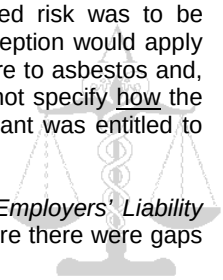
***Barker v Corus (UK) plc* [2006] UKHL 20**

The case set a short-lived precedent that, for this very limited set of mesothelioma claimants, duty holders should compensate according the degree of risk.

The standard test of causation is that it must be proved, on a balance of probabilities, that the defendant's conduct *did* cause the damage in the sense that it would not otherwise have happened. In *Fairchild* this test was relaxed to the extent that exposure to materially increased risk was to be regarded as if it were equivalent to damage [if it actually occurs]. The *Fairchild* exception would apply only when there was more than one source of essentially identical negligent exposure to asbestos and, mesothelioma [an indivisible injury] was the result. Their Lordships in *Fairchild* did not specify how the various defendants should divide their financial contributions, merely that the claimant was entitled to receive all the damages from any one of them.



Private insurers had an understanding [*Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims*] that each would pay on a time-exposure basis. However, where there were gaps in insurance coverage there would be the possibility of difficulties.
In this case, Mr. Barker had been exposed to asbestos on three occasions. The first duty holder was now insolvent with no insurance, the second was solvent (and in effect self insured at the time in question) and trading the third was Mr. Barker himself, during a period of self employment. Should the second duty holder be jointly and severally liable for the full damage? Or, should liability be in proportion to the increased risk created by their breach of duty? No other cause of the mesothelioma was proposed.

In the report, the following statement was recorded:

> *The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.*
>
> *It may be that the most practical method of apportionment will be according to the time of exposure for which each defendant is responsible, but allowance may have to be made for the intensity of exposure and the type of asbestos. These questions are not before the House and it is to be hoped that the parties, their insurers and advisers will devise practical and economical criteria for dealing with them.*

On the period off self employment the view seemed to be that self harm should result in a reduction of the award [contributory negligence], not the elimination of the cause of action.

Comment
The dispute arose as a result of the policy-based reasoning adopted in *Fairchild*. [*Gregg v Scott* [2005] 2 AC 176 provided another recent example of the *Fairchild* effect.]

It is common ground that where two or more parties actually cause indivisible harm there should be joint and several liability. In *Fairchild*, joint and several liability was assigned because of a **possibility** that two indistinguishable negligent episodes had each caused the indivisible harm. Their Lordships in the *Barker* case, by a majority, came to the view that several liability would be fairest; each party contributing according to the degree of risk as opposed to the degree of harm done [possibly regardless of whether or not that exposure to risk was lawful e.g. exposures both before and after the date of knowledge].

The probability of mesothelioma varies according to cumulative exposure. However, the evidence is that the contribution made by each exposure is non linear and from this it would be easy to argue that a time on risk approach would be inaccurate, even if pragmatic. There is evidence that low exposures result in very slowly (possibly negligibly) increasing risks but after a certain point, additional exposures have a much larger effect per unit dose. It is possible that the exposure Mr Barker caused to himself was the only significant exposure in terms of risk.

The dissenting view in *Barker* was that full compensation should always be available regardless of whether or not the claimant [or lead defendant] could find all the relevant defendants. Although unfair to the lead defendant, the greater unfairness would be the loss of full compensation. This dissenting view would seem to be more consistent with *Fairchild* than the majority view in this case.

The *Fairchild* case continues to encourage the creation and testing of legal fictions. It should be recalled that their Lordships in that case were making a policy decision, not one based on an exhaustive self consistent analysis of the law and relevant science.

Gregg v Scott was a case where a patient had a lump under an arm. He consulted a doctor about it but was told it was benign and that no remedial action was called for. This was an incorrect and negligent response. Later the malignant quality of the growth was discovered and the claimant was treated accordingly. But the delay, for which the negligence of the first doctor was responsible, had allowed the growth to develop and spread and had greatly reduced the claimant's prospects of long term survival. He sued for damages. He asked that the extent of the increase in the risk of death from the cancer, an increase caused by the doctor's negligence, be reflected in an award of damages. The uncertainty in the case was over what had been the cause of the reduced expectation of life. Was it the genetics and life style which caused him to contract cancer, or was it the negligent delay in his diagnosis and treatment? The judge found that the delay had increased the chances of a premature death but not enough to enable him to say on a balance of probability that it would not otherwise have happened. The question before the House was whether Mr Gregg could claim that the damage he suffered was the additional chance of a premature death which had been caused by the delay. Could the increase in risk constitute damage for the purposes of the tort of negligence. *Fairchild* was relied on as authority for the proposition that it could do so. The analogy with *Fairchild* was, however, not accepted by the House. A majority held that a claim for damages for clinical negligence required proof, on a balance of probabilities, that the negligence complained of had been the cause of an adverse outcome and that **an increase in the chance of an unfavourable outcome did not constitute a recoverable head of damage**.

In this context it seems odd that an increased chance of an adverse outcome has in fact been accepted as the basis of interim and final awards in case of pleural plaques for around 20 years now.