HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 20
on appeal from [2004] EWCA Civ 545

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Barker (Respondent) *v.* Corus (UK) plc (Appellants) (formerly Barker (Respondent) *v.* Saint Gobain Pipelines plc (Appellants))

Murray (widow and executrix of the estate of John Lawrence Murray (deceased)) (Respondent) *v.* British Shipbuilders (Hydrodynamics) Limited (Appellants) and others and others (Appellants)

Patterson (son and executor of the estate of J Patterson (deceased)) (Respondent) *v.* Smiths Dock Limited (Appellants) and others
(Conjoined Appeals)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

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[2006] UKHL 20

LORD HOFFMANN

My Lords,

Fairchild

1. In *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32 the House decided that a worker who had contracted mesothelioma after being wrongfully exposed to significant quantities of asbestos dust at different times by more than one employer or occupier of premises could sue any of them, notwithstanding that he could not prove which exposure had caused the disease. All members of the House emphasised the exceptional nature of the liability. The standard rule is that it is not enough to show that the defendant's conduct increased the likelihood of damage being suffered and *may* have caused it. It must be proved on a balance of probability that the defendant's conduct *did* cause the damage in the sense that it would not otherwise have happened. In *Fairchild*, the state of scientific knowledge about the mechanism by which asbestos fibres cause mesothelioma did not enable any claimant who had been exposed to more than one significant source of asbestos to satisfy this test. A claim against any person responsible for any such exposure would therefore not satisfy the standard causal requirements for liability in tort. But the House considered that, in all

the circumstances of the case, that would be an unjust result. It therefore applied an exceptional and less demanding test for the necessary causal link between the defendant's conduct and the damage.

The issues

2. These three appeals raise two important questions which were left undecided in *Fairchild*. First, what are the limits of the exception? In *Fairchild* the causal agent (asbestos dust) was the same in every case, the claimants had all been exposed in the course of employment, all the exposures which might have caused the disease involved breaches of duty by employers or occupiers and although it was likely that only one breach of duty had been causative, science could not establish which one it was. Must all these factors be present? Secondly, what is the extent of liability? Is any defendant who is liable under the exception deemed to have caused the disease? On orthodox principles, all defendants who have actually caused the damage are jointly and severally liable. Or is the damage caused by a defendant in a *Fairchild* case the creation of a risk that the claimant will contract the disease? In that case, each defendant will be liable only for his aliquot contribution to the total risk of the claimant contracting the disease – a risk which is known to have materialised.

The three cases

3. Both of these questions are raised by the appeal in *Barker v Corus (UK) Plc*. Mr Barker died of asbestos-related mesothelioma on 14 June 1996. During his working career he had three material exposures to asbestos. The first was for 6 weeks in 1958 while working for a company called Graessers Ltd. The second was between April and October 1962, while working for John Summers Ltd (now Corus (UK) Ltd ("Corus")). The third was for at least 3 short periods between 1968 and 1975, while working as a self-employed plasterer. The first two exposures were in consequence of breaches of duty by the employers and the last is agreed to have involved a failure by Mr Barker to take reasonable care for his own safety. Thus, unlike the facts of *Fairchild*, not all the exposures which could have caused the disease involved breaches of duty to the claimant or were within the control of a defendant. The first question is whether this takes the case outside the *Fairchild* exception. If it does not, the second question is whether Corus is liable for all the damage suffered by Mr Barker's estate and dependants or only for its aliquot contribution to the materialised risk

that he would contract mesothelioma. Moses J decided that the case was within the *Fairchild* exception and that Corus was liable jointly and severally with Graessers Ltd, but subject to a 20% reduction for Mr Barker's contributory negligence while he was self-employed. As Graessers Ltd is insolvent and without any identified insurer, Corus is unable to recover any contribution. The Court of Appeal ((Kay, Keene and Wall LJJ) agreed with the judge on both points: see *Barker v Saint-Gobain Pipelines plc* [2004] EWCA Civ 545; [2005] 3 All ER 661.

4. In the other two appeals, all the exposures to asbestos were in breach of duties owed by employers or occupiers and there was no dispute that the cases fell within the *Fairchild* exception. The only question was whether liability was joint and several or only several. In *Smiths Dock Ltd v Patterson*, Mr Patterson, who died of mesothelioma on 3 May 2002 at the age of 93, had been during his working life regularly exposed to asbestos, in breach of duty, by 4 employers: Smiths Dock Ltd, Vickers Armstrong Ltd, Swan Hunter and Hawthorne Leslie. The latter two companies, both of which are insolvent and whose insurers are also insolvent, accounted between them for 83.22% of the period for which exposure took place. The first two were responsible, in roughly equal shares, for the rest. The question was whether they were nevertheless jointly and severally liable for the whole damage. In *Murray v BS Hydrodynamics Ltd*, Mr Murray, who died of mesothelioma on 19 November 1999 at the age of 75, spent most of his working life in the Tyne shipyards and had been exposed to asbestos, in breach of duty, by a considerable number of employers. The five joined as defendants account for 42.5% of the period of exposure; the others are insolvent and uninsured. Again the question is whether the solvent defendants are jointly and severally liable for the full damage. In both cases the judges and the Court of Appeal followed the decision in *Barker's* case and decided that they were.

The limits of Fairchild

5. My Lords, the opinions of all of your Lordships who heard *Fairchild* expressed concern, in varying degrees, that the new exception should not be allowed to swallow up the rule. It is only natural that, the dyke having been breached, the pressure of a sea of claimants should try to enlarge the gap. Indeed, an attempt to extend the principle of liability for increasing the likelihood of an unfavourable outcome to the whole of medical negligence was narrowly rejected in *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176. But each member of the Committee in *Fairchild* [2003] 1 AC 32 stated the limits of what he thought the case

was deciding in slightly different terms. Thus Lord Bingham of Cornhill at p 40, para 2, formulated the question before the House as follows:

> "If (1) C was employed at different times and for differing periods by both A and B, and (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and (3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and (4) C is found to be suffering from a mesothelioma, and (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together, is C entitled to recover damages against either A or B or against both A and B?

6. To this question he gave, at p 68, para 34, the answer that C was entitled to recover against both A and B, but emphasised that his opinion was "directed to cases in which each of the conditions specified in (1)-(6)…is satisfied and to no other case."

7. Lord Nicholls of Birkenhead, at p 70, para 43, was less prescriptive, saying only that "considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection", that "policy questions will loom large" and that it was "impossible to be more specific".

8. My own opinion, at p 74, para 61, identified five features which were said cumulatively to justify the exception:

> "First, we are dealing with a duty specifically intended to protect employees against being unnecessarily exposed to the risk of (among other things) a particular disease. Secondly, the duty is one intended to create a civil right to

> compensation for injury relevantly connected with its breach. Thirdly, it is established that the greater the exposure to asbestos, the greater the risk of contracting that disease. Fourthly, except in the case in which there has been only one significant exposure to asbestos, medical science cannot prove whose asbestos is more likely than not to have produced the cell mutation which caused the disease. Fifthly, the employee has contracted the disease against which he should have been protected."

9. Lord Hutton, who considered that the exception did not impose liability for exposure which merely increased the likelihood that the claimant would contract the disease but defined the circumstances in which a court would, as a matter of law, infer that the exposure had caused ("materially contributed to") the disease, said, at p 91, para 108, that such an inference should be drawn in:

> "cases such as the present ones where the daimant can prove that the employer's breach of duty materially increased the risk of him contracting a particular disease and the disease occurred, but where in the state of existing medical knowledge he is unable to prove by medical evidence that the breach was a cause of the disease."

10. Finally, my noble and learned friend Lord Rodger of Earlsferry said, at pp 118-119, paras 169-170, that he would:

> "tentatively suggest that certain conditions are necessary, but may not always be sufficient, for applying the principle. All the criteria are satisfied in the present cases…First, the principle is designed to resolve the difficulty that arises where it is inherently impossible for the claimant to prove exactly how his injury was caused. It applies, therefore, where the claimant has proved all that he possibly can, but the causal link could only ever be established by scientific investigation and the current state of the relevant science leaves it uncertain exactly how the injury was caused and, so, who caused it…Secondly, part of the underlying rationale of the principle is that the defendant's wrongdoing has materially increased the risk that the claimant will suffer injury. It is therefore essential not just that the defendant's conduct created a material risk

> of injury to a class of persons but that it actually created a material risk of injury to the claimant himself. Thirdly, it follows that the defendant's conduct must have been capable of causing the claimant's injury. Fourthly, the claimant must prove that his injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing…By contrast, the principle does not apply where the claimant has merely proved that his injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the defendant's wrongful act or omission…Fifthly, this will usually mean that the claimant must prove that 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. A possible example would be where a workman 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. … Sixthly, the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where… the other possible source of the injury is a similar, but lawful, act or omission of the same defendant. I reserve my opinion as to whether the principle applies where the other possible source of injury is a similar but lawful act or omission of someone else or a natural occurrence."

11. The assistance which can be derived from these various formulations is limited. No one expressly adverted to the case in which the claimant was himself responsible for a significant exposure. Lord Bingham's formulation requires that all possible sources of asbestos should have involved breaches of duty to the claimant; Lord Rodger allowed for a non-tortious exposure by a defendant who was also responsible for a tortious exposure but reserved his position on any other non-tortious exposure. The most that can be said of the others is that they did not formulate the issue in terms which excluded the possibility of liability when there had been non-tortious exposures. On the other hand, no one thought that the formulations in *Fairchild* were the last word on the scope of the exception. Lord Bingham said, at p 68, para 34:

> "It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development. Cases seeking to develop the principle must be decided when and as they arise."

Now such cases have arisen.

The reinterpretation of McGhee

12. Given that neither of the issues which I have identified arose or was argued in *Fairchild*, counsel on both sides very sensibly did not place great weight upon a close textual analysis of the way their Lordships formulated the exception. Perhaps more profitable is an examination of what the House said about its earlier decision in *McGhee v National Coal Board* [1973] 1 WLR 1. The facts of this case are too well known to need detailed repetition.

13. The House treated *McGhee* as an application *avant la lettre* of the *Fairchild* exception. This came as a surprise to some commentators (see, for example, Tony Weir, *Making it More Likely v Making it Happen* [2002] CLJ 519) because Lord Bridge of Harwich, speaking for the House in *Wilsher v Essex Area Health Authority* [1988] AC 1074, 1090D, had said that *McGhee* demonstrated no more than a "robust and pragmatic" (ie in the teeth of the evidence) inference from the primary facts. In *Fairchild*, however, only Lord Hutton was willing to accept this interpretation. *McGhee* must therefore be accepted as an approved application of the *Fairchild* exception.

14. For present purposes, the importance of *McGhee* is that it was a case in which there had been two possible causes of the pursuer's dermatitis: the brick dust which adhered to his skin while he was working in the brick kilns and the dust which continued to adhere to his skin while he was on his way home. Both risks had been created by his work for the Coal Board but the exposure while working in the kilns was not alleged to involve any breach of duty. The only breach was the failure to provide showers so that he could wash off the dust before cycling home. So one source of risk was tortious but the other was not. The House decided that the *Fairchild* exception allowed him to recover damages although he could not prove that the persistence of dust after he had left work was more likely to have caused the dermatitis than its original presence on his body while he was working.

15. It was in order to accommodate this case that Lord Rodger in *Fairchild*, at p 119, para 116, accepted that the exception could apply "where, as in *McGhee*, the other possible source of the injury is a similar, but lawful, act or omission of the same defendant." Likewise, Mr Stuart-Smith QC, who appeared for the appellants, did not insist that all sources of risk should have been tortious. He allowed for what he called the "*McGhee* extension" where the risk was created by a similar but lawful act or omission of the same defendant or another tortfeasor.

16. It seems to me, however, as it did to Moses J, that once one accepts that the exception can operate even though not all the potential causes of damage were tortious, there is no logic in requiring that a non-tortious source of risk should have been created by someone who was also a tortfeasor. Suppose, for the sake of an example, that 1962 was the date upon which it became negligent not to take precautions to protect employees against exposure to asbestos. An employee has worked for the same employer between 1955 and 1980. In 2002 he develops mesothelioma. This would plainly fall within *McGhee*; the employee has been subjected to both non-tortious and tortious exposure by the same employer but cannot prove which period of exposure caused his disease. Suppose, however, that in 1962 the employer had sold the business to someone else, so that the original employer was responsible only for the non-tortious exposure and his successor only for the tortious exposure. It would not be very creditable to the law to draw a distinction between these two cases, so that the employee's right of action depended upon whether the 1962 sale had been of the business or the shares in the company which employed him.

17. It should not therefore matter whether the person who caused the non-tortious exposure happened also to have caused a tortious exposure. The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead. For this purpose, 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. On this point I am therefore in agreement with Moses J and the Court of Appeal.

Distinguishing Wilsher

18. If the *Fairchild* exception does not require that all the potential causes of the injury should be tortious, what are the conditions which mark out its limits? For this purpose, it is necessary to examine the way in which the House distinguished *Wilsher v Essex Area Health Authority* [1988] AC 1074. Again, the facts are too familiar to need recitation. It had certain features in common with *McGhee* and *Fairchild*: first, the excessive oxygen which the negligent doctor had allowed to circulate in the baby's blood had increased the likelihood that he would suffer retrolental fibroplasia ("RLF") and might have caused it. Secondly, medical science could not establish whether the excessive oxygen or some other possible source of risk was more likely than not to have been the cause. Thirdly, as in *McGhee* (but not in *Fairchild*) the other sources of risk were not created by any breach of duty. These similarities were sufficient for a majority of the Court of Appeal to hold that the principle in *McGhee* was applicable and the plaintiff entitled to recover. But the decision was reversed by the House of Lords on, as it seems to me, two grounds. The first, which I have already discussed, was that *McGhee* laid down no principle. It only exemplified a robust handling of the facts. This explanation was rejected by a majority of the House in *Fairchild*. The second ground of decision was by way of adoption of a passage in the dissenting judgment of Sir Nicolas Browne-Wilkinson V-C in the Court of Appeal ([1987] QB 730, 779):

> "To apply the principle in *McGhee v National Coal Board* [1973] 1 W.L.R. 1 to the present case would constitute an extension of that principle. In the *McGhee* case there was no doubt that the pursuer's dermatitis was physically caused by brick dust: the only question was whether the continued presence of such brick dust on the pursuer's skin after the time when he should have been provided with a shower caused or materially contributed to the dermatitis which he contracted. There was only one possible agent which could have caused the dermatitis, viz, brick dust, and there was no doubt that the dermatitis from which he suffered was caused by that brick dust.
>
> In the present case the question is different. There are a number of different agents which could have caused the RLF. Excess oxygen was one of them. The defendants failed to take reasonable precautions to prevent one of the possible causative agents (eg excess oxygen) from causing RLF. But no one can tell in this case whether excess oxygen did or did not cause or contribute to the RLF

> suffered by the plaintiff. The plaintiff's RLF may have been caused by some completely different agent or agents, eg hypercarbia, intraventricular haemorrhage, apnoea or patent ductus arteriosus. In addition to oxygen, each of those conditions has been implicated as a possible cause of RLF. This baby suffered from each of those conditions at various times in the first two months of his life. There is no satisfactory evidence that excess oxygen is more likely than any of those other four candidates to have caused RLF in this baby. To my mind, the occurrence of RLF following a failure to take a necessary precaution to prevent excess oxygen causing RLF provides no evidence and raises no presumption that it was excess oxygen rather than one or more of the four other possible agents which caused or contributed to RLF in this case.
>
> The position, to my mind, is wholly different from that in the *McGhee* case [1973] 1 WLR 1, where there was only one candidate (brick dust) which could have caused the dermatitis, and the failure to take a precaution against brick dust causing dermatitis was followed by dermatitis caused by brick dust. In such a case, I can see the common sense, if not the logic, of holding that, in the absence of any other evidence, the failure to take the precaution caused or contributed to the dermatitis. To the extent that certain members of the House of Lords decided the question on inferences from evidence or presumptions, I do not consider that the present case falls within their reasoning. A failure to take preventative measures against one out of five possible causes is no evidence as to which of those five caused the injury."

19. In *Fairchild*, Lord Bingham approved this passage as the reason why *Wilsher* did not fall within the exception. He said, at p 57, para 22:

> "It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage."

20. Similarly Lord Hutton, at p 95, para 115, said that "where there is only one causative agent" the *McGhee* principle could apply and went

on to approve the passage from the judgment of Sir Nicolas Browne-Wilkinson V-C in *Wilsher*.

21. Lord Rodger likewise said, at p 110, para 149, that "the reasoning of the Vice-Chancellor, which the House [in *Wilsher*] adopted, provided a sound and satisfactory basis for distinguishing *McGhee* and for allowing the appeal":

> "Mustill LJ's extension of the approach in *McGhee* to a situation where there were all kinds of other possible causes of the plaintiff's condition, resulted in obvious injustice to the defendants. In particular, there was nothing to show that the risk which the defendants' staff had created—that the plaintiff would develop retrolental fibroplasia because of an unduly highly level of oxygen—had eventuated. That being so, there was no proper basis for applying the principle in *McGhee*."

22. It was only in my own opinion in *Fairchild* that the reasoning of Sir Nicolas Browne-Wilkinson was not accepted. I said, at p 77, para 72:

> "I do not think it is a principled distinction. What if Mr Matthews had been exposed to two different agents—asbestos dust and some other dust—both of which created a material risk of the same cancer and it was equally impossible to say which had caused the fatal cell mutation? I cannot see why this should make a difference."

23. This was a minority opinion and, furthermore, I think it was wrong. The question which I raised about different kinds of dust is not so much about the principle that the causative agent should be the same but about what counts as being the same agent. Lord Rodger identified this point when he said, at pp 118-119, para 170:

> "The claimant must prove that 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. A possible

example would be where a workman 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."

24. If the distinction between *Fairchild* and *Wilsher* does not lie in the fact that in the latter case a number of very different causative agents were in play, I think it would be hard to tell from my *Fairchild* opinion what I thought the distinction was. In my opinion it is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect, as in Lord Rodger's example of the different kinds of dust, but the mechanism by which it caused the damage, whatever it was, must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent.

Apportionment

25. The second issue arising in all three appeals is whether under the *Fairchild* exception a defendant is liable, jointly and severally with any other defendants, for all the damage consequent upon the contraction of mesothelioma by the claimant or whether he is liable only for an aliquot share, apportioned according to the share of the risk created by his breach of duty.

26. Moses J dealt with the point quite shortly. He said that mesothelioma was an "indivisible injury". It was not like asbestosis, which can be partly caused by one period of exposure and made worse by another. Such an injury is divisible, each defendant being responsible for his contribution to the disease. But the likelihood is that mesothelioma is caused by a single exposure. The more you are exposed, the more likely you are to get it, in the same way as the more you spin the roulette wheel, the more likely is a given number to come up.

27. Counsel for the defendant accepted that mesothelioma was an indivisible injury but argued that since liability was being imposed upon a novel basis, the court should adopt a novel solution for the distribution of liability. Moses J said that on authority it was not open to him to do so. This, he said, was:

> "a case of concurrent joint tortfeasors, where the actions of either would be sufficient by themselves to produce the consequence."

28. The judge referred to the well-known statement by Devlin LJ in *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162, 188-189 of the rule which requires that in such a case there should be joint and several liability:

> "Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law."

29. In fact, of course, *Barker* was *not* a case of "concurrent joint tortfeasors, where the actions of either would be sufficient by themselves to produce the consequence." If it had been, there would have been no need to apply the *Fairchild* exception. The evidence did not establish that the actions of either tortfeasor would by itself have been sufficient to cause mesothelioma. They might have had nothing to do with the onset of the disease. The defendants were held liable because they had each created a material risk that the claimant would contract mesothelioma. But Moses J proceeded on the assumption that, for the purposes of deciding what they should be liable for, each should be deemed to have caused the disease.

30. Likewise in the Court of Appeal, Kay LJ said, at para 44, that if "normal principles" were applied, there could be no apportionment "on the basis that this was an indivisible injury". There had to be some "compelling reason" for departing from the normal rule. He could not find any. There might be some hardship to defendants, particularly as time went on and the number of employers remaining solvent and traceable diminished. But joint and several liability was for the protection of the plaintiff, which was also the purpose of the *Fairchild* rule itself. Keene LJ said, at paras 51-52, that he had been attracted by the argument for apportionment but concluded that there was no need to depart from the "long established principle applicable in the case of an indivisible injury." Apportionment could lead to the claimant losing part of his damages if one of the defendants became insolvent.

What is the defendant liable for?

31. My Lords, the reasoning of Moses J and the Court of Appeal would be unanswerable if the House of Lords in *Fairchild* had proceeded upon the fiction that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. The disease is undoubtedly an indivisible injury and the reasoning of Devlin LJ in *Dingle's* case would have been applicable. But only Lord Hutton and Lord Rodger adopted this approach. The other members of the House made it clear that the creation of a material risk of mesothelioma was sufficient for liability. Lord Bingham said, at p 68, para 35:

> "Lord Wilberforce, in one of the passages of his opinion in *McGhee*, wisely deprecated resort to fictions and it seems to me preferable, in the interests of transparency, that the

courts' response to the special problem presented by cases such as these should be stated explicitly."

32. Lord Nicholls of Birkenhead likewise said, at p 71, para 45:

"the court is not, by a process of inference, concluding that the ordinary 'but for' standard of causation is satisfied. Instead, the court is applying a different and less stringent test. It were best if this were recognised openly."

33. And in my own opinion, at p 75, para 65, I said much the same:

"when some members of the House [in *McGhee*] said that in the circumstances there was no distinction between materially increasing the risk of disease and materially contributing to the disease, what I think they meant was that, in the particular circumstances, a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease. I would respectfully prefer not resort to legal fictions and to say that the House treated a material increase in risk as sufficient in the circumstances to satisfy the causal requirements for liability."

34. Lord Hutton, as I have already noted, said that in *Fairchild* the court was required to infer that exposure by the defendant had materially contributed to the disease and Lord Rodger expressed the exception, at p 118, para 168, in the following terms:

"Following the approach in *McGhee* I accordingly hold that, by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants are taken in law to have proved that the defendants materially contributed to their illness."

Creating a risk as damage

35. Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterize the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for the chances of an event happening, in the way that a person who buys a whole book of tickets in a raffle has a separate and larger chance of winning the prize than a person who has bought a single ticket.

36. Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialized) was caused by that particular defendant. It will then be possible to determine the share of the damage which should be attributable to him. The quantification of chances is by no means unusual in the courts. For example, in quantifying the damage caused by an indivisible injury, such as a fractured limb, it may be necessary to quantify the chances of future complications. Sometimes the law treats the loss of a chance of a favourable outcome as compensatable damage in itself. The likelihood that the favourable outcome would have happened must then be quantified: see, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Kitchen v Royal Air Force Association* [1958] 1 WLR 563.

37. These are of course cases in which there is uncertainty as to what will be, or would have been, the outcome of a known event; for example, the consequences of a fractured ankle, a beauty contest or a lawsuit. The present case involves uncertainty as to the cause of a known outcome, namely, the mesothelioma. But in principle I can see no reason why the courts cannot quantify the chances of X having been the cause of Y just as well as the chance of Y being the outcome of X.

38. *Gregg v Scott* [2005] 2 AC 176 was a case of uncertainty about the cause of a known event. Although this point was to some extent obscured by the fact that Mr Gregg was making a claim for loss of expectation of life and was still alive at the time when he brought his action, there was no finding of uncertainty about what the outcome would be. The judge found as a fact that his expectation of life was

substantially less than it would have been if he had not contracted cancer. His loss of expectation of life was therefore damage which he was taken to have suffered at the time when he made his claim, exactly as if he had suffered a broken leg. If he had subsequently died prematurely, that would only have confirmed that the judge's finding about his expectations was correct. 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.

39. Although the House, by a majority, answered this question in the negative, it was not on the ground that there was some conceptual objection to treating the diminution in the chances of a favourable outcome or (putting the same thing in a different way) the increase in the risk of an unfavourable outcome as actionable damage. The reason was that the adoption of such a rule in *Gregg v Scott* would in effect have extended the *Fairchild* exception to all cases of medical negligence, if not beyond, and would have been inconsistent with *Wilsher*, in which the negligent doctor had increased the chances of the baby suffering RLF (or reduced his chances of escaping it). It is plain, at least in my own opinion in the case, at p 197, para 85, that I regarded *Fairchild* as an example of the very rule which the minority wished to apply. But clearly, if that rule had been applied, Mr Gregg would not have recovered the same damages as if he had proved that Dr Scott had caused his loss of expectation of life. He would have recovered a proportion, related to the extent to which Dr Scott had increased the likelihood that he would suffer a premature death.

Fairness

40. So far I have been concerned to demonstrate that characterising the damage as the risk of contracting mesothelioma would be in accordance with the basis upon which liability is imposed and would not be inconsistent with the concept of damage in the law of torts. In the end, however, the important question is whether such a characterisation would be fair. The *Fairchild* exception was created because the alternative of leaving the claimant with no remedy was thought to be

unfair. But does fairness require that he should recover in full from any defendant liable under the exception?

41. Lord Bingham in *Fairchild*, at p 67, para 33, dealt with the competing policy considerations:

> "The crux of cases such as the present, if the appellants' argument is upheld, is that an employer may be held liable for damage he has not caused. The risk is the greater where all the employers potentially liable are not before the court. This is so on the facts of each of the three appeals before the House, and is always likely to be so given the long latency of this condition and the likelihood that some employers potentially liable will have gone out of business or disappeared during that period. It can properly be said to be unjust to impose liability on a party who has not been shown, even on a balance of probabilities, to have caused the damage complained of. On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law."

42. Lord Rodger, at p 112, para 155, also thought that the balance of fairness came down in favour of liability:

> "The principle in *McGhee* involves an element of rough justice, since it is possible that a defendant may be found

> liable when, if science permitted the matter to be clarified completely, it would turn out that the defendant's wrongdoing did not in fact lead to the men's illness. That consideration weighed with the Court of Appeal…It must be faced squarely. The opposing potential injustice to claimants should also be addressed squarely. If defendants are not held liable in such circumstances, then claimants have no claim, even though, similarly, if the matter could be clarified completely, it might turn out that the defendants were indeed the authors of the men's illnesses."

43. In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. 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.

An American analogy

44. Courts in the United States have similarly imposed several liability for the chance that the defendant, among others, was the manufacturer of the drug DES which caused long-delayed injury to the daughters of women who took it during pregnancy. In these cases it was impossible to prove who had been the manufacturer of the particular drug which the mother had ingested (during sales over 24 years, there had been 300 manufacturers in the market) and the courts of California and New York decided to apportion liability according to national market share. That was a way of dealing with the particular form of uncertainty which arose in those cases and it obviously has no application to injury caused by exposure to asbestos. But the similarity lies in the fact that the defendants were held liable for the *chance* that their drug had caused the injury. In *Brown v Superior Court* (1988) 751

P 2d 470, 486 the Supreme Court of California, referring to its earlier judgment in *Sindell v Abbott Laboratories* (1980) 607 P 2d 924, which had created the market share doctrine, decided that the liability of each manufacturer should be several:

> "In creating the market share doctrine, this court attempted to fashion a remedy for persons injured by a drug taken by their mothers a generation ago, making identification of the manufacturer impossible in many cases. We realised that in order to provide relief for an injured DES daughter faced with this dilemma, we would have to allow recovery of damages against some defendants which may not have manufactured the drug that caused the damage.…Each defendant would be held liable for the proportion of the judgment represented by its market share, and its overall liability for injuries caused by DES would approximate the injuries caused by the DES it manufactured. A DES manufacturer found liable under this approach would not be held responsible for injuries caused by another producer of the drug. The opinion acknowledged that only an approximation of a manufacturer's liability could be achieved by this procedure, but underlying our holding was a recognition that such a result was preferable to denying recover altogether to plaintiffs injured by DES.
>
> It is apparent that the imposition of joint liability on defendants in a market share action would be inconsistent with this rationale. Any defendant could be held responsible for the entire judgment even though its market share may have been comparatively insignificant. Liability would in the first instance be measured not by the likelihood of responsibility for the plaintiff's injuries but by the financial ability of a defendant to undertake payment of the entire judgment or a large portion of it."

45. In *Hymowitz v Eli Lilly & Co* (1989) 539 NE 2d 1069 the Court of Appeals of New York adopted a similar rule, Wachtler CJ said, at p 1078:

> "We hold that the liability of DES producers is several only, and should not be inflated when all the participants in the market are not before the court in a particular case. We understand that, as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages.

> However, we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility."

Joint tortfeasors and contributory negligence

46. The effect of the Civil Liability (Contribution) Act 1978 is that if each defendant is treated as having caused the mesothelioma as an indivisible injury and pays the damages in full, he will be able to recover contribution to the extent that he has paid more than his fair share of the responsibility from such other tortfeasors as are traceable and solvent. But he will in effect be a guarantor of the liability of those who are not traceable or solvent and, as time passes, the number of these will grow larger. Experience in the United States, where, for reasons which I need not examine, the DES rule of several liability has not been applied to indivisible injuries caused by asbestos, suggests that liability will progressively be imposed upon parties who may have had a very small share in exposing the claimant to risk but still happen to be traceable and solvent or insured: see Jane Stapleton, "Two causal fictions at the heart of US asbestos doctrine", (2006) 122 LQR 189. That would, as I have said, not be unfair in cases in which they did actually cause the injury. It is however unfair in cases in which there is merely a relatively small chance that they did so.

47. Similarly, if the defendant is deemed to have caused the mesothelioma but the claimant, like Mr Barker, was himself responsible for a significant period of exposure, the court may find that he did not take adequate care for his own safety or was in breach of safety regulations and, as Moses J did in the *Barker* case, reduce the damages for contributory negligence. On the other hand, if liability is several, there is no question of contributory negligence any more than of contribution. A defendant is liable for the risk of disease which he himself has created and not for the risks created by others, whether they are defendants, persons not before the court or the claimant himself.

Quantification

48. Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has

actually been contracted. Mr Stuart-Smith QC, who appeared for Corus, was reluctant to characterise the claim as being for causing a risk of the disease because he did not want to suggest that someone could sue for being exposed to a risk which had not materialised. But in cases which fall within the *Fairchild* exception, that possibility is precluded by the terms of the exception. It applies only when the claimant has contracted the disease against which he should have been protected. And in cases outside the exception, as in *Gregg v Scott* [2005] 2 AC 176, a risk of damage or loss of a chance is not damage upon which an action can be founded. But when the damage is apportioned among the persons responsible for the exposures to asbestos which created the risk, it is known that those exposures were together sufficient to cause the disease. The damages which would have been awarded against a defendant who had actually caused the disease must be apportioned to the defendants according to their contributions to the risk. 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.

Disposal

49. In the *Barker* case I would therefore allow the appeal, but only to the extent of setting aside the award of damages against Corus (UK) Ltd and remitting the case to the High Court to redetermine the damages by reference to the proportion of the risk attributable to the breach of duty by John Summers Ltd. I would likewise allow the appeals in the other two cases and remit them to the County Court to determine the damages by reference to the share of risk attributable to the breaches of duty by the defendants.

LORD SCOTT OF FOSCOTE

My Lords,

50. I have had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Hoffmann and am in complete agreement both with his conclusions and with his reasons for

reaching them. In view, however, of the importance of these appeals for the purpose of further defining the nature and the limits of the principle for which the decision of this House in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 stands as authority, I want to express in my own words my reasons for coming to the same conclusions.

51. It is trite law, learned by all of us in our days as law students, that a remedy in damages for the tort of negligence requires the claimant to establish that the defendant owed him or her a duty of care, that the defendant was in breach of that duty of care and that the breach of duty caused the damage or loss of which the claimant complains. In *Fairchild* three appeals were brought before the House. The critical issue was the same in each. In the *Fairchild* appeal the claimant's widow was able to show that over her deceased husband's working life he had been exposed to asbestos dust by a number of different employers. She was able to satisfy the court that each of these employers had owed him a duty of care and that his exposure at each working place to asbestos dust had constituted a breach by each of these employers successively of the duty that each of them had owed him. The exposure had been a breach of duty because of the risk that exposure to asbestos dust would lead to his contracting mesothelioma, a disease, usually fatal, that may not manifest itself until many years after the exposure. Mr Fairchild did contract the disease and died because of it. It was common ground that the disease had been caused by exposure to asbestos dust at his workplace while working for one or other of his employers. But it was not possible by any known medical science to identify which of the employers had been his employer when he had inhaled the asbestos fibres that in the event had caused the disease. Nor was it possible by any known medical science to eliminate any employer from those who might have been the employer at the relevant time. On the other hand the expert medical evidence did justify the conclusion that his employer at the relevant time must have been one, and may have been more than one, of the employers (see the discussion of the various possibilities in para 7 of the opinion given by Lord Bingham of Cornhill). The situation, therefore, was that Mrs Fairchild was unable to prove on any balance of probabilities which employer was the employer whose breach of duty had caused her husband's mesothelioma. Traditional jurisprudence would have led to the failure of her action against each of them. She would have failed because she could not establish against any employer that the breach of duty that that employer had committed had caused the mesothelioma from which her husband had died.

52. This House remedied the evident unfairness of the situation by expanding the boundaries of tortious liability. That was done by building on the earlier decision of the House in *McGhee v National Coal Board* [1973] 1 WLR 1, a decision carefully analysed by my noble and learned friend Lord Bingham of Cornhill in paras 17 to 21 (inclusive) of his opinion in *Fairchild*. In para 21 Lord Bingham took *McGhee* as authority for the proposition that, on the facts of that case, no distinction was to be drawn between making a material contribution to causing the disease that the employee had contracted and materially increasing the risk of his contracting it. Applying that proposition to *Fairchild* facts Lord Bingham, at p 68, para 34, concluded that it was

> "… just and in accordance with commonsense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him."

The other members of the House all reached the same conclusion and, with the exception, perhaps, of Lord Hutton, for essentially the same reasons. Lord Hutton took the view that an inference of actual causative effect should be drawn where it could be shown that the breach of duty had materially increased the risk of the victim contracting the disease that he had eventually contracted (see para 108). But the other members of the House were prepared to impose liability in cases where Lord Bingham's six conditions (set out by Lord Hoffmann in para 5 of this opinion in the present case) were met, not on the basis of an inference of actual causation but on the basis that the causing of a material increase in risk would suffice (see Lord Nicholls of Birkenhead, paras 41 and 45, Lord Hoffmann, paras 47 and 67 and Lord Rodger of Earlsferry, para 168).

53. It is essential, in my opinion, to an appreciation of the effect of the *Fairchild* decision to keep firmly in mind that liability was not imposed on any of the defendant employers on the ground that the employer's breach of duty *had* caused the mesothelioma that its former employee had contracted. That causative link had not been proved against any of them. It was imposed because each, by its breach of duty, had materially increased the risk that the employee would contract mesothelioma. That, coupled with the fact that mesothelioma *had* been contracted and that it was not possible to tell when the fatal inhalation had taken place, justified, in their Lordships' view, the imposition of liability on each employer who had contributed to the risk.

54. It was recognised in *Fairchild* that the principle formulated for the purposes of the decision in that case, a development of the proposition on which the decision in *McGhee* had been based, might require further refinement when other cases came up for decision. Lord Bingham said, at p 68, para 34, that

> "[It] would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development."

and that

> "Cases seeking to develop the principle must be decided when and as they arise."

Gregg v Scott [2005] 2 AC 176 was such a case and so are the cases now before the House.

55. *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 question was whether the increase in risk could 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. Lord Nicholls of Birkenhead and Lord Hope of Craighead dissented but neither of them regarded *Fairchild* as providing any assistance to the claimant. Lord Nicholls, who would have allowed a "diminution in prospects" claim, said, at p 191, para 51, that

> "Application of the 'diminution in prospects' approach in this type of case does not impinge upon the *Fairchild* decision."

And Lord Hope did not mention *Fairchild* at all.

56. Lord Hoffmann, in *Gregg v Scott* [2005] 2 AC 176, expressly restricted the *Fairchild* decision to cases where there was a causation difficulty in connecting the breach of duty to the eventual outcome. He said, at pp 195-196, para 78, that

> "The House of Lords accepted that the [mesothelioma] had a determinate cause in one fibre or other but constructed a special rule imposing liability for conduct which only increased the chances of the employee contracting the disease. That rule was restrictively defined in terms which make it inapplicable in this case."

He said, at p 196, para 79:

> "Everything has a determinate cause, even if we do not know what it is. The blood starved hip joint in *Hotson's* case, the blindness in *Wilsher's* case, the mesothelioma in *Fairchild's* case; each had its cause and it was for the plaintiff to prove that it was an act or omission for which the defendant was responsible. The narrow terms of the exception made to this principle in *Fairchild's* case only serves to emphasise the strength of the rule."

Lord Phillips of Worth Matravers MR, too, referred to *Fairchild* as an exception to the normal requirement of proof of a causal connection between the breach of duty and the injury (see para 174).

57. My Lords, the importance of *Gregg v Scott* for present purposes is that *Fairchild* was treated as an exception to the normal requirement of a proved causative link between the breach of duty and the damage for which tortious damages are claimed. *Fairchild* is explained as a pragmatic judicial response to what would otherwise have been an unjust and unsatisfactory denial of a remedy to a mesothelioma sufferer

whose disease had been caused by one or other of a number of wrongdoers (in the sense of persons shown to have been in breach of duty) each of whose breach of duty may have caused the disease, and could not be shown not to have done so, but could not be shown to have done so. *Fairchild* cannot, therefore, be taken to have established an overarching principle in the law of tort. Its narrow scope was, in my respectful opinion, rightly recognised by Lord Hoffmann in his comments in *Gregg v Scott* that I have cited.

58. The present appeals ask the following questions about the scope of the *Fairchild* decision:

(1) Does the *Fairchild* principle apply where the period of the victim's exposure to the injurious agent that has caused the disease has been in part during his employment by one or more employers and in part during a period of self-employment or, perhaps, while carrying out domestic chores such as demolishing outbuildings with asbestos roofs?

(2) Does the *Fairchild* principle apply where the period of the victim's exposure has been in part during his employment by an employer who has not been negligent?

(3) If the *Fairchild* principle does apply notwithstanding that some of the periods of exposure have been periods when the victim has not been employed by a negligent employer, what is the effect, if any, of those periods of exposure on the quantum of damages for which the negligent employers are liable?

(4) There is a fourth question, not thrown up by the facts of any of the cases now before the House, but almost inevitably prompted by the previous three questions, namely, does the *Fairchild* principle apply only where exposure to a single injurious agent has caused the risk of the disease that the victim has eventually contracted or can it also apply where the victim has been exposed to more than one injurious agent each of which has subjected the victim to a risk of the outcome and it cannot be ascertained which agent has been responsible?

59. The answers to the first two questions depend, in my opinion, on understanding that the *Fairchild* defendants were not held liable for causing the eventual damage. In relation to none of them was it proved, nor could it be proved, that that defendant's breach of duty had caused

the damage, and thereby brought about the fatal outcome. A defendant in a *Fairchild* type of case is held liable for having materially contributed to the risk of the eventual outcome. That this is so is, to my mind, apparent from the opinions delivered in *Fairchild* [2003] 1 AC 32 and is confirmed by Lord Hoffmann's references to *Fairchild* in *Gregg v Scott* [2005] 2 AC 176. Accordingly, in my opinion, it can make no logical difference to the liability of a *Fairchild* defendant, save as to quantum (a matter addressed by the third question), whether there are periods of exposure to asbestos dust, or to whatever the potentially injurious agent may be, during which the victim is not in the employment of a negligent employer. Liability is imposed by *Fairchild* on a negligent employer because that employer has, by allowing the victim to be exposed to the injurious agent in question, materially increased the risk that the employee will contract the disease or be afflicted by the condition attributable to that injurious agent. The fact that there may have been periods of exposure during which the victim was employed by an employer who had not been in breach of duty, or during which the victim had been self-employed, or during which the victim had not been working for reward in any capacity, does not detract from the exposure for which the negligent employers had been responsible. My answers to questions (1) and (2) would, therefore, in each case be 'yes'.

60. That brings me to the third question. It is a well established principle in the law of tort that if more than one tortfeasor causes the damage of which complaint is made, and if it is not possible to attribute specific parts of the damage to a specific tortfeasor or tortfeasors in exoneration, as to those parts of the damage, of the other tortfeasors, the tortfeasors are jointly and severally liable for the whole damage. A pedestrian on the pavement injured by a collision between two cars both of whose drivers were driving negligently can hold either driver liable for his or her injuries. The apportionment of liability between the two negligent drivers is no concern of the victim.

61. If the *Fairchild* principle were based upon the fiction that each *Fairchild* defendant had actually caused the eventual outcome, the analogy with tortfeasors each of whom had contributed to an indivisible outcome would be very close. But *Fairchild* liability is not based on that fiction. It is based on the fact that each negligent defendant has wrongfully subjected the victim to a period of exposure to an injurious agent and has thereby, during that period, subjected the victim to a material risk that he or she will contract the disease associated with that agent. Each successive period of exposure has subjected the victim to a further degree of risk. If, in the event, the victim does not contract the

disease, no claim can be made for the trauma of being subjected to the risk (see *Gregg v Scott* [2005] 2 AC 176). But if the victim does contract the disease the risk has materialised. If the degree of risk associated with each period of exposure, whether under successive employers or during self-employment or while engaged in domestic tasks, were expressed in percentage terms, the sum of the percentages, once the disease had been contracted, would total 100 per cent. But the extent of the risk for which each negligent employer was responsible and on the basis of which that employer was to be held liable would be independent of the extent of the risk attributable to the periods of exposure for which others were responsible. The relationship between the various negligent employers seems to me much more akin to the relationship between tortfeasors each of whom has, independently of the others, caused an identifiable part of the damage of which the victim complains. The joint and several liability of tortfeasors is based upon a finding that the breach of duty of each has been a cause of the indivisible damage for which redress is sought. No such finding can be made in a *Fairchild* type of case and the logic of imposing joint and several liability on *Fairchild* defendants is, in my opinion, absent. Moreover, *Fairchild* constitutes an exception, perhaps an anomalous one, to the causation principles of tortious liability. It should not, therefore, be found to be surprising if consequential adjustments to other principles of tortious liability become necessary.

62. I would, therefore, hold that the extent of the liability of each defendant in a *Fairchild* type of case, where it cannot be shown which defendant's breach of duty caused the damage but where each defendant, in breach of duty, has exposed the claimant to a significant risk of the eventual damage, should be liability commensurate with the degree of risk for which that defendant was responsible. Ascertainment of the degree of risk would be an issue of fact to be determined by the trial judge. The issue would depend upon the duration of the exposure for which each negligent defendant was responsible compared with the total duration of the claimant's exposure to the injurious agent in question. It might depend also on the intensity of the exposure for which the defendant was responsible compared with the intensity of the exposure for which the defendant was not responsible. The exact type of agent might be a relevant factor in assessing the degree of risk. I have in mind that there are different types of asbestos and some might create a greater risk than others. Other factors relevant to the degree of risk might come into the picture as well. The assessment of the percentage risk for which an individual defendant was responsible, and therefore the percentage of the total damage for which that defendant could be held liable, would, as I have said, be an issue of fact to be

decided on the evidence in each case. I would answer question (3) accordingly.

63. If this answer to question (3) is adopted, no problems about apportionment of damages between different defendants would arise. Each defendant would be responsible only for his proportion of the total damages that would have been awarded if the whole period of exposure had occurred during the claimant's employment by a single defendant. Any element of contributory negligence during the period of exposure for which a defendant was responsible would go to reduce the damages payment by that defendant. The approach to damages payable on a Fatal Accidents Act 1976 claim would be no different.

64. That brings me to the fourth question. Everything I have said in regard to the previous three questions has been on the footing that only a single injurious agent was involved (and as at present advised I would regard different types of asbestos as constituting a single agent). If, however, the case were not one of an eventual outcome produced by a single agent but of an outcome that might have been produced by one of a number of different agents and where the guilty agent could not be identified eg cases like *Wilsher v Essex Area Health Authority* [1988] AC 1074 or *Hotson v East Berkshire Area Health Authority* [1987] AC 750, I would not regard the *Fairchild* principle as applicable. *Fairchild* did not establish an overarching principle. It established a narrow exception to the causation requirements applicable to single agent cases. I would not extend the exception to cover multi-agent cases as well. One reason why I would not do so is that the identification of the proportion of risk of the eventual outcome attributable to each particular agent would, to my mind, be well nigh impossible and highly artificial. At least in the asbestos cases it is known that asbestos was responsible for the eventual outcome and that the negligent defendants are to be held liable for subjecting the victim to a risk that has materialised.

65. I would, for these reasons and in agreement with those of Lord Hoffmann, deal with these appeals in the manner he has suggested in paragraph 49 of his opinion.

LORD RODGER OF EARLSFERRY

My Lords,

66. In these appeals the House is called on to decide two issues arising out of *Fairchild v Glenhaven Funerals Ltd* [2003] 1 AC 32. As argued at the hearing, the first relates to the prerequisites for the application of the exceptional rule on causation enunciated in that decision ("the *Fairchild* exception"), while the second, and by far the more important, relates to the nature of a defendant's liability where the exception applies.

67. As my noble and learned friend, Lord Hoffmann, pointed out early in the hearing, the answer to the first issue may well depend, in part at least, on the answer to the second. This is because, in *Fairchild*, when deciding whether or not to adopt an exceptional approach to causation modelled on *McGhee v National Coal Board* [1973] 1 WLR 1, the House was concerned to weigh the potential injustices of either course to the defendants and plaintiffs respectively. The House held that, in the circumstances of that case, there would be greater injustice in sticking to the usual test and giving no remedy to the plaintiffs than in applying the exceptional rule and holding the defendants liable. Counsel for the *Fairchild* defendants did not dispute that, if they were found liable on that basis, their liability would be joint and several (in solidum). In the present case, however, the second issue is whether that is correct or whether, rather, the defendants should be held severally liable to the claimants in proportion to their responsibility for creating the risk to the victims. In order to be in a position to consider the potential injustices to the parties in applying the *Fairchild* exception to a new situation, the court must know the nature of the defendants' liability where the exception applies. I therefore begin with the issue of the apportionment of liability.

Apportionment of Liability

68. Lord Hoffmann describes the issue as being whether the damage caused by a defendant in a *Fairchild* case is the creation of a risk that the claimant will contract the disease so that each defendant will be liable only for his aliquot contribution to that total risk which has materialised. But, at the hearing, Mr Stuart-Smith QC, on behalf of Corus UK Ltd ("Corus") was at very considerable pains to say that he

was *not* advancing an argument along those lines. On the contrary, he accepted that in a *Fairchild* case the defendant was liable for causing the mesothelioma, not for causing the risk of developing mesothelioma: the damage was the mesothelioma, not the risk of developing mesothelioma. He eschewed any suggestion that the "gist" of the tort was creating the risk of harm rather than causing harm to the victim. The approach now adopted by your Lordships is, accordingly, not one advocated by the appellants.

69. Counsel simply argued that, since the House had adjusted the law of causation to allow for difficulties of proof in this type of situation, equally it should be prepared to make a corresponding adjustment by dividing up the liability for the victim's death among the defendants. Leaving other objections aside for the moment, counsel's approach runs into an immovable roadblock. By any reckoning, death brought on by mesothelioma is indivisible, indeed the classically indivisible injury. Viscount Dunedin once said scornfully of a hypothetical case where two dogs had worried a sheep to death, "Would we then have to hold that each dog had half killed the sheep…?": *Arneil v Paterson* [1931] AC 560, 565. It is similarly unthinkable that the law would hold that, vis à vis the claimant, defendant A one-fifth killed the victim of mesothelioma, defendant B one-quarter killed him, defendant C forty per cent killed him and so forth.

70. Lord Hoffmann acknowledges that this objection would be unanswerable if in *Fairchild* the House had proceeded upon "the fiction" that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. But, on his analysis, the majority of the House proceeded on the simple basis that the creation of a material risk of mesothelioma was sufficient for liability. Hence the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. Since chances are infinitely divisible, the roadblock of the indivisibility of death is removed and the way lies open to attributing liability according to the relative degree of any defendant's contribution to the chance of the disease being contracted. All that remains is for the first instance judges to redetermine the damages by reference to the share of the risk attributable to the breaches of duty by the relevant defendants.

71. My Lords, I accept, of course, that the problem in *Fairchild* can be analysed as Lord Hoffmann now proposes and, indeed, had already suggested in *Gregg v Scott* [2005] 2 AC 176. But that is quite different

from saying that the House actually chose to analyse it in that way. By adopting the proposed analysis your Lordships are not so much reinterpreting as rewriting the key decisions in *McGhee* [1973] 1 WLR 1 and *Fairchild* [2003] 1 AC 32.

72. To see what these cases actually decided, it is first necessary to go back for a moment to *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. I need not repeat the analysis which I made of this decision in *Fairchild*, [2003] 1 AC 32, 98–100, paras 127–129. Lord Reid held that the pursuer, who had been exposed to dust from two sources (one being "innocent"), did not require to prove that his pneumoconiosis had been caused solely by the dust which the defenders had negligently failed to intercept when it came from the swing grinders. His Lordship said, [1956] AC 613, 621:

> "It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material."

Bonnington Castings soon became established as the classic authority for the proposition that, to succeed and recover damages in full against any defendant, a plaintiff need prove no more than that the defendant's wrongful act materially contributed to his injury. Since anything above de minimis will do, this means that a claimant can succeed even though the injury would have occurred without the defendant's act. The "but for" or sine qua non test of causation gives way to this considerably more generous test based on the defendant's material contribution to the victim's injury.

73. The decision in *Bonnington Castings* was invoked in *McGhee v National Coal Board* [1973] 1 WLR 1. The pursuer had developed dermatitis as a result of exposure to brick dust in a kiln in the course of his work with the defenders. At the end of his shift he could not wash thoroughly and had to cycle home with dust on his skin because the Board had not provided showers. The Lord Ordinary rejected the

allegations that the exposure to dust in the kilns had been delictual, but accepted that the defenders had been at fault in failing to provide showers. In that situation it was impossible for medical science to tell whether the dermatitis had been caused by the effects of the initial lawful exposure rather than by the effects of the dust operating on the pursuer's skin during the period when, because of the Board's failure to provide showers, he had to cycle home without first being able to wash thoroughly. The medical evidence showed, however, that the longer the pursuer's skin was exposed to injury by abrasion by the dust, the greater was his chance of developing dermatitis. The House held that, since the failure to provide the showers had materially increased the risk of the pursuer developing dermatitis, the Board was liable.

74. Mr McGhee succeeded on his common law case. In terms of his averments on record he had offered to prove that his "dermatitis was caused by the fault and negligence of the defenders" and his first plea-in-law, in standard form, was that, "having sustained loss, injury and damage through the fault and negligence of the defenders, as condescended upon, [the pursuer] is entitled to reparation therefor." There was no mention of the pursuer suffering damage in the form of a risk that he would develop dermatitis. His pleadings remained unamended when the House allowed his appeal and found the Board liable. It follows that the defenders can have been found liable only on the basis that Mr McGhee had proved that *his dermatitis* had been caused by their fault and negligence.

75. This is indeed what Lord Reid held when, invoking the approach in *Bonnington Castings*, he said, [1973] 1 WLR 1, 5B: "From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury." Similarly, Lord Simon of Glaisdale said, at p 8E, that in his view "a failure to take steps which would bring about a material reduction of the risk involves, in this type of case, a substantial contribution to the injury." Lord Salmon too proceeded, at pp 11H–12A, on the basis that "In the circumstances of the present case it seems to me unrealistic and contrary to ordinary common sense to hold that the negligence which materially increased the risk of injury did not materially contribute to causing the injury." He concluded, at pp 12H–13A:

> "In the circumstances of the present case, the possibility of a distinction existing between (a) having materially

> increased the risk of contracting the disease, and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the common law."

In *Fairchild*, [2003] 1 AC 32, 55F, para 21, Lord Bingham of Cornhill summarised the position by saying that Lord Reid, Lord Simon and Lord Salmon had expressly held that "in the circumstances no distinction was to be drawn between making a material contribution to causing the disease and materially increasing the risk of the pursuer contracting it."

76. Lord Wilberforce, [1973] 1 WLR 1, 7E-F, wrapped up his conclusion in less distinct language, but nevertheless seems to be describing a similar approach:

> "But I find in the cases quoted an analogy which suggests the conclusion that, in the absence of proof that the culpable addition had, in the result, no effect, the employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default."

By "the cases quoted" Lord Wilberforce must have been referring to *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, *Nicholson v Atlas Steel Foundry and Engineering Co Ltd* [1957] 1 WLR 613 and *Gardiner v Motherwell Machinery and Scrap Co Ltd* [1961] 1 WLR 1424. In all of them the pursuer was held to have proved that the wrongful act of the defenders in exposing him to conditions liable to injure him had materially contributed to his injuries and so had "caused" them.

77. The radical step which this House took in *McGhee* was accordingly to hold that, in the particular circumstances, by proving that the defenders had materially increased the risk of injury, the pursuer had proved that they had materially contributed to his injury.

78. In *Fairchild*, [2003] 1 AC 32, 75H, para 65, Lord Hoffmann commented on the approach of the members of the House in *McGhee*:

> "So when some members of the House said that in the circumstances there was no distinction between materially increasing the risk of disease and materially contributing to the disease, what I think they meant was that, in the particular circumstances, a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease. I would respectfully prefer not to resort to legal fictions and to say that the House treated a material increase in risk as sufficient in the circumstances to satisfy the causal requirements for liability."

The passage begins by acknowledging that in *McGhee* the members of the House did actually say that in the circumstances there was no distinction between materially increasing the risk of disease and materially contributing to the disease. Lord Hoffmann then goes on to explain that, in his view, their Lordships meant that in those circumstances a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease. I see no reason to quarrel with that. He then respectfully declines to resort to legal fictions, preferring to say that the House treated a material increase in risk as sufficient in the circumstances to satisfy the causal requirements for liability. This is more difficult if it means resorting to a fiction that the members of the House did not link proof that the defenders had materially increased the risk of injury to the pursuer with proof that the defenders had materially contributed to his injury. I would respectfully prefer not to resort to such legal fictions but to recognise what their Lordships actually said and did in *McGhee* [1973] 1 WLR 1.

79. Before looking at the speeches in *Fairchild*, it is likewise worth recalling what the three plaintiffs had to prove. In two of the cases the victims of mesothelioma were dead and the actions were brought by their widows under the Fatal Accidents Act 1976. In terms of section 1(1) defendants are liable to widows "if death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof…." Therefore, Mrs Fairchild and Mrs Fox had to prove that their husbands' deaths had been caused by the

defendants' wrongful act towards their husbands. In her statement of claim Mrs Fox, for example, began her Particulars of Injury by saying that the deceased suffered a malignant mesothelioma of the pleura and she ended them by referring to his lingering and exquisitely painful death. Similarly, Mr Matthews gave as the Particulars of Injury: "Malignant mesothelioma". His claim was brought at common law rather than under statute, but he too set out to prove that his mesothelioma had been caused by the defendants' wrongful act. In each case, proving that the defendants' wrongful act had materially contributed to the victims developing mesothelioma would have been sufficient, of course. In none of the cases did the plaintiff claim damages for the creation of a risk or chance that the victim would develop mesothelioma.

80. Lord Hoffmann suggests that in *Fairchild* the majority did not proceed on the basis that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. That may well be true of his own speech, given the interpretation which he had sought to place on the speeches in *McGhee*. In my view, however, it is not true of the speech of Lord Bingham who referred to six conditions and said, [2003] 1 AC 32, 68B, para 34:

> "Where those conditions are satisfied, it seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him."

That is an exact transposition of the reasoning of Lord Reid to the circumstances of *Fairchild.* And Lord Bingham is indeed saying that in these circumstances someone who exposes the victim to a risk to which he should not have been exposed is to be treated as making a material contribution to the victim's contraction of the condition against which it was his duty to protect him. It was on this basis that Lord Bingham concluded that the appeals should be allowed – because the plaintiffs had proved that the defendants had caused the men's death or injury. This is scarcely surprising since the plaintiffs' appeals were argued on exactly that basis.

81. Lord Nicholls of Birkenhead puts the point somewhat differently, at p 70B-C, para 42:

> "So long as it was not insignificant, each employer's wrongful exposure of its employee to asbestos dust, and, hence, to the risk of contracting mesothelioma, should be regarded by the law as a sufficient degree of causal connection. This is sufficient to justify requiring the employer to assume responsibility for causing or materially contributing to the onset of the mesothelioma when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established."

For Lord Nicholls, proof that an employer wrongfully exposed his employee to the risk of contracting mesothelioma should be regarded as a sufficient degree of causal connexion to justify requiring the employer to assume responsibility for causing or materially contributing to the onset of mesothelioma. He does not go on to adopt the formula of equating materially contributing to the risk of the illness with materially contributing to the contraction of the illness. On the other hand, there is nothing to suggest that he considered that the damage which the defendants should be regarded as having caused was the creation of a risk that the victim would develop mesothelioma.

82. Lord Hutton adopted an entirely traditional analysis, but felt able to infer, as a matter of fact, that the defendants had materially contributed to the victims' mesothelioma. For my own part, in the passage from para 168 of my speech which Lord Hoffmann quotes, I was doing nothing more than applying the approach in *McGhee* and, quite openly, making the connexion between proof that the defendants had increased the risk of the victims developing mesothelioma and proof that the defendants had materially contributed to their illness. Naïvely - as your Lordships' speeches must now convince me - I had thought that, whether under the Fatal Accidents Act 1976 or at common law, this was a necessary step in the chain of reasoning if the appeals were to be allowed on the basis of *McGhee*.

83. Given the terms of Lord Bingham's speech, with which I agreed, and given the terms of my own speech, it respectfully appears to me to be impossible to say that in *Fairchild* the majority of the House decided the case simply on the basis that the creation of a material risk of

mesothelioma "would suffice" for liability. That is to ignore the further stage in the reasoning – derived fair and square from the reasoning of the majority in *McGhee* – that in cases of this kind there is, in Lord Bingham's words, at p 55F-G, para 21, "no distinction" between making a material contribution to causing the disease and materially increasing the risk of the victim contracting it. When that stage was included, by proving that the defendants had materially increased the risk of the victim contracting mesothelioma, the plaintiffs had proved that the defendants had made a material contribution to causing the disease and were accordingly liable for causing it. Reading the speeches as though they were saying something different is unlikely to make an already difficult topic any easier.

84. In para 36 of his speech today Lord Hoffmann says:

> "consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance."

That may well be so if the dominant aim is to secure internal consistency between the basis of liability and the nature of the damage. But the reasoning in *McGhee* [1973] 1 WLR 1 and *Fairchild* [2003] 1 AC 32 indicates that the House was primarily concerned to maintain a consistency of approach with the main body of law on personal injuries. Under that law victims recover damages because the defendants' wrongful act has materially contributed to them becoming ill, not because it has created a risk that they will become ill. By reasoning as they did, the members of the House minimised the disruption to this long-settled aspect of the law.

85. The new analysis which the House is adopting will tend to maximise the inconsistencies in the law by turning the *Fairchild* exception into an enclave where a number of rules apply which have been rejected for use elsewhere in the law of personal injuries. Inside the enclave victims recover damages for suffering the increased risk of developing mesothelioma (or suffering the loss of a chance of not developing mesothelioma) while, just outside, patients cannot recover damages for suffering the increased risk of an unfavourable outcome to medical treatment (or suffering the loss of a chance of a favourable outcome to medical treatment). On the other hand, if such a claim had

been recognised outside the enclave, the patient would have been entitled to recover damages for the increased likelihood that he would suffer a premature death, whereas inside the enclave a victim who suffers an increased risk of developing mesothelioma cannot recover damages unless he actually develops it. Inside the enclave claimants whose husbands die of mesothelioma receive only, say, 60% of their damages if the court considers that there is a 60% chance that the defendant caused the death and no other wrongdoer is solvent or insured. Outside the enclave, claimants whose husbands are killed in an accident for which the only solvent defendant is, say, 5% to blame recover the whole of their damages from that defendant.

86. Why, then, is the House spontaneously embarking upon this adventure of redefining the nature of the damage suffered by the victims? The majority are not just on a mission to tidy up the reasoning in *McGhee* and *Fairchild.* Their aim is to open the way to making each defendant severally liable for a share of the damages, rather than liable in solidum for the whole of the damages. This is said to be a preferable, fairer, solution when the defendants are found liable for creating the risk of illness rather than for causing it.

87. Certainly, as a matter of legal logic, it would be open to the House to hold that since on the reasoning in *McGhee* and *Fairchild* the defendants are ultimately held liable for materially contributing to the victims' mesothelioma, they should be held liable in solidum like any other concurrent tortfeasors whose separate wrongful acts combine to produce indivisible harm. That was indeed one of the main submissions for the claimants - and I would accept it. Mr Stuart-Smith countered by arguing that, since the *Fairchild* exception involved adjusting the rules on causation, so equally the House should be prepared to adjust the rules on liability and apportion it among the defendants. That would be a powerful argument indeed if there were actually any logical or otherwise compelling connexion between the *Fairchild* exception and the introduction of several liablity which the defendants seek. In truth, there is not.

88. So long as all the defendants and possible defendants are solvent or insured, the application of liability in solidum causes them no problems and makes life simple for the claimant. A defendant or insurer who pays the claimant's damages can recover the appropriate contribution from the other defendants and their insurers under the Civil Liability (Contribution) Act 1978. In asbestosis cases insurers have been operating such a system among themselves for decades, with

contributions being based on the plaintiff or pursuer's periods of work with various employers. And, following the judgment of the House in *Fairchild* which, in the absence of argument, provided for joint and several liability, insurers introduced a somewhat similar scheme for mesothelioma cases in England and Wales in their *Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims*.

89. As Mr Gore QC rightly emphasised on behalf of Mr Patterson, the real reason why the defendants want to get rid of liability in solidum is that quite a number of the potential defendants and their insurers in the field of mesothelioma claims are insolvent. So, if held liable in solidum, solvent defendants or, more particularly, their insurers will often find that they have to pay the whole of the claimant's damages without in fact being able to obtain a contribution from the other wrongdoers or their insurers, if any. So their only hope of minimising the amount they have to pay out by way of damages is to have liability to the claimant apportioned among the wrongdoers. Therefore they are asking for the introduction of apportionment because of this entirely contingent aspect of the situation regarding mesothelioma claims. If *Fairchild*-exception claims had first arisen in an area where the wrongdoers and their insurers were in good financial heart, matters could have been resolved satisfactorily for all concerned on the basis of liability in solidum and the use of the Civil Liability (Contribution) Act 1978.

90. Of course, it may seem hard if a defendant is held liable in solidum even though all that can be shown is that he made a material contribution to the risk that the victim would develop mesothelioma. But it is also hard – and settled law - that a defendant is held liable in solidum even though all that can be shown is that he made a material, say 5%, contribution to the claimant's indivisible injury. That is a form of rough justice which the law has not hitherto sought to smooth, preferring instead, as a matter of policy, to place the risk of the insolvency of a wrongdoer or his insurer on the other wrongdoers and their insurers. Now the House is deciding that, in this particular enclave of the law, the risk of the insolvency of a wrongdoer or his insurer is to bypass the other wrongdoers and their insurers and to be shouldered entirely by the innocent claimant. As a result, claimants will often end up with only a small proportion of the damages which would normally be payable for their loss. The desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me.

91. Nor do I find useful guidance for the position in this country in the examples of several liability from the United States. When introducing comparative fault legislation – similar to the Law Reform (Contributory Negligence) Act 1945 - some states have thought it necessary or desirable to depart from a system of joint and several liability. Parliament made no such change in this country. Jury awards of punitive damages and the multitude of suits by persons suffering no symptoms of mesothelioma are special factors which help to explain why insurers in the United States have been engulfed by a crisis for which various forms of several liability may afford some relief. I am prepared to assume that insurers in this country are also faced with problems arising out of the post-*Fairchild* mesothelioma awards, even though, quite properly, the House was given no specific information about the scale of these difficulties. That information would, of course, be very relevant if Parliament were being asked to legislate to assist the insurers at the expense of the victims of mesothelioma and their relatives. In the meantime, however, I would adhere to the usual rule of liability in solidum which applies generally to defendants who are held to have made a material contribution to indivisible injuries such as mesothelioma.

Application of Fairchild

92. This issue arises only in the case concerning the death of Mr Barker. As Lord Hoffmann has explained, on the facts found by Moses J, Mr Barker was exposed to asbestos dust during three periods. The first was when he worked for Graessers Ltd for six weeks in 1958. The judge found that the company were at fault, since they should have known of the risks and should have taken precautions. The second period was between April and October 1962, while he was working for Corus. Corus accept that they were at fault. The third was during a period when he was a self-employed plasterer between 1968 and 1975. In particular, the judge found that he was exposed to asbestos dust on three occasions in about 1974 and 1975: when he cut asbestos sheets at the builders Neville Wood, when he did the same for other builders, Hedley Greenslade, and when he worked for Roger Williams on pipes lagged with asbestos at Courtauld's.

93. Before Moses J and the Court of Appeal, counsel for Corus argued that the fact that Mr Barker was self-employed when exposed to the dust was sufficient to take the case outside the scope of the decision in *Fairchild*, which should not be construed as applying to cases where the deceased may have inhaled asbestos dust without a breach of duty by

anyone. The judge rejected that argument, as did the Court of Appeal. They held that justice was best served by applying the *Fairchild* exception but reducing the damages to be awarded by 20% to reflect Mr Barker's failure to take proper precautions for his own safety in 1974 and 1975.

94. In the hearing before the House Mr Stuart-Smith for Corus emphasised that the key factor was not whether a victim had been self-employed when an exposure occurred but whether there had been a period when he, and no-one else, had been responsible for his exposure to asbestos dust. For instance, duties under the Asbestos Regulations 1969 (SI 1969/690) could be owed to self-employed persons hired to carry out a particular process, just as much as to an employee. In that situation the *Fairchild* principle would apply in full measure. If, on the other hand, for example, someone pulled down an old shed in his garden which had been lined with asbestos boards, he and he alone might be responsible for his exposure to the asbestos dust and, if the exposure could be regarded as material, the *Fairchild* exception would not apply.

95. There is no evidence about the exact nature of Mr Barker's work on the three occasions in 1974 and 1975. Although the point was not explored before the House, it seems at least possible that, if Mr Barker was at fault in failing to take the necessary precautions, as the judge found, those for whom he cut asbestos sheets or worked on asbestos-lagged pipes may also have been at fault under the Asbestos Regulations 1969. In that eventuality, the proper analysis would be that his exposure was partly due to the fault of those for whom he worked and partly due to his own contributory fault. That would bring the case squarely within the scope of *Fairchild*, but some allowance would have to be made for the deceased's fault in relation to those incidents.

96. I therefore respectfully share the doubts of my noble and learned friend, Lord Walker of Gestingthorpe, about the claimant's concession. Assuming, however - as is conceded - that Mr Barker was solely at fault, how does that affect the position? Discussion ranged fairly widely. Since the decision in *Fairchild* had been based on *McGhee*, it was, nevertheless, common ground that *Fairchild* must apply in cases where the claimant has been exposed to asbestos by a number of employers or occupiers, all of whom were at fault, but one or more of whom may also have exposed him lawfully to asbestos dust. I had suggested as much in *Fairchild*, [2003] 1 AC 32, 119, para 170.

97. Starting from "the *McGhee* extension", counsel considered whether *Fairchild* would apply where one or more of the sources of exposure to asbestos dust had been lawful but unconnected with any wrongdoer. For instance, the victim had been employed for a period before the dangers of exposure to asbestos dust should have been known in the industry and there had been no fault on the part of the employer. Having reserved my opinion on the point in *Fairchild*, I would now hold that the rule should apply in that situation.

98. The *Fairchild* problem arises because the victim has been exposed to asbestos dust while working for a number of employers and, in the present state of scientific knowledge, it is impossible to say which employer was responsible for the fibre which led to the mesothelioma. So, if the usual test for proof of causation is applied, the claimant will be unable to obtain damages. In deciding whether or not to apply a more relaxed rule relating to causation, the House was concerned to recognise and to weigh the potential injustices to the claimant and defendants respectively. In the circumstances of those three cases, the House held that there would be greater injustice in sticking to the usual test and giving no remedy to the claimant than in applying a more relaxed standard and holding the defendants liable. The result was that a defendant was held liable to pay damages even though the unlawful act of one of the other wrongdoers might have been the actual cause of the victim's mesothelioma.

99. Assume for the sake of argument, however, that one of several periods of exposure to asbestos dust occurred before the risks should have been appreciated in the industry. That is, of course, a conclusive reason for not holding the relevant employer liable. If the *Fairchild* exception applies in that situation, a wrongdoer may be held liable even though the victim was injured either by another employer's wrongful act or by another employer's lawful act. Putting the point differently, the claimant may recover even though the victim's illness may not have been caused by any tort at all. But the *McGhee* extension already shows that the exception can apply in such circumstances. And, weighing the potential injustices, it seems right to apply it in this case too. An employer may well feel aggrieved because, under the *Fairchild* exception, he is held liable, even though not his, but some other employer's, wrongful exposure may have caused the victim's injury. But he can scarcely claim to feel more aggrieved just because one of the other employers was acting lawfully when he may have caused the victim's injury. In that sense, as between the victim and a wrongdoing employer, the lawfulness or unlawfulness of the exposure by any other employer is irrelevant. The balance of potential injustice between the

victim and the wrongdoers in applying the rule remains in favour of the victim. I agree with your Lordships on this point.

100. Different factors are in play, however, where – and such cases are likely to be extremely rare - the victim was himself solely responsible for a material exposure to asbestos dust. In that situation, in weighing the potential injustices, as between the victim and the wrongdoing defendants, of sticking to the usual test for proof of causation or applying the *Fairchild* exception, the fact that the victim may have caused his own injury cannot be irrelevant - especially if, as here, the victim was at fault. Applying the *Fairchild* exception in such a case would involve tipping the balance even further in the victim's favour.

101. If the defendants' liability under the *Fairchild* exception had been in solidum, in my view the potential injustice to a defendant in applying the exception in a case where the victim was solely responsible for a material exposure to asbestos dust would have been too great. On that basis I would have favoured applying the normal rule for proof of causation. The majority conclusion is, however, that a defendant's liability is to be several only. This involves such a major reduction in the scope of the defendants' liability that, on that basis, I too would conclude that the balance of potential injustices favours applying the *Fairchild* exception.

102. For these reasons, in respectful disagreement with your Lordships, I would have dismissed the defendants' appeals on the question of apportionment. But, having regard to the majority conclusion that the defendants' liability is to be several, I would dismiss the appeal by Corus in the Barker case and hold them liable on the basis of the *Fairchild* exception.

LORD WALKER OF GESTINGTHORPE

My Lords,

103. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann, and I gratefully adopt his statement of the facts of these three appeals. I am also in full agreement with Lord Hoffmann's reasons for allowing the appeals on the issue of

apportionment. But because of the general importance of the issues I will briefly state my reasons in my own words.

104. The starting point must be the decision of this House in *Fairchild (Fairchild v Glenhaven Funeral Services Ltd* and associated appeals [2003] 1 AC 32). In *Fairchild* the House explicitly established or affirmed a new principle (already emerging in *McGhee v National Coal Board* [1973] 1 WLR 1) and began to mark out the field in which that principle applies. A defendant who is under a duty to protect a worker from the risk associated with a single noxious agent, and who breaches that duty by exposing the worker to that very risk, may be held liable even though the worker cannot (on the traditional "but-for" test) prove that his ensuing disease was caused by that exposure. Exposing the claimant (or the deceased worker whose personal representative is the claimant) to the risk of injury is in this situation equated with causing his injury. This result is achieved not by manipulation of the burden of proof, or some other comparable fiction, but as an explicit variation of the ordinary requirement as to causation, adopted in order to avoid injustice: see the speech of Lord Bingham of Cornhill at pp 67-68, paras 33-35; Lord Nicholls of Birkenhead at pp 70-71, paras 42-45; Lord Hoffmann at pp 71, 74 and 75, paras 47, 61-62 and 65; and Lord Rodger of Earlsferry at pp 112 and 118-119, paras 155 and 168-170 (only Lord Hutton, pp 91-92, paras 107-112, based his conclusion on an inference of causation). All those speeches must be read in full, to do justice to their closely-reasoned surveys of principle, authority and policy; but the above references contain the salient statements of the new principle.

105. As to the field in which the principle is to be applied, the narrowest reading of *Fairchild* would limit it to mesothelioma caused by the inhalation of asbestos fibres during successive periods of employment, in circumstances where each of two or more employers was in breach of duty, and where any other possible cause of the claimant's mesothelioma can be disregarded: see Lord Bingham, at p 40, para 2 (also p 41, para 3, observing that Waddingtons Plc's duty was as occupier of premises, not as employer, but that nothing turned on that). The other speeches were rather less clear-cut: see Lord Nicholls, at p 70, para 41; Lord Hoffmann, at p 74, para 61 (not expressly excluding the possibility of other occasions of exposure to asbestos); Lord Hutton, at p 95, para 116 (a widely-stated conclusion which must no doubt be read in context); and Lord Rodger, at p 119, para 170 (reserving his opinion "where the other possible source of injury is a similar but lawful act or omission of someone else or a natural occurrence"). The whole House recognised that the principle would be subject to "incremental and analogical development" (Lord Bingham, at p 68, para 34) but took a

cautious attitude towards the pace of such development: see also Lord Nicholls, at p 70, para 43; Lord Hoffmann, at pp 77-78, paras 73-74; Lord Hutton, at p 95, para 118; and Lord Rodger, at p 118, para 169.

106. In *Fairchild* it was not argued by any of the respondents that the liability of a defendant employer should be limited to part only of the claimant's damage, in proportion to the duration and intensity of the claimant's exposure to asbestos during successive periods of employment. The House noted this and deliberately abstained from expressing any view on the point which had not been argued: see Lord Bingham, at p 68, para 34; Lord Hoffmann, at p 78, para 74; Lord Hutton, at p 95, para 117; and Lord Rodger, at p 97, para 125.

107. In deciding these appeals your Lordships have two important tasks: to go further than was necessary in *Fairchild* in defining the field in which the new principle should be applied, and to determine the issue as to apportionment which was deliberately left open. I prefer to start with the more fundamental issue of apportionment, since it must have a bearing on how far and how fast the boundaries of the new principle are to be extended.

108. In many cases the issue of apportionment will be of crucial importance to a defendant employer. It is true that where all the relevant employers and insurers are known to be in existence and solvent, the same result will be produced whatever the basis of liability, by the mechanism of contribution between all the tortfeasors, whether or not they were originally made defendants to the claim. The guidelines issued by the Association of British Insurers (*Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims, 28 October 2003*) show that this sort of apportionment can be achieved in a rough and ready way (although it should not, I think, be assumed that the guidelines would necessarily be followed by the court, which might be persuaded that a more precisely "weighted" approach was called for on the facts of the particular case). But in a large number of cases claimants have been exposed to asbestos during employment with one or more employers which have since ceased to exist, or have become untraceable or insolvent (and uninsured). In such cases a single solvent employer (or its insurers) might be faced, in the absence of proportionately limited liability, with a very heavy liability for a relatively short period of tortious exposure during employment with that employer.

109. Simple fairness does therefore argue in favour of liability under the *Fairchild* principle being proportionately limited. A rule of law by which exposure to risk of injury is equated with legal responsibility for that injury entails the possibility that an employer may be held liable for an injury which was not in fact caused by that exposure (though in the present state of medical science, that fact can be neither proved nor disproved). This possible unfairness cannot be eliminated, as the House recognised in *Fairchild*, but it is considerably reduced if each employer's liability is limited in proportion to the fraction of the total exposure (measured by duration and intensity) for which each is responsible.

110. It has been argued that apportionment of that sort would be contrary to principle, since mesothelioma is "indivisible" damage, and where several concurrent tortfeasors are legally responsible for damage of an indivisible nature, each is liable for the whole damage. This principle was stated by Devlin LJ in a well-known passage in *Dingle v Associated Newspapers Ltd* [1961] 2QB 162, 188-189 (a case concerned with two publications of defamatory matter, one protected by privilege). Lord Hoffmann has already set out the passage in his speech, and I need not repeat it.

111. Devlin LJ described unlimited concurrent liability for indivisible damage as a fundamental principle; but he also emphasised that whether the damage is indivisible is a question of fact, not law. The rather improbable example which he gave (of a claimant losing a month's wages after four unconnected assaults by different defendants) illustrates that. So does the decision of the Court of Appeal in *Rahman v Arearose Ltd* [2001] QB 351, in which three psychiatrists agreed that the aetiology of the claimant's very severe psychiatric disabilities was complex and that different elements of his mental troubles could be attributed to the two separate tortious incidents (a vicious physical assault from which the claimant's employers should have protected him, and an incompetently-performed surgical operation). It has been suggested that the court ought not to have accepted the expert evidence, unanimous though it was; but at the very least the case shows that indivisible damage is not always instantly recognisable, and that there are debateable borderline cases. As Hale LJ said, giving the judgment of the Court of Appeal in *Hatton v Sutherland* and associated appeals [2002] 2 All ER 1, 18 para 41 (cases concerned with illnesses caused by stress at work),

> "Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire."

The last sentence of this quotation refers back to a passage in *Prosser and Keeton on Torts* 5th ed (1984) pp 345-346 which Laws LJ quoted in *Rahman* [2001] QB 351 (pp 361-362, para 17).

112. So there may be borderline cases of indivisibility of damage, but I do not think that your Lordships can avoid the problem by treating mesothelioma itself as a borderline case. It is not an industrial disease (such as hearing loss eventually leading to profound deafness) which becomes progressively more severe (although not necessarily at a uniform rate) with continuing exposure to a harmful agent (such as excessive noise in shipyards). Prolonged exposure to asbestos does indeed increase the risk of mesothelioma, but only in a statistical sense. The disease may be caused by inhalation of a single fibre of asbestos which operates (in a way that medical science does not fully understand) in the transformation of a normal mesothelial cell into a malignant tumour (see para 7 of Lord Bingham's speech in *Fairchild*; the state of medical knowledge has not changed significantly since 2002).

113. The solution to the problem is in my opinion more radical, in line with the radical departure which this House has already made in *Fairchild*. That case was decided by the majority, as I have already noted, not on the fictional basis that the defendants should be treated as having caused the claimant's (or deceased's) damage, but on the factual basis that they had wrongfully exposed him to the risk of damage. The damage was indivisible, but the risk was divisible—a matter of statistics. In line with that new principle established or affirmed in *Fairchild*, and as a solution which does justice (so far as possible) both to the generality of claimants and to the generality of defendants, limited liability proportionate to risk is the better course for the law to take.

114. Taking that course does not in my view require your Lordships to revisit either *Wilsher v Essex Area Health Authority* [1988] AC 1074 or *Gregg v Scott* [2005] 2 AC 176. *Wilsher* was not a case of successive

periods of exposure to a single noxious agent, but of uncertainty as to the causative effect (in producing the infant's retrolental fibroplasia) of wholly disparate factors, only one of which (excessive oxygen) was the fault of the defendant health authority. The excessive oxygen might have been the cause of the disability, but it would be a very long step indeed, which I would not contemplate, to extend an analysis based on "increase in risk" (or its mirror image, "loss of a chance") to a case like *Wilsher*. In *Gregg v Scott* the "loss of a chance" approach was more plausible (as the division in this House demonstrates), but it would nevertheless have gone far beyond the *Fairchild* principle as it now stands. Such an extension would lead to great uncertainty in a large number of clinical negligence cases. The principle must in my view be restricted to mesothelioma induced by inhalation of asbestos fibres, and other conditions having the same distinctive aetiology and prognosis (such as the dermatitis caused by brick dust in *McGhee* [1973] 1 WLR 1).

115. The other issue which your Lordships have to decide is the effect (in the *Barker* appeal) of the deceased's period of self-employment, during which he was exposed to asbestos. Moses J and the Court of Appeal treated this as contributory negligence reducing the value of the claim by 20%. Mrs Barker does not challenge that finding before your Lordships. Nevertheless it raises an important issue of principle, since it involves applying the *Fairchild* principle in a situation in which the court cannot be sure that Mr Barker's fatal disease was caused by breach of duty on the part of any one of his employers.

116. Before addressing this general issue I would interpose a word of caution as to the concession made by the claimant in *Barker*. Moses J made some findings about Mr Barker's period of self-employment (they are set out in para 30 of his judgment), but they are not very detailed, no doubt because there simply was not the evidential material on which to make more detailed findings. I would be slow to accept that the owner or occupier of industrial or public buildings does not owe a duty of care to workers engaged on the refitting, repair or modification of those buildings even if the workers are labour-only subcontractors rather than employees in the strict sense. Lord Bingham appears to have accepted this in *Fairchild* (para 3) and no one expressed a different view. So while accepting the concession for the purposes of deciding the point of principle, I think it is a matter which may have to be looked at more closely at some future time.

117. The injustice, recognised in *Fairchild*, of denying a claimant any remedy in a situation in which his (or the deceased's) fatal disease *must* have been caused by a breach of duty on the part of at least one of two or more employers loses some of its edge if the disease *might* have been caused by the claimant's (or the deceased's) own fault, or (as will become increasingly unlikely with the passage of time) by exposure to asbestos which (because public knowledge was deficient) did not involve any breach of duty by an employer or occupier, and without contributory negligence on the part of the claimant (or the deceased). In that sort of situation the possible injustice to the defendant assumes more importance. Nevertheless, if your Lordships accept that the right way forward is to limit a defendant's liability by reference to its own contribution to the risk, the balance of fairness is still clearly, to my mind, in favour of applying the *Fairchild* principle to cases where less than 100% of the risk has been caused by employers or occupiers guilty of breaches of duty.

118. On this approach, questions of contributory negligence under the Law Reform (Contributory Negligence) Act 1945 and contribution under the Civil Liability (Contribution) Act 1978 will not normally arise. A defendant found to be in breach of duty will be liable for no more than a fraction of the damage in proportion to its contribution to the risk, whether or not the other periods of exposure involved breaches of duty or contributory negligence on the part of others. That is not to say that questions of contributory negligence or contribution may not sometimes arise in respect of some particular period of exposure: for instance, contributory negligence on the part of a claimant (or deceased person) by failing to comply with measures taken for his protection, or contribution as between an employer and an engineering consultant or specialist manufacturer who has failed to install an adequate system of protection in the workplace.

119. For these reasons, and for the fuller reasons given in the opinion of Lord Hoffmann, I would allow these appeals (but in *Barker* only on the issue of apportionment) and make the order which Lord Hoffmann proposes.

BARONESS HALE OF RICHMOND

My Lords,

120. In this case, the usual courtesies are more than usually apt. It has been both a privilege and an advantage to read your lordships' opinions in draft. To some extent, I agree with you all. Thus I agree entirely with my noble and learned friend, Lord Rodger of Earlsferry, that the damage which is the "gist" of these actions is the mesothelioma and its physical and financial consequences. It is not the risk of contracting mesothelioma. Mr Stuart-Smith was indeed anxious to disclaim any such argument. He was understandably concerned to avoid the possibility that our reasoning might lead to the imposition of liability for tortiously exposing a person to the risk of harm even where that harm had not in fact been suffered.

121. I also agree entirely with my noble and learned friend, Lord Walker of Gestingthorpe, that while the borderline between a divisible and an indivisible injury may be debateable, mesothelioma is an indivisible injury. What makes it an indivisible injury, and thus different from asbestosis or industrial deafness or any of the other dose-related cumulative diseases, is that it may be caused by a single fibre. This much, as I understand it, is known, although the mechanism whereby that fibre causes the transformation of a normal into a malignant cell is not known.

122. But it does not necessarily follow from the fact that the damage is a single indivisible injury that each of the persons who may have caused that injury should be liable to pay for all of its consequences. The common law rules that lead to liability *in solidum* for the whole damage have always been closely linked to the common law's approach to causation. There is no reason in principle why the former rules should not be modified as the latter approach is courageously developed to meet new situations. Where joint tortfeasors act in concert, each is liable for the whole because each has caused the whole. The owner of one of the two dogs which had worried the sheep was liable for the whole damage because "each of the dogs did in law occasion the whole of the damage which was suffered by the sheep as a result of the action of the two dogs acting together." (*Arneil v Paterson* [1931] AC 560, 563, per Lord Hailsham) Where two people, acting independently, shoot simultaneously and kill another, each is still liable for the whole. This is because, according to *Prosser and Keeton on Torts* 5th ed, p 345, there

is no sensible basis for dividing up the single damage which they have combined to cause - "for death cannot be divided or apportioned except by an arbitrary rule".

123. But as our perceptions of causation have expanded, so too has our conception of whether there may exist a sensible basis for apportionment. In *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, the issue was whether the employer was liable at all, given that some of the exposure to dust was in breach of duty and some was not; but it could be shown that the tortious exposure had materially contributed to the harm, even if it was not the only cause. In *McGhee v National Coal Board* [1973] 1 WLR 1, where again some of the exposure was in breach of duty and some was not, but this time it could not be shown that the tortious exposure had even materially contributed to the harm, the issue again was whether the employer was liable at all; it was held that a material increase to the risk of harm was the equivalent of a material contribution to causing the harm. In neither case was it argued that the employer should only be liable to the extent that his behaviour had been in breach of duty. Yet in the case of diseases which progress over time, such exercises have now become commonplace, following the decision of Mustill J in *Thompson v Smiths Shiprepairers Ltd* [1984] QB 405, whether as between successive employers or as between tortious and non-tortious exposure by the same employer.

124. There is, therefore, a logical connection between the law's approach to causation and the law's approach to the extent of liability. At each point along the road in developing the concept of causation, there is a choice to be made as to whether a single tortfeasor or a joint or concurrent tortfeasor should be liable for the whole or only for part of the damage. This is a policy question. One element in making that choice is whether there exists a sensible basis for apportioning liability. Another element is whether this would strike the right balance of fairness between claimant and defendant.

125. In one sense, there always exists a sensible basis for apportioning liability where more than one person is involved. Liability could be divided equally between them. But that would be arbitrary unless each was equally responsible. Even if liability were equally divided, this could be unfair to the claimant if, as in the dog-worrying and shooting examples, each defendant has in fact caused the whole of his damage. In the *Bonnington Castings* and *McGhee* situations, where one employer is responsible for all the potentially harmful exposure, there may exist a sensible basis for apportioning liability, but it may still be unfair to the

claimant to do this, if the one employer has undoubtedly caused all his harm.

126. But in the *Fairchild* situation we have yet another development. For the first time in our legal history, persons are made liable for damage even though they may not have caused it at all, simply because they have materially contributed to the risk of causing that damage. Mr Stuart-Smith does not quarrel with the principle in *Fairchild*. He simply argues that it does not follow from the imposition of liability in such a case that each should be liable for the whole. I agree with the majority of your lordships that indeed it does not follow. There is in this situation no magic in the indivisibility of the harm. It is not being said that each has caused or materially contributed to *the harm.* It can only be said that each has materially contributed to the *risk of harm.* The harm may be indivisible but the material contribution to the risk can be divided. There exists a sensible basis for doing so. Is it fair to do so?

127. In common with the majority of your lordships, I think that it is fair to do so. On the one hand, the defendants are, by definition, in breach of their duties towards the claimants or the deceased. But then so are many employers, occupiers or other defendants who nevertheless escape liability altogether because it cannot be shown that their breach of duty caused the harm suffered by the claimant. For as long as we have rules of causation, some negligent (or otherwise duty-breaking) defendants will escape liability. The law of tort is not (generally) there to punish people for their behaviour. It is there to make them pay for the damage they have done. These *Fairchild* defendants may not have caused any harm at all. They are being made liable because it is thought fair that they should make at least some contribution to redressing the harm that may have flowed from their wrongdoing. It seems to me most fair that the contribution they should make is in proportion to the contribution they have made to the risk of that harm occurring.

128. This solution is all the more attractive as it also provides the solution to the problem posed by the *Barker* appeal. If the damage could have been suffered during a period of non-tortious exposure, it is suggested that the tortious exposers should escape liability altogether. There is considerable logic in this. One way of explaining *Fairchild* is that all were in breach of duty and one of them must be guilty, so that it made sense that all should be liable. That rationale does not apply, or certainly not with the same force, if there are other, non-tortious causers in the frame. But if the tortious exposers are only liable in proportion to their own contribution to the claimant's overall exposure to the risk of

harm, then the problem does not arise. The victim's own behaviour is only relevant if he fails to take reasonable care for his own safety during a period of tortious exposure by a defendant.

129. These reflections are only a footnote to the much fuller reasons given by my noble and learned friends, Lord Hoffmann and Lord Walker of Gestingthorpe, with which I agree. I too would allow these appeals and make the orders proposed by Lord Hoffmann.