12
King's Bench Walk

Causation in Non-Asbestos Related Occupational Cancers

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Introduction

- Divisible/indivisible diseases
- The Fairchild exception
- Multiple agencies acting on the body in substantially the same way;
- Multiple agencies not acting upon the body in substantially the same way;
- Evidential issues.

Divisible/indivisible

- Severity of divisible disease is dose related, unlike for indivisible disease;

- Causation of divisible diseases is approached differently following *Bonnington Castings Ltd v Wardlaw* [1956] AC 613

- Has the exposure by the D made a material contribution to C's injury?

Material Contribution

- Lord Reid at [621] in *Bonnington*:
  - *"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."*

The Fairchild Exception: *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

- A claimant can succeed against a defendant which caused a material increase in the risk of them contracting the disease.

- Per Lord Rodger's test in *Fairchild* at [170], the exception applies only where the

  - *"injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way."*

  - *"a workman [who] suffered injury from exposure to dusts coming from two sources, the dusts being particles of different substances each of which, however, could have caused his injury in the same way".*

Multiple agencies acting upon the body in substantially the same way

- Where multiple agencies operate upon the body in substantially the same way, the Fairchild exception will apply

- *Barker v Corus* (UK)PLC [2006] UKHL 20, Lord Hoffman at [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."*

Novartis Grimsby Ltd v Cookson **[2007] EWCA Civ 1261**

- Smith LJ at [72]:
  - *"It seems to me that it is highly arguable that the mesothelioma exception should apply to bladder cancer and that it would be sufficient if a claimant were to prove that the occupational exposure had made a material contribution to the risk of him developing the disease."*

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

- *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) ("Phurnacite Workers Group Litigation").

- Swift J t [8.61]:

  - *"All these considerations lead me to the conclusion that it cannot be right to approach the cases of lung cancer – nor indeed those of bladder cancer – by applying the Bonnington principle. Moreover, to adopt the claimants' arguments would, as the defendants have pointed out, have potentially far-reaching effects. It would mean that, in any case of cancer where a claimant could establish tortious exposure to a carcinogen that was 'material' (according to whatever measure of materiality the court chose to adopt) the claimant would succeed in establishing causation and would be entitled to 100% damages. Whilst I have some sympathy with the predicament of claimants who may have difficulty in establishing a link between occupational exposure to carcinogens and the development of their cancers, I cannot accept that such a result would be fair to potential defendants who would be required to pay full damages in many cases in which occupational exposure had played a small part or, perhaps, no part at all."*

Doubling of the risk

- Swift J at [8.62]:

  - *"In view of my conclusions on the material contribution argument, I must look for another way of approaching the case. The obvious alternative – and that urged on me by the defendants – is the application of the 'doubling of risk' test. It is plain that the majority of members of the Supreme Court in Sienkiewicz considered that the test can be used in appropriate circumstances although there was obvious concern about over-reliance on epidemiological evidence alone."*

Sienkiewicz v Greif (UK) Ltd [2011] 2 A.C. 229

- Lord Phillips at [72]:
  - *"one that applies epidemiological data to determining causation on balance of probabilities in circumstances where medical science does not permit determination with certainty of how and when an injury was caused. The reasoning goes as follows. If statistical evidence indicates that the intervention of a wrongdoer more than doubled the risk that the victim would suffer the injury, then it follows that it is more likely than not that the wrongdoer caused the injury."*

Novartis Grimsby Ltd v Cookson [2007] EWCA Civ 1261

- Smith LJ at [74]:
  - *"the correct test for causation in a case such as this is the 'but for' test and nothing less will do, that test is plainly satisfied on the facts as found. The natural inference to draw from the finding of fact that the occupational exposure was 70% of the total is that, if it had not been for the occupational exposure, the respondent would not have developed bladder cancer. In terms of risk, if occupational exposure more than doubles the risk due to smoking, it must, as a matter of logic, be probable that the disease was caused by the former."*
- Cf *AB v Ministry of Defence* [2012] UKSC 9 (the Atomic Veterans case).

Evidence

- *Keefe v The Isle of Man Steam Packet* [2010] EWCA Civ 683 at [18-19]:

- *"In the present case, there is the potent additional consideration that any difficulty of proof for the claimant has been caused by the defendant's breach of duty in failing to take any measurements. The judge does not appear to have given any weight to this important factor."*

- *"If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not in fact excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. ...[A] defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings. To my mind this is just such a case.'*

Conclusion

- Divisible disease? *Bonnington* – material contribution.
- Indivisible disease:
  - Single or multiple agents?
  - If multiple, do they act on the body in substantially the same way?
  - If yes, Fairchild likely to apply. If not, doubles the risk.
- Evidence – Defendants cannot rely on their own failure to record evidence