullet for claimants: their recovery will correlate directly to exposure risk and it may be necessary to pursue several defendants in order to recover meaningful compensation. On the other hand, defendants must conduct a thorough investigation into <u>all</u> possible sources of exposure in order to seek to reduce their liability.

Multiple agencies acting upon the body in substantially the same way

The approach here is as with single agency cases. The agencies must operate upon the body in substantially the same way: *Barker* at [24]. Thus, in *Novartis Grimsby Ltd v Cookson* [2007] EWCA Civ 1261 at [72], the court held that the *Fairchild* exception would arguably have applied to bladder cancer where the claimant had been exposed to multiple agents (amines from both smoking and occupational exposure) which acted upon the body in the same way.

However, defendants should be wary of expert references to the 'multiplicative' effects of different agencies which are said to operate upon the body in substantially the same way. In *Jones*, the court opined that if the carcinogens from two sources had been identical their effect would have been <u>additive</u> as opposed to <u>multiplicative</u>: "*the fact that their combined effects on risk are multiplicative or nearly so, strongly suggests that different carcinogens were at work*" [652].

Multiple agencies which did not act upon the body in substantially the same way

The *Fairchild* exception will not apply to the question of which agent caused the injury. The claimant must effectively prove causation on the balance of probabilities – the "*doubling of the risk*" test. In *Sienkiewicz v Greif (UK) Ltd* [2011] 2 A.C. 229, Lord Phillips described the test as:

> "*one that applies epidemiological data to determining causation on balance of probabilities in circumstances where medical science does not permit determination with certainty of how and when an injury was caused. The reasoning goes as follows. If statistical evidence indicates that the intervention of a wrongdoer more than doubled the risk that the victim would suffer the injury, then it follows that it is more likely than not that the wrongdoer caused the injury*."

It follows that the claimant will necessarily place a heavy reliance on scientific and epidemiological evidence in the presentation of their case. Epidemiological evidence does not come without risks.

The adequacy and reliability of epidemiological data will influence how much weight, if any, the court is willing to place upon it. Furthermore, a statistical probable cause is not inevitably the probable biological cause, or cause in fact, and it is unlikely that epidemiological data which demonstrates barely more than a doubling of risk will satisfy the court that causation is proved. In this regard, the *Sienkiewicz* judgment warrants careful reading by claimants and defendants alike.

The availability of epidemiological data is also likely to vary wildly between specific agencies, specific cancers and the relationship between each. In *Heneghan*, the data relating to asbestos-induced lung cancer was sufficient to bring about a five-fold increase in overall risk; in *Jones*, the data was sufficient to show a relationship between tar/pitch substances and squamous cell carcinoma (SCC), but not basal cell carcinoma (BCC); in the same case, it was possible to show a doubling in the risk of lung cancer arising from exposure to certain chemicals, but not bladder cancer.

Significant numbers of claims will undoubtedly fail because of shortcomings in scientific and epidemiological data. It is possible that some of those claims might otherwise be well-founded.

However, for the limited number of claimants who can establish a doubling of the risk, they demonstrate on the balance of probabilities that the defendant caused the cancer which in fact occurred and will recover damages in full: *Novartis*

Grimsby Ltd at [74]; *Department for Communities and Local Government v Blackmore* [2017] EWCA Civ 1136 at [34].

Reductions for contributory negligence will be open to the court with causation and culpability remaining the key drivers of that assessment. An employer's culpability - by failing to observe statutory and common law duties - is likely to outweigh the culpability of the claimant if, for example, he increased the risk of contracting lung cancer by smoking: *Blackmore* at [39].

A further complication arises in cases of multiple exposures of the causative agent by different employers. As noted in *Heneghan* at [8-9], there are two aspects to proving causation – 'what caused it' and 'who caused it'. Claimants in multiple agency cases, where the agencies operated in different ways, may overcome the 'what' question by demonstrating more than a doubling of the risk; however, the claimant who was exposed to the causative agent by multiple employers then faces the questions (i) from whom can they recover and (ii) what can be recovered from each?

These questions were addressed – to some extent – in *Heneghan*. In that case, the parties agreed that there had been a lifetime asbestos exposure sufficient to exceed a doubling of the risk of lung cancer. However, the deceased had been exposed to asbestos throughout his lifetime by multiple employers, the six against whom the claim was brought having contributed individually and collectively to less than 50% of his lifetime exposure [1-10].

The claimant argued that each defendant had made a material contribution to the deceased's *injury* and therefore he should recover in full. The defendants argued that the *Fairchild* exception should apply as the claimant could only prove that each defendant had materially increased the deceased's *risk of injury*; thus they should only compensate the claimant according to the degree to which they each increased the risk. The court held that the *Fairchild* exception did apply [48].

This decision is somewhat problematic: the deceased was also a smoker and therefore multiple agencies were present and operated in different ways upon his body. However, this might be rationalised by saying that asbestos had been established as the cause of the lung cancer (the 'what' question) – at which point this effectively became a single agency case in respect of the 'who' question. This adds perhaps a further unwelcome layer of complexity in determining causation of occupational cancers.

An area of uncertainty

A further interesting point arose from the *Heneghan* judgment. The trial judge, Jay J, considered obiter that had the claimant sued another employer, W. Blackwell – whose contribution to the deceased's total exposure was in excess of 50% – there would have been no need to resort to the *Fairchild* exception; he considered that proving causation against that employer would have been a simple matter of arithmetic. All parties took objection to this observation and the Court of Appeal was asked to expressly disapprove the statement. The court declined to do so, but Sales LJ made this interesting observation:

> "*It is unnecessary for us to say anything definitive about this and it would not be appropriate to do so, since we have not heard adversarial argument on the point. It is not immediately obvious to me that the judge was wrong … I would wish to reserve any concluded opinion on the question whether one in a series of employers might be held liable on ordinary principles on the basis of epidemiological evidence showing that that employer was responsible for a doubling of the relevant risk (which the judge took to be the position of W. Blackwell) alongside other employers whose liability depended upon application of the Fairchild approach (as with the defendant employers in these proceedings) and, if so, what the effect might be in terms of the recoverability of damages against each of them.*"

It remains to be seen what the court's approach would be to this issue.

The future of the *Fairchild* exception

The *Fairchild* exception is self-limiting. It applies only where medical science is unable to determine how an injury was caused and who caused it. As medical science progresses in future decades it is possible that the *Fairchild* exception will become legal history. As Lord Rodger in *Sienkiewicz* observed at [142] in relation to mesothelioma:

> *"the Fairchild exception was created only because of the present state of medical knowledge. If the day ever dawns when medical science can identify which fibre or fibres led to the malignant mutation and the source from which that fibre or those fibres came, then the problem which gave rise to the exception will have ceased to exist. At that point, by leading the appropriate medical evidence, claimants will be able to prove, on the balance of probability, that a particular defendant or particular defendants were responsible. So the Fairchild exception will no longer be needed. But, unless and until that time comes, the rock of uncertainty which prompted the creation of the Fairchild exception will remain."*

However, with the application of the *Fairchild* exception said to extend to other forms of cancer – and, indeed, any disease with the unusual features of mesothelioma – it is possible that the exception will continue to exist until the Supreme Court or Parliament sees fit to limit it. However, given the level of judicial disquiet since *Fairchild*, it seems likely that there will be a forced return to more orthodox principles of causation in non-mesothelioma cases at some point. But, in the meantime new diseases will arise, new exposures will occur, medical science will at times lag behind, and the *Fairchild* debate will rumble on.