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# Causation Compared: Facts, Fiction, Inferences and Legal Legitimacy

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An analysis of how the supreme courts in Australia, Canada, and the United Kingdom have dealt with evidential difficulties in establishing causation in tort/delict, where there is a gap in scientific knowledge which makes it impossible to say how an injury or disease occurred, highlights the different interpretations given to the “but for” test so central to the rules of causation in all three jurisdictions. These jurisdictions ostensibly apply the “but for” criterion as the primary test for determining causation. Material contribution to harm and increase in risk of harm each play a varying role in causation in each jurisdiction. Their role is determined by the way in which the “but for” test is applied. Particularly as between the United Kingdom, on one hand, and Canada and Australia, on the other, the application of the “but for” test varies significantly and results in a different outcome for the establishment of causation.

In the last ten years it is perhaps the United Kingdom that has experienced the greatest difficulty in trying to cope with gaps in scientific knowledge. Of the three jurisdictions, the United Kingdom has applied more strictly the “but for” test. This historical strict application has brought difficulties when the Supreme Court in the United Kingdom (hereinafter: Supreme Court) has tried to introduce flexibility into the causal assessment. The Supreme Court has chosen to create a transparent looser test for causation in order to try to deal with evidential difficulties and gaps in scientific knowledge. This has been met with criticism and, partly as a result, the Supreme Court has restricted this looser test to cases where the injury suffered is mesothelioma. This is a special rule, or an exception to the general rule. The courts in Canada and Australia have not had to create such a clear exception to their general rule because their application of the “but for” test is less strict. Their application of the “but for” test involves a generous injection of what they term “common sense”. This in reality requires greater analysis, because risk is allowed to play a greater part in the causal assessment than is currently so in the United Kingdom and thereby admits of a flexibility to cope with evidential difficulties.

As part of the analysis of the different approaches, it is necessary to trace in detail how and why these approaches have developed. There is still scope for the Supreme Court to develop the rules on causation, and the role of risk is not yet settled. An analysis of the

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approaches in these three jurisdictions allows the pros and cons for each approach to be carefully considered. Looking at the different jurisdictions highlights the strong influence of policy in this area of the law; there are lessons to be learned from the experiences of each. The purpose of delict/tort law needs to be borne in mind. The courts in Scotland and England have not generally embraced alternative, academically led thoughts and theories on the development of causation in their judgments, perhaps because these have been viewed by the judiciary as overly complicated.<sup>1</sup> The Supreme Court withdrew from an initial attempt to develop rules on causation to meet the needs of tort law in the twenty-first century.

The arbitrary, unprincipled risk exception that has been carved out for mesothelioma cases,<sup>2</sup> has been criticised for, *inter alia*, failing to have any proper legal basis and failing to have any proper legal justification for its limits. However the Canadian Supreme Court decision of *Clements (Litigation Guardian of) v Clements*<sup>3</sup> could perhaps provide a valid principled basis for the restriction of the risk exception, set as it is in *Clements*, within the traditional “but for” test. The Canadian approach allows risk to play a part in the causal assessment by virtue of the role it plays in the drawing of factual inferences. It is suggested that the Supreme Court, if not persuaded by academic discussion, might be persuaded by its counterparts in Canada and Australia. There are elements from each jurisdiction that the Supreme Court may wish to adopt.

## SCOTLAND AND ENGLAND

### Traditional Test for Causation

In Scotland and in England the causal requirement that must be satisfied in order to make a successful claim in delict/tort has historically been that the breach of duty by the defender/defendant must be the *causa sine qua non*; in other words, it is the cause, but for which the injury would not have happened.<sup>4</sup> However, this “but for” test is merely the starting point. The causal requirement can be satisfied not only when the negligence of the defender/defendant has caused the injury which is the subject of the delictual/tortious action, in the sense of the wrongful act being the dominant cause, but also where the wrongful act has materially contributed to the injury. This was established long before *Bonnington Castings Ltd v Wardlaw*,<sup>5</sup> although *Bonnington Castings* is normally taken as authority for this proposition and as the starting point in any discussion on causation within the law of delict/tort, particularly in cases of industrial disease.<sup>6</sup>

In the case of *Bonnington Castings*, the injury which was the subject of the tortious action was the disease pneumoconiosis which resulted from the breathing in of air that

<sup>1</sup> See Martin Hogg, “Developing Causal Doctrine”, in Richard Goldberg, *Perspectives on Causation* (2011).

<sup>2</sup> See the case of *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10; [2011] 2 WLR 523, below.

<sup>3</sup> *Clements (Litigation Guardian of) v Clements* 2012 SCC 32.

<sup>4</sup> See for example the case of *McWilliams v Sir William Arrol & Co and Lithgows Ltd* 1962 SC (HL) 70.

<sup>5</sup> *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. See for example the cases of *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41 at 47 per Lord Watson and *Craig v Glasgow Corporation* 1919 SC (HL) 1 at 6 per Lord Buckmaster.

<sup>6</sup> See, for example, Lord Rodger in the case of *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3WLR 89 at para. 129.

contained silica dust. Pneumoconiosis is a cumulative disease; each exposure contributes to the disease. The evidence showed that the pursuer had been exposed to two sources of silica dust; dust from the operation of the pneumatic hammer and dust from the operation of the swing grinders. The defenders were found to be in breach of their duty of care in relation to the dust from the swing grinders only. Lord Reid looked at what was meant by a material contribution. He felt that any contribution that did not fall within the exception *de minimis non curat lex* must be material. It was held by the House of Lords that the swing grinders had contributed an amount of dust that was not negligible and therefore had materially contributed to this cumulative disease.

The test for satisfying causation is therefore more generous than the “but for” test.<sup>7</sup> The “but for” test alone requires more than the material contribution requirement, when you take into account the definition of material contribution by Lord Reid in *Bonnington Castings*. Taking *Bonnington Castings* as an example, the pursuer did not need to establish that “but for” the dust from the swing grinders, he would not have developed pneumoconiosis. All he needed to prove was that the dust from the swing grinders was more than a negligible contribution to the disease.<sup>8</sup> However, the material contribution test in the United Kingdom has increasingly been seen as only appropriate with respect to cumulative divisible diseases or harm.<sup>9</sup>

### Relaxation in the Test

In certain types of delictual/tortious action there has been what effectively amounts to a relaxation in the traditional causal requirements. This was clearly established in the case of *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufactures (1978) Ltd*<sup>10</sup> which developed a principle, the foundations of which had first been laid down in the case of *McGhee v National Coal Board*.<sup>11</sup> In the subsequent case of *Barker v Corus Ltd Murray v British Shipbuilders (Hydrodynamics) Ltd and Others, Patterson v Smiths Dock Ltd and another*<sup>12</sup> there was however a move away from framing the relaxation in terms of causation and a move towards creating a new head of liability. The type of action to which this appeared to be relevant was one where the injury or harm sustained was a non-cumulative disease, there was more than one source of the harmful agent (whether that source was employers; specific source within one employer;

<sup>7</sup> Lord Rodger sees the test for causation in *Wardlaw* as more generous than the “but for” test - see Lord Rodger in *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3WLR 89 at para 129 and in the case *Barker v Corus UK Ltd, Murray v British Shipbuilders (Hydrodynamics) Ltd and Others, Patterson v Smiths Dock Ltd and another* [2006] 2 AC 572 at para 72.

<sup>8</sup> Lord Rodger in *Fairchild*, *ibid*.

<sup>9</sup> See for example Robert O’Leary, “Balance of Probability or Material Contribution? Establishing Causation in Occupational Cancer Claims”, *Journal of Public Interest Law*, 1 (2013), p. 19; and the case of *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB). Cf *Bailey v Ministry of Defence* [2009] 1 WLR 1052, a case of medical negligence which involved an indivisible injury; and Lord Phillips’ view of the material contribution test in the case of *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10; [2011] 2 WLR 523, and its appropriate use in indivisible diseases such as lung cancer. See further below for a discussion of material contribution generally.

<sup>10</sup> *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3WLR 8.

<sup>11</sup> *McGhee v National Coal Board* 1973 SC(HL) 37; 1973 SLT 14.

<sup>12</sup> *Barker v Corus UK Ltd, Murray v British Shipbuilders (Hydrodynamics) Ltd and Others, Patterson v Smiths Dock Ltd and another* [2006] UKHL 20, [2006] 2 AC 572.

or otherwise), and as a result of the constraints of scientific knowledge, it could not be determined which source caused the disease.

In the case of *McGhee*, although there was one possible cause of the harm (dermatitis) – brick dust, there were two possible sources of the harm. The first source of harm was one for which the defenders were not liable: working in hot and dusty conditions; and there was the potential source of harm for which the defenders were liable; a failure to provide showers at the end of the day. The medical evidence at that time could not determine exactly how the dermatitis was caused. It could have begun with a single abrasion of the horny layer of the skin, or it could have been caused by an accumulation of minor abrasions. So it was possible that the disease was non-cumulative. If that were so, the dermatitis could have been caused by working in the hot and dusty conditions or it could have occurred when the pursuer cycled home caked in grime and sweat because of an inability to shower. It could not therefore be proven that the failure to provide showers had caused or materially contributed to the dermatitis. There was, however, evidence that this failure had *added materially to the risk* that the dermatitis might develop. The House of Lords held that, under the circumstances, to materially increase the risk of injury was the same as making a material contribution to the injury, and the defendants were found liable. Key parts of the judgments of Lords Reid, Simon, and Salmon demonstrate this approach.

Lord Reid in *McGhee* states that in the type of case that *McGhee* is, that is, it is not possible scientifically to say how the disease begins, so that it may be non-cumulative, a broader view of causation must be taken. He states:

Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence ...

There may be some logical ground for such a distinction where our knowledge of all the material factors is complete ... 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.<sup>13</sup>

Lord Simon stated 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”.<sup>14</sup>

Lord Salmon stated:

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 ... 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 academic discussions between students of philosophy. Such a distinction is however, far too unreal to be recognised by the common law.<sup>15</sup>

<sup>13</sup> *McGhee* per Lord Reid at 22.

<sup>14</sup> *McGhee* per Lord Simon at 24.

<sup>15</sup> *McGhee* per Lord Salmon at 26.

It is difficult to draw a clear picture of Lord Wilberforce's argument, other than the fact that he felt there should be a reversal of the burden of proof where there was an evidential difficulty created by the lack of scientific knowledge, so that it should be the defender who suffers the consequences of the impossibility of saying what the precise cause was, rather than the pursuer,<sup>16</sup> but the statements made by Lords Reid, Simon and Salmon are clear and create a majority opinion.<sup>17</sup>

The seeds sown in *McGhee* were harvested in *Fairchild*. Lord Bingham in *Fairchild* drew from *McGhee* that the *ratio* of that case was, under the circumstances of this type of case, 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.<sup>18</sup> He saw the orthodox test of causation as being adapted, but nonetheless the causal requirement was rooted in the requirement that the negligence materially contributed to the harm.

In the case of *Fairchild* the claimants had contracted mesothelioma through exposure to asbestos dust and fibres whilst they each worked for a number of different employers. At the time, it was thought that mesothelioma could be caused by a single fibre and that it was a non-cumulative disease.<sup>19</sup> However, it was then and still is now the case that each exposure to the harmful agent increases the risk that the particular exposure will cause the disease. At the time of *Fairchild*, it was thought that each exposure did not contribute cumulatively to the disease. Although this has since been questioned, how asbestos fibres cause mesothelioma is still not fully understood. There is no way of identifying the source of the fibres instigating the genetic changes that result in the malignant tumour. The problem for the claimants in *Fairchild* therefore was that there was no way of establishing that any one negligent employer had caused the mesothelioma or had even materially contributed to the disease. The House of Lords held unanimously that the appellants should be allowed to recover damages for the breaches of duty because, in the particular circumstances of the cases, to be able to prove on a balance of probabilities that the defendants had materially increased the risk of the employees contracting mesothelioma, where it was not scientifically possible to establish exactly which defendant's or defendants' exposure was the cause of the harm, was sufficient to establish the necessary causal requirements. The majority of the Law Lords felt that this type of case called for an alteration of the traditional requirements necessary to establish causation<sup>20</sup> or at least a broad view to be taken of causation.<sup>21</sup> They relied heavily on the decision in *McGhee*.

That the traditional requirement of causation was relaxed in *Fairchild* is clear. What was not clear was any majority basis for this relaxation.<sup>22</sup> The four Law Lords who supported this relaxation fell into two camps. Lords Bingham and Rodger, following the path begun by *McGhee*, took a material increase in risk as amounting to a material contribution. Lord

<sup>16</sup> Lord Rodger in *Barker* stated diplomatically at para 76, that Lord Wilberforce "wrapped up his conclusion in less distinct language".

<sup>17</sup> Lord Kilbrandon dissented.

<sup>18</sup> Three members of the House, Lords Reid, Simon and Salmon, had expressly said this.

<sup>19</sup> The single fibre theory has been discredited. It is now believed that causation may involve a cumulative effect with later exposure contributing to causation initiated by an earlier exposure. For more information on mesothelioma, see the annex to Lord Phillips judgement in the case of *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229.

<sup>20</sup> See the judgments of Lords Bingham, Nicholls, and Hoffmann.

<sup>21</sup> See the judgment of Lord Rodger.

<sup>22</sup> See S. Arnell, "Causation Reassessed", *Scots Law Times* (2002), p. 265.

Nicholls and Hoffmann, on the other hand, went down a different route. They did not link a material increase in risk of contracting the disease with a material contribution to the disease. They preferred to say simply that negligent actions materially increasing the risk of contracting mesothelioma satisfied the causal connection. Lord Bingham concluded,

Where those conditions are satisfied,<sup>23</sup> 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.<sup>24</sup>

His decision was based on justice and on what he saw as the correct interpretation of *McGhee*.

Lord Rodger agreed with Lord Bingham's judgment. He too relied heavily on *McGhee* and backed this up with the attainment of justice. He saw *McGhee* as taking a broad view of causation. It was still necessary to show that the wrongful act had materially contributed to the injury, but the court looked at what was necessary in this particular case to prove the material contribution. In this particular case it was enough that the risk was increased. Lord Rodger justified the element of rough justice that results from the application of *McGhee*, that is, a defender may be found liable when in fact his wrongdoing did not cause the harm. The alternative is injustice to the claimants who would have no claim otherwise. These claimants did nothing wrong, whilst the defendants are all in breach of their duty of care, by exposing the men to a risk of developing mesothelioma, which risk did eventuate.<sup>25</sup> Lord Rodger therefore held 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.<sup>26</sup>

By contrast, Lord Hoffmann interpreted *McGhee* as stating that materially increasing the risk that the disease would occur, in the particular circumstances of that case, was enough to satisfy the causal requirements for liability. He accepted that passages in the judgments in *McGhee* suggest that materially increasing the risk is to be treated as equivalent to materially contributing to the injury. However, he pointed out that this is precisely what the doctors would not say. So he takes it therefore that what the members of the House in *McGhee* meant when they said there was no distinction between materially increasing the risk and materially contributing to the disease, 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. He said that he would prefer not to resort to such "legal fictions". He would rather decouple material increase in risk from material contribution and treat material increase in risk standing alone, as sufficient to satisfy the causal requirements for liability. Similarly, Lord Nicholls felt that it should be recognised openly that the court is applying a different and less stringent test. He did not link this with material contribution.

<sup>23</sup> Lord Bingham is here referring to the conditions in para. 2 of his judgment.

<sup>24</sup> *Fairchild* per Lord Bingham at para. 34.

<sup>25</sup> Lord Rodger also derived support for his decision from other legal systems.

<sup>26</sup> *Fairchild* per Lord Rodger at para. 168.

He said the House in *McGhee* “departed from the usual threshold ‘but for’ test of causal connection and treated a lesser degree of causal connection as sufficient”.<sup>27</sup>

It should be noted that the fifth Law Lord, Lord Hutton, took a different view of *McGhee*, believing that the decision was reached by drawing an inference from the facts rather than a new principle of law being developed. However, he did conclude that the breach of duty by each defendant materially increasing the risk of the onset of mesothelioma involved a substantial contribution to the disease suffered by the claimants. He thereby linked the material increase in risk with material contribution, as did Lords Bingham and Rodger. Ultimately, Lord Hutton believed that a legal inference should be drawn in these types of cases, rather than a new principle being formulated, so that an increase in risk is sufficient to say that the act made a material contribution.

This split in the underlying basis for the relaxation in causation requirements in a *Fairchild* type of case left the development of this area of the law uncertain. The House of Lords could have chosen one of three bases for allowing causation to be established in these types of cases, as they are all evident in either *McGhee* or *Fairchild* –

(1) a clear relaxation in the rules of causation, where a material increase in risk created by the wrongdoer is sufficient to establish causation (Lord Hoffman and Lord Nicholls); or

(2) a common sense application of the material contribution to harm test, where in these types of cases, a material increase in risk will in law be taken to amount to a material contribution, either through the drawing of a legal inference (Lord Hutton), or through the creation of a new principle (Lord Bingham and Lord Rodger); or

(3) a common sense application of the causation rules, which includes the material contribution test, which allows an inference on the facts to be drawn in the circumstances, to say that a material contribution to the harm was made by the wrongdoer (a factual inference) (Lord Hutton’s interpretation in *Fairchild*, of *McGhee*).

The House of Lords in the case of *Barker v Corus UK Ltd*<sup>28</sup> chose to be transparent. It opted for the clear relaxation in the rules of causation, but then chose to reshape the angle from which these types of cases are approached.<sup>29</sup> Lord Hoffmann took the opportunity in the case of *Barker* to take the law down his own interpretative path. He did this by reinterpreting Lord Bingham’s judgment in *Fairchild* so that he could align it with his own judgment in *Fairchild* and with Lord Nicholl’s judgment. Having chiselled out what he sees as a *ratio* from *Fairchild*, he applied it to the case of *Barker* and used it, along with the professed attainment of justice, to reformulate the liability itself. It is no longer liability for causing or materially contributing to harm or injury. It becomes liability for materially increasing the risk of exposing the claimant to harm or injury. This finally allowed the House of Lords to hold that liability in this type of case is, out of fairness, several only, not joint and several. This means that liability can be divided between the defendants relative

<sup>27</sup> See *Fairchild* per Lord Nicholls at para 44. It is not clear that Lord Nicholls appreciated that the *Wardlaw* test of material contribution to the harm is not in fact the “but for” test.

<sup>28</sup> *Barker v Corus UK Ltd, Murray v British Shipbuilders (Hydrodynamics) Ltd and Others, Patterson v Smiths Dock Ltd and another* [2006] UKHL 20, [2006] 2 AC 572.

<sup>29</sup> There was no need for the House of Lords to go to the lengths of using the 1966 Practice Statement because they did not have to overrule a previous decision. They merely developed the point begun in *Fairchild*, but in developing it, they also changed tact slightly and were able to do this because there was no clear ratio in *Fairchild*. By reinterpreting Lord Bingham’s judgment in *Fairchild*, the House in *Barker* produced a clear *ratio* and thereby provided a foundation for their ultimate judgment.



to their degree of contribution to that risk. The Law Lords feel that this helps to smooth the rough justice that results from joint and several liability; that is, there would be one or more defendants who had not actually caused the injury and yet were having to pay possibly full damages. The Compensation Act 2006 ultimately restored joint and several liability, but the clear creation of a new rule of causation where an increase in risk is sufficient to establish causation, was untouched by Parliament. It is interesting to consider whether in hindsight the Law Lords would have opted for this basis of liability, had they known that their ultimate goal of several liability would be hijacked by Parliament.

### Reformulation of Fairchild

In *Barker*, as in *Fairchild*, there were a number of different employers over the course of the claimants' working life. The disease contracted by the employees was mesothelioma. Unlike *Barker*, there was in this case a period of self-employment during which the employee was exposed to asbestos. This aspect emphasised the injustice to the defendants that can arise in cases such as these. It was conceivable that the exposure to asbestos took place during this period of self-employment and that accordingly no employer was actually responsible for the mesothelioma that resulted.

Lord Hoffmann in *Barker* began his slow reformulation of the law left by *Fairchild* by formulating two questions which he said had been left undecided by *Fairchild*: first, what were the limits of the *Fairchild* exception? Did the causal agent have to be the same? Did each exposure have to involve a breach of duty of care by employers? Second, what was the extent of liability? The answers to these two questions are interlinked. Perhaps partly because of the answer arrived at by the House of Lords to the first question, the House answered the second question as they did.

With reference to the first question, the House of Lords held in *Barker* that the exposures did not all have to be a result of a breach of duty to "qualify" for application of the *Fairchild* exception. It should be recalled that in *McGhee* the brick dust to which the pursuer was exposed whilst working in the kilns was not a wrongful exposure. The House in *Barker* went as far as to hold that even where the employee was himself responsible for a material exposure, the *Fairchild* exception could still apply.

In dealing with the second question Lord Hoffmann introduced the idea that the damage caused in a *Fairchild* type of case is the creation of a risk that the claimant will contract the disease rather than the contraction of the disease itself. He is critical of Moses J at first instance, proceeding on the basis that each employer should be deemed to have caused the disease and therefore that they be jointly and severally liable for this indivisible injury. Yet this is exactly the approach taken in *McGhee* and by Lords Bingham and Rodger in *Fairchild*. Lord Hoffmann says that this approach would have been acceptable if the House in *Fairchild* had proceeded on 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 that actually the House in *Fairchild* was quite open in saying that creation of a material risk was sufficient for liability. He referred to his own judgment and that of Lord Nicholls, which admittedly do take this more radical position. But he also represented Lord Bingham as taking this view, with Lord Rodger and Hutton as the only two Law Lords who did not. In his argument for Lord Bingham taking this view, Lord Hoffmann refers to the following part of Lord Bingham's judgment,

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.<sup>30</sup>

Lord Hoffmann quoted this passage out of context. If that excerpt is taken with the rest of what Lord Bingham said, it can be seen that Lord Bingham was saying that he cannot follow or agree with what Lord Hutton says about *McGhee*, that it was based on drawing a factual or legal inference. He said that he preferred to recognise that the ordinary approach to the proof of causation is varied rather than to resort to the drawing of legal inferences. The drawing of legal inferences was what he saw as a fiction. His judgment, though, is basically that a material increase in risk is treated as amounting to a material contribution. This is much more anchored onto material contribution than the reasoning of Lord Nicholls or Lord Hoffmann.

Lord Rodger in *Barker* was critical of Lord Hoffmann's interpretation of Lord Bingham's judgment in *Fairchild*. He accepted that the problem in *Fairchild* could have been analysed in such a way as to say that the creation of a material risk was sufficient to satisfy the causation requirements in that type of case, but he stressed that it was not so analysed in *Fairchild*. He stated that "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".<sup>31</sup> Having presented this rather distorted interpretation of *Fairchild*, Lord Hoffmann stated that the quantification of chances was by no means unusual in the courts and that sometimes the law has treated the loss of a chance of a favourable outcome as compensatable damage in itself.<sup>32</sup> Although the House in their decision in *Gregg v Scott*<sup>33</sup> rejected the possibility of liability for the loss of a chance being introduced into personal injury claims, Lord Hoffmann insisted that this decision was not because there was any conceptual objection to treating the loss of a chance or as he also put it, the increase in the risk of an unfavourable outcome, as actionable damage. He explained the refusal to adopt such a rule in *Gregg v Scott* on the basis that to have done so would have applied the *Fairchild* exception to all cases of medical negligence and would have been inconsistent with the case of *Wilsher v Essex Area Health Authority*.<sup>34</sup> He did not see *Gregg v Scott* as any kind of bar to him recognising a claim for the increase in the risk of an unfavourable outcome (or turned around, loss of a chance) in a *Fairchild* type case. Lord Hoffmann then turned to fairness and justice to bolster his argument for several liability.<sup>35</sup> Lord Hoffmann therefore effectively managed to retract from the significant development of the law of causation in *Fairchild* so that the emphasis moved to liability: liability of the defendants is for the creation of a risk of injury in relation to which they have a duty of care to prevent

<sup>30</sup> *Fairchild* per Lord Bingham at para. 35.

<sup>31</sup> *Barker* per Lord Rodger at para. 71.

<sup>32</sup> Lord Hoffmann referred to the cases *Chaplin v Hicks* [1911] 2 KB 786 and *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 as evidence that the loss of a favourable outcome can be compensatable damage in itself. In contract law damages may be awarded for the loss of a chance.

<sup>33</sup> *Gregg v Scott* [2005] UKHL 2.

<sup>34</sup> *Wilsher v Essex Area Health Authority* [1988] AC 1074. In this case there were a number of different possible agents that could have caused the injury. There was no evidence that the wrongful agent was more likely to have caused the injury than any of the other four candidates. Causation was not found to be established.

<sup>35</sup> Analysis of several liability is beyond the scope of this article, which is concerned with causation.

the employee being so injured and the employee is in fact so injured. The focus moved from the relaxation of causation rules to the extent of the liability.

Lord Scott in *Barker*, like Lord Hoffmann, understood *Fairchild* to impose liability because the defendants had materially increased the risk of contracting the disease, rather than because they had materially contributed to the mesothelioma, which he also referred to as a “fiction”. This is despite the fact that those parts of the judgements of Lords Rodger and Bingham that he referred to in support of this clearly show that these judges saw the material increase in risk in *Fairchild* as being deemed to amount to materially contributing to the illness.<sup>36</sup> Lord Scott also emphasised the exceptional nature of the *Fairchild* type of case. There was a causative difficulty which did not exist in *Gregg v Scott*. The *Fairchild* principle does not apply to all types of cases. The liability is for contributing to the risk of the eventual outcome. If the victim does not contract the disease, there is no claim for simply the trauma of being subjected to the risk, which has been clarified in *Gregg v Scott*. Lord Scott reasons that since *Fairchild* is an anomalous exception to the causation principles of tortious liability, it is not surprising if other principles of tortious liability have to be adjusted.

Lord Walker agreed with the judgment of Lord Hoffmann. He began by stating that the principle established or affirmed by *Fairchild* was as follows:

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.<sup>37</sup>

Lord Walker described this as an explicit variation of the ordinary requirement as to causation. He then moved away from equating exposing the claimant to the risk of injury to the causing of an injury, and stated that, as he had already noted (which seems slightly inaccurate), *Fairchild* was decided not on the fictional basis that the defendants should be treated as having caused the employee’s damage, but on the factual basis that they had wrongfully exposed him to the risk of damage. Because risk is something that can be divided and apportioned, this approach allowed him to opt for several liability rather than joint and several liability. Fairness to the employers was his overriding reason for taking this approach. Following Lord Scott, he excused the “radical” solution of basing liability on the exposure of a risk because it is in line with the radical departure that was made in *Fairchild*.

Baroness Hale aligned herself with Lords Hoffmann and Walker. However, she also agreed with Lord Rodger’s dissenting judgment that the damage in this type of action is the mesothelioma and not the risk of contracting mesothelioma. She felt that although the harm may be indivisible, the contribution to the risk can be divided. It is for this that the defendants are being made liable, so there is a sensible basis for apportioning liability. A sensible basis there may be, but Baroness Hale failed to provide any real legal basis. She said that this is a policy question, and so for her, sense and fairness have the upper hand

<sup>36</sup> See *Barker* per Lord Scott at para. 52 where he quotes from para. 34 of Lord Bingham’s judgment in *Fairchild*; and from para. 168 of Lord Rodger’s judgment in *Fairchild*.

<sup>37</sup> *Barker* per Lord Walker at para. 104.

over precedent and certainty. As she rightly stated, liability was originally placed on such employers because it was thought fair to do so. And now we have fairness directing the scope of their liability. Historically, the Law Lords have felt that tort is an area where justice as fairness is more important than certainty.<sup>38</sup> The excessive use of fairness to make radical departures from the general legal principles in a particular area of the law can be disconcerting, however, and reduces confidence in the legal process. Policy has always played an important role in shaping the development of the law of tort/delict. Here we see policy in the shape of justice as fairness not only leading to a departure from established law on causation, but then also reshaping that original departure. However, as Morgan pointed out, corrective justice is not the only way to analyse these issues.<sup>39</sup> Other policy considerations were not considered.<sup>40</sup>

The majority of Law Lords in *Barker* referred often to the “fiction” in *Fairchild*. Yet it is the fiction of Lord Hoffmann’s interpretation of *Fairchild* that they followed. Only Lord Rodger accurately presented the decision in *Fairchild*. Lord Rodger disputed Lord Hoffmann’s assertion that in *Fairchild* the majority did not see that a material increase in risk was deemed to amount to materially contributing to the injury. He accepted that Lord Hoffmann himself did not (because of what Lord Hoffmann said in his own judgement in *Fairchild*) but disputed that Lord Bingham did not. He referred to that part of Lord Bingham’s judgement<sup>41</sup> which encapsulated Bingham’s approach of anchoring material increase in risk to materially contributing to injury. Lord Rodger also pointed out that the appeals in *Fairchild* were argued on the basis that the defendants caused the men’s death and that was how they were dealt with by the Law Lords. Lord Rodger accepted that Lord Nicholl’s judgment did not equate material increase in risk with materially contributing, but he did point out that, on the other hand, there was nothing to suggest that Lord Nicholl considered the damage to be the creation of a risk. Lord Rodger correctly stated<sup>42</sup> that when you look at Lord Bingham’s speech in *Fairchild* and his own (he agreed with Lord Bingham), one cannot say that the majority in *Fairchild* went down the “material risk would suffice for causation/ liability” road. Lord Rodger not only accurately presented the *Fairchild* decision but he considered the practical reason why *McGhee* and *Fairchild* were decided as they were. He felt that the reasoning indicated a desire on the part of the House to minimise disruption to the area of the law that is personal injury law and to try to maintain a consistency of approach. Under that law, victims recover damages because the wrongful act has materially contributed to their harm, not because it has created a risk that they would suffer harm. He questioned whether it should be the court system, rather than Parliament, that ameliorated the rough justice that results from the decision in *Fairchild*.

<sup>38</sup> See for example Lord Reid and the majority of the active Law Lords from between 1972-73. Alan Paterson, *The Law Lords* (1982), p. 175.

<sup>39</sup> Jonathan Morgan, “Causation, Politics and Law: The English and Scottish Asbestos Saga,” in Goldberg, note 1 above.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Barker* per Lord Rodger at para. 80 – where he referred to paragraph 34 of Lord Bingham’s judgment in *Fairchild*.

<sup>42</sup> *Barker* per Lord Rodger at para. 83.

## Compensation Act 2006

As it turned out, Lord Rodger's words about Parliament were prescient. The Compensation Act 2006 came into force in July 2006. Section 3, which is the only substantive section relevant here, was to be treated as having always had effect. It applied to England and Wales, Scotland, and Northern Ireland. For all claims settled on or after 3 May 2006, where a defender/defendant is found liable for negligently exposing the pursuer/plaintiff to asbestos, whether by reason of having materially increased a risk or for any other reason, the defender/defendant shall be liable for the whole of the consequent damage and jointly and severally liable with any other defenders/defendants. Parliament therefore decided that the wrongdoers and their insurers rather than the claimant should bear the inconvenience of pursuing a number of wrongdoers for their share of the financial compensation and also the risk of insolvency of a wrongdoer or his insurer in this particular area of reparation law. The Compensation Act 2006 also arguably overruled the decision in *Barker* that the liability in these types of cases is for the increase in risk of injury.<sup>43</sup> If *Barker* is overruled, we go back to *Fairchild* with its variety of potential bases for a relaxation in the rules of causation, and also therefore to *McGhee*.

The Supreme Court did not take the opportunity to re-evaluate the basis for the looser test for causation in the next relevant case that came before it, *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council*.<sup>44</sup> The radical nature of the basis for which the Supreme Court opted meant that they have restricted this looser test for causation to mesothelioma cases. There has been no focus on a common sense application of the rules on causation; no resort to the drawing of legal inferences or factual inferences, which in the long term, when we look at Canada and Australia, might have allowed greater flexibility in the application of the rules on establishing causation and a more subtle use of risk in establishing causation, without a significant departure from the traditional rules. This might have allowed greater flexibility with less criticism because it would have allowed the application of the traditional rules on causation without the requirement to make a unprincipled exception for mesothelioma cases that does not survive legal scrutiny.

### Cautious Retraction to Mesothelioma Cases

The decision in the combined cases of *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council*<sup>45</sup> indicated two things. First, that there was no clear agreement within the Supreme Court on what should be required to establish causation; and second, that although the *Fairchild* exception was actually extended even further, it was clear from *obiter* remarks that a number of the Justices did not favour such a relaxed approach beyond mesothelioma cases. In fact, there was definite support for a move back to the traditional "but for" and material contribution tests in almost every other situation.

<sup>43</sup> Lord Hoffmann saw it this way – see Rt. Hon. Lord Hoffmann, "Causation" in Richard Goldberg, *Perspectives on Causation* (2011), p. 8.

<sup>44</sup> *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10; [2011] 2 WLR 523.

<sup>45</sup> *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10; [2011] 2 WLR 523.

In the first case the claimant's mother, Mrs. Costello, had died of mesothelioma by the time the case was before the Court. Her mother had been exposed to asbestos dust during the course of her employment with the defendant's predecessor. She had also been exposed to a low level of asbestos in the general atmosphere. The judge at first instance dismissed the claim in damages against the defendant. He applied the doubles the risk test for causation that had been applied by the Court of Appeal in the case of *Novartis Grimsby Ltd v Cookson*.<sup>46</sup> He held that although the defendant had been in breach of either its statutory or common law duty towards Mrs. Costello throughout her employment between 1966 and 1984, the tortious exposure was modest compared with the environmental exposure and had increased the risk of her contracting the disease by a very specific 18%. Mrs. Costello had not therefore established that on a balance of probabilities, the defendant's tortious exposure had more than doubled the risk of Mrs. Costello contracting the disease. The Court of Appeal allowed an appeal by the claimant, holding that the doubles the risk test could not be applied to mesothelioma cases because of the development of the common law in that area and Section 3 of the Compensation Act 2006. For mesothelioma cases, causation was established by proof of a material increase in risk.

In the second case the claimant's wife, who had died of mesothelioma, had been exposed to asbestos fibres while a pupil at a school for which the defendant was responsible. She had also been exposed to low level asbestos in the general atmosphere. The judge at first instance held that the defendant had been in breach of its duty in relation to its exposure of the claimant to asbestos and that the exposure, although small, was not minimal. Therefore, the exposure had materially increased the risk of her contracting mesothelioma. The Court of Appeal had dismissed an appeal by the defendant. The defendants appealed in each of these cases to the Supreme Court.

The Supreme Court confirmed the application of the *Fairchild* exception to mesothelioma cases even where one of the sources of asbestos was the environment rather than multiple tortious exposure (as in *Fairchild*) or self-exposure (as in *Barker*). So the *Fairchild* exception had been extended further still. There was to be no difference in treatment between what some term as single exposure cases and cases where there are multiple defendants. This extension, however, was a development within the confines of mesothelioma cases. As an aside, the meaning of Section 3 of the Compensation Act 2006 was clarified after the misreading by the Court of Appeal. Section 3 did not provide that in cases of mesothelioma the defendant will be held liable in tort if he has materially increased the risk of a victim contracting mesothelioma. It provides that where a defendant is held liable in a mesothelioma case, they will be liable for the whole of the damage caused, jointly and severally, whether that liability is established because the defendant materially increased the risk of the victim contracting mesothelioma or for any other reason. It is still the common law alone that dictates when causation is established.

Perhaps because Parliament intervened in this area in the form of Section 3 of the Compensation Act 2006, there is a feeling of restraint in the discussion of causation in the judgments in this case. *Barker* redefined the decision in *Fairchild* to justify joint liability rather than joint and several liability. Parliament reinstated joint and several liability. The injustice which in *Fairchild* the House of Lords had fairly unanimously agreed would lay heavy on the claimants if liability was not established, is in *Sienkiewicz* no longer so clearly

<sup>46</sup> *Novartis Grimsby Ltd v Cookson* [2007] EWCA Civ 1261.

pointing in favour of the claimants. The result of Parliament's intervention meant that in a future case that was factually similar to *Barker*, the defendants would be jointly and severally liable for a disease which may in fact have been caused by asbestos exposure to which the claimant had exposed himself. The Court had rejected this in *Barker*. The Court was faced in *Sienkiewicz* with a factual situation where the defendant would be held fully liable where in fact the exposure to asbestos dust which caused the disease may have been environmental exposure. All the Justices in *Sienkiewicz* agreed that the extension of the *Fairchild* exception to this type of mesothelioma case could not be avoided,<sup>47</sup> but the Justices could see that the injustice was starting to severely affect the defendants. Their *obiter* remarks on the requirements for the establishing of causation in other types of cases show the majority of the Court returning to traditional causal requirements.

In *Sienkiewicz* a number of the Court reacted to this increasingly obvious injustice to defendants by emphasising that the *Fairchild* exception applied only to mesothelioma cases and that the traditional tests of causation were still to apply in any other type of case.<sup>48</sup> Lord Brown, the most outspoken in this respect, was quite critical of how the law has developed since *McGhee*. He said:

Although, therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the "but for" test of causation at its peril.<sup>49</sup>

He seemed to be in favour of returning to the traditional "but for" test in anything other than mesothelioma cases, where the die "was inexorably cast in *Fairchild*".<sup>50</sup> Lord Brown felt constrained to find liability in the cases before him because of the development of the law in *Fairchild*, *Barker* and then Section 3 of the Compensation Act 2006. He questioned whether this special treatment of mesothelioma cases was actually justified and suggested that the judges in *Fairchild* could not have known the law would have developed as it had. He felt that: "It is to my mind quite clear that the preparedness of the majority of the court in *Barker* to extend the reach of the *Fairchild* principle this far was specifically dependent upon there being aliquot liability only".<sup>51</sup> Lord Brown said in the final paragraph of his judgment: "Save only for mesothelioma cases, claimants should henceforth expect little flexibility from the courts in their approach to causation".<sup>52</sup> Lord Brown felt that this area of law benefited from clarity, consistency, and certainty, and that special rules have no place in the principles for compensation for personal injury.

Lady Hale also seemed to suggest that although she accepted that the *Fairchild* exception applied to these single tortious exposure cases, the decision of *Fairchild* was a mistake and their Lordships could not have foreseen the far-reaching implications. She accepted that there is no point in reversing the decision in *Fairchild* because Parliament would reverse

<sup>47</sup> Lord Phillips saw this as a straightforward application of *Barker v Corus* - see *Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10; [2011] 2 WLR 523 per Lord Phillips at para. 70. See also in particular, Lord Rodger at para. 160; Lady Hale at para. 173; Lord Brown at para. 184; Lord Mance at paras. 188-189; Lord Kerr at para. 203; and Lord Dyson at para. 212.

<sup>48</sup> See in particular *Sienkiewicz* per Lady Hale at para. 167, Lord Mance at para. 189, and Lord Brown at para. 187.

<sup>49</sup> *Sienkiewicz* per Lord Brown at para. 186.

<sup>50</sup> *Sienkiewicz* per Lord Brown at para. 185.

<sup>51</sup> *Sienkiewicz* per Lord Brown at para. 182.

<sup>52</sup> *Sienkiewicz* per Lord Brown at para. 187.

that decision of the Supreme Court's (presumably based on the fact that Parliament reversed the joint liability finding in *Barker*), but there was little doubt that as far as Lady Hale is concerned, the *Fairchild* exception will not be applied beyond mesothelioma cases.

Lord Mance, although he agreed that *Fairchild* and *Barker* apply on the facts and he agreed with the reasoning of Lord Phillips, Rodger, Dyson and Lady Hale on this aspect, also agreed with Lady Hale and Lord Brown on the impossibility of going back on *Fairchild*, and "the lesson of caution"<sup>53</sup> that this teaches on future invitations to depart from conventional principles of causation, suggesting strongly his disinclination to welcome such future invitations.

Referring to *Fairchild* and *Barker*, Lord Phillips said that:

Those cases developed the common law by equating "materially increasing the risk" with "contributing to the cause" in specified and limited circumstances, which include ignorance of how causation in fact occurs. The common law is capable of further development.<sup>54</sup>

This was said, however, within the context of Section 3 of the Compensation Act 2006 which deals with mesothelioma. Lord Phillips went on to elaborate; section 3 did not preclude the courts from reverting to the conventional balance of probabilities in mesothelioma cases should advances in medical science in such cases make clearer the way in which mesothelioma is caused. It would appear that this development of the common law that he has in mind is only within the context of mesothelioma cases, and if anything would be a reversion to more traditional principles if scientific knowledge allowed. Even Lord Rodger, the only Justice in *Sienkiewicz* that also sat in *Fairchild* and *Barker*, kept the increased risk test restricted to mesothelioma cases and made no reference to the applicability of such a test beyond such cases. Lord Kerr and Lord Dyson gave no hint of their own opinion on the *Fairchild* exception. They accepted that it applied to the cases before them but went no further than that.

All the Justices, except Lord Brown, in their discussion of causal requirements bring up the nature of epidemiological evidence and its place in establishing causation. They all warn against placing excessive reliance on such evidence in determining that on a balance of probability the defendant caused the injury or disease. Their reasoning differs, but their ultimate opinions on its value are very close. This may be considered along with other factors, and its limitations need to be recognised. Lord Phillips described the particular problems with epidemiological evidence in relation to mesothelioma cases.<sup>55</sup> Lord Rodger pointed out that as a result of the nature of epidemiological evidence, the most that this evidence can do is establish that on the balance of probability the defendant probably caused the damage. This he recognised, is not the law of causation in either England or Scotland. Lady Hale pointed out: "But if the disease materialises, the existence of a statistically significant association between factor X and disease Y does not prove that in the individual case it is more likely than not that factor X caused disease Y".<sup>56</sup> Lord Mance felt that it should be considered along with specific evidence related to the individual circumstances and parties; what significance a court may attach to this will depend on

<sup>53</sup> *Sienkiewicz* per Lord Mance at para. 189.

<sup>54</sup> *Sienkiewicz* per Lord Phillips at para. 70.

<sup>55</sup> See in particular Lord Phillips' judgment at paras. 80-84 and 98-102.

<sup>56</sup> *Sienkiewicz* per Lady Hale at para. 170.



the nature of the epidemiological evidence and the particular factual issues before the court. It would be rare that epidemiological evidence by itself would prove a case. A similar opinion was shared by Lord Kerr. Lord Dyson was probably the most generous to epidemiological evidence when he said:

It seems to me, however, that there is no a priori reason why, if the epidemiological evidence is cogent enough, it should not be sufficient to enable a claimant to prove his case without more. Our civil law does not deal in scientific or logical certainties.<sup>57</sup>

Some of the Justices dealt with the doubling the risk test, which was applied in the Court of Appeal case of *Novartis Grimsby*. But there is a difference of opinion on its value. Such a test applies epidemiological data to establishing causation on the balance of probabilities where science does not allow the exact cause of a disease or injury to be known. The argument is that if statistical evidence suggests that the wrongdoer's wrongdoing more than doubled the risk that the victim would suffer the injury, then it follows that it is more probable than not that the wrongdoer caused the injury.

Lady Hale and Lord Rodger are both opposed to using the doubling the risk test to establish causation in any type of case. Lord Brown did not specifically refer to the doubling the risk test but one would suppose that he would oppose such a test because his judgment is strongly in favour of the traditional "but for" test without exception. Lords Mance, Kerr, and Dyson did not mention the test explicitly, but they did all warn against over reliance on epidemiological evidence. Lords Mance and Kerr at least, on the basis of what they said about epidemiological evidence generally, would not appear to favour the doubling of the risk test in all cases where it was impossible to say what caused the damage. Lord Phillips is most favourable towards the doubling the risk test. He is willing to see its value in some types of multiple cause cases involving diseases other than mesothelioma. Although still adhering to the *Bonnington Castings* rule for cases where two agents operate cumulatively and simultaneously in causing the onset of the disease, one situation where the doubles the risk test may be appropriate, in his opinion, is where the initiation of the disease is dose-related and there have been consecutive exposures to an agent or agents that cause the disease, one innocent and one tortious, particularly where the innocent exposure came first. Another situation is where there are competing alternative potential causes of a disease or injury, such as in the case of *Hotson v East Berkshire Area Health Authority*.<sup>58</sup> So long as the court is "astute to see that the epidemiological evidence provides a really sound basis for determining the statistical probability of the cause or causes of the disease",<sup>59</sup> he can see no reason in principle why the test should not be applied. Lord Phillips quoted Smith LJ in *Novartis Grimsby Ltd* where she justifies her opinion that the doubles the risk test satisfies the "but for" test. She said: "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".<sup>60</sup> Lord Phillips agreed with Smith LJ as a matter of logic, but, as he himself pointed out, these are statistical probabilities. They are usually based on epidemiological evidence. It is assuming that the claimant is not atypical. It is establishing on a balance of probability that the wrongdoing probably caused the disease.

<sup>57</sup> *Sienkiewicz* per Lord Dyson at para. 222.

<sup>58</sup> *Hotson v East Berkshire Area Health Authority* [1987] AC 750.

<sup>59</sup> *Sienkiewicz* per Lord Phillips at para. 91.

<sup>60</sup> *Sienkiewicz* per Lord Phillips at para. 77.

But that does not mean that in the given case, the wrongdoing had actually caused the disease or even that on the balance of probability the wrongdoing had caused the disease.

The doubles the risk test is more demanding than the material increase in risk test. The material increase in risk creates a lower threshold because the risk only has to be more than *de minimis*. The doubles the risk test requires the risk to be twice as much as the risk from the alternative source. But both tests are ultimately merely dealing with risk rather than occurrence.<sup>61</sup> Lord Phillips therefore is the only Justice in *Sienkiewicz* who appeared to be willing to accommodate a relaxation in causal requirements beyond mesothelioma cases. It is arguable however that using epidemiological evidence alone to establish that on a balance of probability the wrongdoing caused the disease is itself effectively allowing a relaxation in causal requirements through the back door. The other Justices do warn against over reliance on epidemiological evidence. In reality it is difficult to actually control any particular judge's reliance on and use of such evidence.

We can see a significant change in attitude in the Supreme Court from *Fairchild* to *Sienkiewicz*. The relaxed, quite radical handling of causation in *Fairchild*, with the significant role that risk plays in establishing causation, has been replaced with a mainly conservative approach; a reluctant application of the *Fairchild* exception to only mesothelioma cases, and a clear message from the majority that a strict application of the "but for" test will apply in all other cases. But despite the Justices' views that they were bound to apply the *Fairchild* exception to the *Sienkiewicz* cases, it is arguable that they were not so constrained. If the exception had been restricted to *Fairchild* type cases, where all the sources of the one substance were wrongful, and *McGhee* type cases, where the one substance came from more than one source but for which the same wrongful defender was responsible, then the global "but for" justification that Chief Justice McLachlin relied on in the case of *Clements (Litigation Guardian of) v Clements*<sup>62</sup> could have been applied.<sup>63</sup> There is an argument that the case of *Barker*, which allowed the risk exception to apply where there was asbestos exposure by virtue of the environment, was overruled by the Compensation Act 2006. *Sienkiewicz* did not have to be decided as it was. The risk exception, so restricted, could have been used beyond mesothelioma cases for other single agent cases where it is scientifically impossible to determine the precise cause and the only source of that agent is either a number of possible wrongful defendants or a number of sources under the control of one wrongful defendant. The decision to allow increased risk to inform the establishment of causation in this type of situation may not have been so heavily criticised, and an argument for its use in the future could have remained intact.

In *Sienkiewicz* there is a clear warning against the dangers of over reliance on epidemiological statistics where risk plays a significant role. It can be considered along with other factors, and its limitations need to be recognised. Lord Phillips stands out as the most open to the doubles the risk test in future multiple cause cases where the cause of the disease or injury cannot be established to the satisfaction of the "but for" test. And that is as radical as *Sienkiewicz* gets beyond mesothelioma cases. The pivotal role of increased risk

<sup>61</sup> See Lord Rodger's judgment in *Sienkiewicz* and also the discussion in Sandy Steel and David Ibbetson, "More Grief on Uncertain Causation in Tort", *Cambridge Law Journal*, LXX (2011), p. 451.

<sup>62</sup> *Clements (Litigation Guardian of) v Clements* 2012 SCC 32.

<sup>63</sup> See below at the discussion on Canada.

in mesothelioma cases will not be extended to other types of cases, it would seem, as far as the majority of the Justices who sat in *Sienkiewicz* are concerned.

### Clarification of Basis of Fairchild Exception - *Durham v BAI (Run Off) Ltd*

The role of risk in causation was the subject of discussion in the Supreme Court in the case of *Durham v BAI (Run Off) Ltd*.<sup>64</sup> In this case a number of insurance companies questioned whether their employer liability insurance policies covered employers for cases of mesothelioma which did not manifest in the employee until after the insurance period. The various insurance policies covered injury or disease that was “sustained”, or “contracted”, or “sustained or contracted” by employees in the course of their employment. This raised the issue of causation in mesothelioma cases once more in the Supreme Court. The distinction between imposition of liability for the creation of the risk of contracting mesothelioma (the *Barker* interpretation) and imposition of liability for contributing to the contraction of mesothelioma by virtue of the employers materially increasing the risk of mesothelioma (Lord Rodger’s interpretation of *Fairchild* in *Barker*) which first arose in *Barker* came up again in this decision, due primarily to the dissenting opinion of Lord Phillips.

Lord Phillips took the opportunity to admit that his interpretation of *Fairchild* and *Barker* in the *Sienkiewicz* case, whereby materially increasing the risk was equated with contributing to the cause, was not an accurate summary of what he referred to as the special approach adopted in those cases.<sup>65</sup> He decided to adhere to the majority interpretation in *Barker* where liability is for the creation of the risk. He seems to have been swayed by part of Lord Hoffmann’s extra-judicial explanation in *Perspectives on Causation*<sup>66</sup> and did not feel that the Compensation Act 2006 altered the jurisprudential basis of the special approach, just the effect of that special approach, despite the fact that Lord Hoffmann himself did see the 2006 Act as altering the basis of the special approach, and thereby instituting Lord Rodger’s dissenting opinion in *Barker*, as is pointed out by Lord Mance in *Durham*.<sup>67</sup>

The majority in *Durham* put an end to this interpretation of *Fairchild* by re-explaining *Fairchild* and *Barker*. According to the majority in *Durham*,<sup>68</sup> *Fairchild* and *Barker* are to be interpreted as establishing liability not for the creation of the risk, but for the contracting of mesothelioma. In the special factual circumstances of mesothelioma, the wrongdoer’s material increase of the risk of contracting the disease meets the causal requirements, and this is a relaxation of the traditional causal requirement which the Supreme Court has allowed in these particular circumstances. Lord Mance referred to a “weak” or “broad” causal link.<sup>69</sup>

The retraction and conservatism in *Sienkiewicz* was reflected in the judgments and in the attitude of the majority in *Durham*. The Justices proceeded on the basis that the restriction of risk in establishing causation in mesothelioma cases had been established in *Sienkiewicz*. Lord Phillips referred in *Durham* to the criticism to which the *Fairchild* special approach has

<sup>64</sup> *Durham v BAI (Run Off) Ltd* [2012] UKSC 14, [2012] 1 WLR 867.

<sup>65</sup> *Durham* per Lord Phillips at para. 117.

<sup>66</sup> See Lord Hoffmann in Goldberg, note 1 above, p. 8.

<sup>67</sup> *Durham* per Lord Mance at para 62. See Lord Hoffmann in Goldberg, note 1 above, p. 8

<sup>68</sup> Lord Mance gave the leading judgment with Lords Dyson, Kerr, and Clark agreeing with Lord Mance.

<sup>69</sup> *Durham* per Lord Mance at paras. 73 and 74.

been subjected, both judicial and academic.<sup>70</sup> It seems that he had become aware of a strong objection to this level of judicial law making, for he sought to justify the special approach in *Fairchild* and *Barker*; reminding us that the reason the Supreme Court originally took this approach was to achieve justice. But he seemed to apprehend a dissension and felt that to apply the majority interpretation so that in *Durham*, the mesothelioma is held to have been sustained when it was caused and any and all exposures that are independently sufficient are taken to have caused the mesothelioma by virtue of the *Fairchild* principle, and so insurers are held liable where otherwise they would not, may be taking things too far. The majority in *Durham* seemed to have decided to bring this line of reasoning to its logical conclusion in relation to the position with the insurers, but because the special rule had been limited to mesothelioma cases, they seemed confident in this one final consequence.

The Justices in *Durham* decided to follow Lord Hoffmann's approach, first begun in *Fairchild*, of recognising an increase in risk as a transparent relaxation in the rules of causation but specifically only in mesothelioma cases. They followed the Lord Hoffmann interpretation of *Fairchild* in *Barker*. However, despite the caution in *Sienkiewicz* and *Durham*, and the restriction to mesothelioma cases, the cases of *McGhee* and *Fairchild* left open the possibility of a material increase in risk informing the consideration of causation in other types of cases in the future if it were scientifically impossible to say how the disease or injury was caused and justice in the eyes of the Court demanded such an approach. This is because everything else that was stated in *Sienkiewicz* beyond the application of the *Fairchild* exception to the cases before the Court, and the rejection of the doubles the risk test to such cases, was *obiter*.

In the same way, the Supreme Court in *Durham* was dealing with the interpretation of the special rule in mesothelioma cases. Discussions beyond that were *obiter*. Admittedly, the chances are that we will not be seeing the *Fairchild* exception being applied by the Supreme Court in anything other than mesothelioma cases in the near future, nor a material increase in risk becoming predominant in the consideration of causation. Both the *McGhee* and *Fairchild* exceptions are there, nevertheless, if they are needed in the future; and for a differently constituted Supreme Court. Just as the doubling the risk test is available as an alternative to bare "but for" causation.<sup>71</sup> *McGhee* and *Fairchild* remain significant because they laid the foundation for a departure from the traditional tests of causation where justice so demands. For now, however, the traditional and safe route to causation will be the one favoured until a strong argument to depart from it can be made out. The clarity, consistency, and certainty that Lord Brown advocated can never be guaranteed whilst *McGhee* and *Fairchild* remain good law. They leave the door of causation open. *McGhee* and *Fairchild* have together created a potential for greater flexibility in establishing causation. This is a significant development; a justice-led pragmatic recognition that in both England and Scotland a strict application of traditional approaches to causation cannot adequately deal with the diseases that cause personal injury.

If this potential is developed in future cases, one option is to pursue Lord Hutton's explanation of *McGhee* in *Fairchild* and the drawing of a factual inference in a particular case.

<sup>70</sup> *Durham* per Lord Phillips at para. 135.

<sup>71</sup> And has been embraced by subsequent lower English courts. Though it has been taken to satisfy the "but for" test - see below.

This may achieve justice in the particular case before the court. Brown argued in its favour.<sup>72</sup> This would allow an increase in risk by the wrongdoer, along with other evidence in a particular case, to influence the establishment in that particular case, of causation, without departing from the traditional rules of the “but for” test and the material contribution test. It would be consistent with the demands of formal justice and yet could be consistent, on its face, with the accepted traditional rules of causation. The Canadian and Australian courts have taken this route. There are signs in the lower courts in the United Kingdom that relaxation in the rules on causation is better approached through the traditional rules. Despite the warnings of the Supreme Court, lower English courts have in fact embraced the doubles the risk test for non-mesothelioma occupational cancer cases where it is impossible to say scientifically that the cancer was caused by a particular carcinogenic substance from a particular source.<sup>73</sup> But rather than being openly acknowledged as a relaxation of the causal requirements, it is being taken as establishing the “but for” test.<sup>74</sup> This gives it acceptability in the new conservative causation environment,<sup>75</sup> and would appear to be taken from the Canadian and Australian law books.

The recent evolution of the rules on causation in the United Kingdom has regrettably left them in a state unable to meet the needs of personal injury. The tort system needs to remain meaningful.<sup>76</sup> The Supreme Court retraction in *Sienkiewicz* and *Durham* and return to the safety of the strict application of the “but for” rule, having created one exception in the course of its uncertain journey, has, in a sense, been a missed opportunity. If the Supreme Court was going to decide *Fairchild* in the way it did, it should have continued confidently on its journey; realised that the rules of causation required an overall review<sup>77</sup>, and instigated a confident reassessment of the “but for” and material contribution rules, at the very least resulting in a more flexible application of these rules, which in appropriate circumstances and in conjunction with other factors, allows risk to play some role in establishing causation through the drawing of a factual inference. *McGhee* had laid the foundations for such an approach. Lord Bridge in the case of *Wilsher* built on those foundations. Such a flexible application of the “but for” rule can be seen in Canada.

## CANADA

In Canada, as in England and Scotland, the fundamental principles of causation are that the plaintiff must prove, on a balance of probabilities, that “but for” the defendant’s negligence,

<sup>72</sup> Russell Brown, “Inferring Cause in Fact and the Search for Legal Truth,” in Goldberg, note 1 above.

<sup>73</sup> Before *Sienkiewicz*, see, for example, *Shortell v BICAL Construction* 16 May 2008, unreported; and in the Court of Appeal, *Novartis Grimsby v Cookson* [2007] EWCA Civ 1261. Following *Sienkiewicz*, see *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB). See also Robert O’Leary, note 9 above, p. 19.

<sup>74</sup> See *Novartis Grimsby v Cookson* [2007] EWCA Civ 1261 and *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB).

<sup>75</sup> But the doubles the risk test is not a failsafe approach either. It has its detractors. See Jane Stapleton, “Factual Causation, Mesothelioma and Statistical Validity”, *Law Quarterly Review*, CXXVIII (2012), p. 221; and Steel and Ibbetson, note 61 above, p. 451 – who say that obiter, the weight of the Supreme Court is against the doubles the risk test alone, to establish causation.

<sup>76</sup> Justice Beverley McLachlin in “Negligence Law - Proving the Connection”, in Mullany and Linden *Torts Tomorrow, A Tribute to John Fleming* (1998), p. 35.

<sup>77</sup> Jane Stapleton makes some recommendations. See Jane Stapleton, “Unnecessary Causes”, *Law Quarterly Review*, CXXIX (2013), p. 129.

the plaintiff would not have suffered the loss.<sup>78</sup> It has been the position in Canada that the defendant's negligence need not be the only causal factor, but that causation is satisfied if the negligence made a material contribution to the harm.<sup>79</sup> In the decision of the Supreme Court of Canada in *Athey v Leonati*<sup>80</sup> Major J stated,

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury ... As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury.<sup>81</sup>

A contributing factor will be material if it falls outside the *de minimis* range.<sup>82</sup> However, there has been a willingness on the part of the Canadian courts to be flexible with regard to the rules of causation. This can be seen in the case of *Cook v Lewis*.<sup>83</sup> Two persons fired shots in the same direction. The plaintiff was injured by one of the shots, but it could not be proved on a balance of probabilities which shot actually injured the plaintiff. The case of *Cook v Lewis* has been taken to be the leading authority for the proposition that, when justified by circumstances, the Supreme Court of Canada will reverse the burden of proof in order to establish causation in a negligence action.<sup>84</sup> Rand J's judgment does reveal that he is in favour of a shifting of the onus of proof to the wrongdoers in a situation where the plaintiff is not only injured by one of the negligent acts but is also prevented, by virtue of the nature of the acts, from being able to establish causation and thereby liability. The judgement of the majority (as delivered by Cartwright J), on the other hand, does not as clearly advocate a reversal of the burden of proof in such a situation, although that is the practical effect of their judgment. They state that the general rule in criminal law is that if it is certain that one of two individuals committed an offence but it is uncertain which did it, then neither can be convicted.<sup>85</sup> This is applicable in civil actions, so that the action must fail unless there are special circumstances which make the rule inapplicable. The majority then go on to follow the United States case of *Summers v Tice*.<sup>86</sup> It is not clear whether they accept the aspect of *Summers v Tice* that the burden of proof should shift to the defendants in these type of circumstances, for Cartwright J states, "I do not think it necessary to decide whether all that was said in *Summers v Tice* should be accepted as stating the law of British Columbia, but ...".<sup>87</sup>

The majority stress that if it is decided that the plaintiff was shot by either one or other of the defendants, but it is not possible to say which it was because both shot negligently in

<sup>78</sup> *Horsley v McLaren* [1972] SCR 441.

<sup>79</sup> *Myers v Peel County Board of Education* [1981] 2 SCR 21; *School Division of Assiniboine South No 3 and Hoffer v Greater Winnipeg Gas Co.* [1971] 4 WWR 746 (Man CA), aff'd [1973] SCR vi.

<sup>80</sup> *Athey v Leonati* [1997] 1 WWR 97.

<sup>81</sup> *Athey v Leonati* [1997] 1 WWR 97, per Major J at para. 17.

<sup>82</sup> *R v Pinsky* (1988) 30 BCLR (2d) 114 (CA), aff'd [1989] 2 SCR 979. See also *Athey v Leonati* [1997] 1 WWR 97.

<sup>83</sup> *Cook v Lewis* [1951] SCR 830.

<sup>84</sup> See Mitchell McInnes "Causation in Tort Law: A Decade in the Supreme Court of Canada", *Saskatchewan Law Review*, XXXV (2000), p. 445. Justice Beverley McLachlin, "Negligence Law - Proving the Connection". in Mullany and Linden, note 76 above, simply referred to *Cook v Lewis* as an alternative approach to the "but for" test.

<sup>85</sup> *Cook* per Cartwright J at para. 35 (relying on *Starkie on Evidence* (4<sup>th</sup> ed.), p. 860 and approved by Patterson J.A. in *Moxley v The Canada Atlantic Railway Company* (1887) 14 OAR 309 at 315).

<sup>86</sup> *Summers v Tice* (1948) 5 ALR (2<sup>nd</sup>) 91.

<sup>87</sup> *Cook* per Cartwright J at para 44.

the plaintiff's direction, then both defendants should be found liable. The majority appear to be guided in their decision by fairness and justice.

Although it is by no means clear that the majority in *Cook v Lewis* opted for a reversal of the burden of proof after the decision by the House of Lords in the case of *McGhee*, and although it was really only Lord Wilberforce who in that case espoused a reversal of the burden of proof where the plaintiff had evidential difficulties, the Canadian courts embraced this reversal of the burden of proof and went on to apply it in subsequent cases.<sup>88</sup> When *Wilsher*, decided by the House of Lords, rejected the idea that *McGhee* had laid down a new principle of law that the burden of proof should be reversed in certain circumstances, the Canadian courts drew an inference of causation.<sup>89</sup> Sopinka J, who gave the judgment of the Supreme Court in *Snell v Farrell*,<sup>90</sup> himself, made clear that there is to be no overt reversal of the burden of proof in establishing causation.

In *Snell*, the plaintiff, Mrs. Snell, was a 70 year old lady who had a cataract. The defendant, Dr. Farrell, an ophthalmologist, carried out an operation on Mrs. Snell's eye to remove the cataract. Mrs. Snell's optic nerve in her right eye atrophied, which resulted in the loss of sight in her right eye. Neither of the medical experts called to give evidence were able to say with certainty what caused the atrophy or when it occurred. One possible cause was pressure due to retrobulbar haemorrhage. Mrs. Snell had suffered a retrobulbar bleed at the start of the operation but Dr. Farrell continued with the operation. Another cause is a stroke in the eye which is most likely in a patient with cardiovascular disease, high blood pressure, or diabetes. Mrs. Snell suffered from the last two. Mrs. Snell also suffered from severe glaucoma which over a long period, can also cause nerve atrophy. So there were a number of possible causes of the nerve atrophy, one of which was the actions of Dr. Farrell whilst the others were "innocent" causes. The case was therefore similar to *Wilsher*.

Sopinka J in *Snell* made a thorough analysis of the recent developments in the requirements to establish causation. He began by referring to the traditional principles in the law of torts as the "but for" test. He noted that this traditional "but for" test of causation has not always been applied, particularly where there is more than one negligent defendant but the plaintiff cannot produce evidence to prove causation against any specific defendant in accordance with traditional principles and that in such cases there has sometimes been a shifting in the onus of proof and in this regard refers to the case of *Cook v Lewis* and the pre-*Wilsher* view that was taken of *McGhee*.

Sopinka J looked at the case of *McGhee* in some detail. He stated that two theories of causation emerge from *McGhee* – (1) the plaintiff need prove only that the defendant created a risk of harm and the injury occurred within the area of that risk (the reversal of the onus of proof a part of that); and (2) in the circumstances, an inference of causation can be drawn because there is no practical difference between materially contributing to

<sup>88</sup> See for example *Wipfli v Britten* (1984) 13 DLR (4<sup>th</sup>) 169 (BC CA); *Powell v Guttman (No2)* (1978) 89 DLR (3d) 180 (Man CA); *Letnik v Metropolitan Toronto (Municipality)* (1988) 49 DLR (4<sup>th</sup>) 707 (FCA), taken from McInnes, note 84 above, p. 445, fn. 8.

<sup>89</sup> See Sopinka J in *Snell v Farrell* 4 CCLT (2d) 229 at para. 25. He refers to the following cases as drawing an inference - see *Rendall v. Evert* (1989), 38 B.C.L.R. (2d) 1 (C.A.); *Kitchen v. McMullen* (1989), 100 N.B.R. (2d) 91 (C.A.); *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*, [1989] 4 W.W.R. 289 (Man. C.A.); and *Haag v. Marshall*, [1990] 1 W.W.R. 361 (B.C.C.A.).

<sup>90</sup> *Snell v Farrell* 4 CCLT (2d) 229.

the risk of harm and materially contributing to the harm itself. He noted that Canadian cases decided after *McGhee* but before *Wilsher* tended to follow *McGhee* by adopting either theory. Even when it was the inference theory that a court opted for, the creation of the risk was deemed to establish a *prima facie* case which then shifted the onus on to the defendant. But Canadian cases after *Wilsher* accepted its interpretation of *McGhee*, and they then drew an inference to find causation.<sup>91</sup>

In questioning whether there is a need to look further than the traditional approach to causation, Sopinka J here took the traditional approach as being that the tortious conduct must cause the harm or contribute to the plaintiff's harm. His discussion of *McGhee* showed that he drew a distinction between the traditional test of causation as aforementioned and the alternative approach of drawing an inference of causation where all that could be proved was that the defendant had increased the risk of harm, and in the circumstances it was felt that there was no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.<sup>92</sup> Sopinka J did not discuss in detail what exactly the traditional causal requirements are. He obviously did not think there was any question over the meaning of causing the harm or materially contributing to the harm itself. This lack of a clear pronouncement on the meaning of materially contributing caused great problems for Canadian courts in the years to follow.

Sopinka J felt that the traditional causal requirements were quite sufficient for the type of case that is before him, that is, where there are a number of different possible causes, some of which are unconnected to the defendant and not the fault of anyone and are therefore "innocent". They ensure that there is a substantial connection between the injury and the defendant's conduct. He accepted the reversal of the burden of proof in a *Cook v Lewis* type situation, where both suspected causes were negligent. He rejected the two alternative approaches:<sup>93</sup> the two theories of causation that emerge from *McGhee*, for a *Wilsher* type case, as the case before him was. He believed that if these were adopted, the result would be that a plaintiff would receive compensation where there was no substantial connection between the injury and the defendant's negligence. So he rejected the increase in risk causation test for *Wilsher* type cases. It is not clear if he rejected such a test in a *McGhee* type case; that is, where all possible sources of the harm stem from the defendant and involve the same agent, or a *Fairchild* type case, where all possible sources of harm are the result of negligence of a number of defendants and all involve the same agent, or a *Barker/Sienkiewicz* type case, where the sources are a result of a mix of tortious conduct and non-tortious factors but still involve the same agent.

The Court judgment up to this point is clear, but Sopinka J then stated that the dissatisfaction with the traditional approach to causation stems from its too rigid application and thereby advocated a less rigid application of the traditional approach. He stated that causation need not be determined by scientific precision. What is required legally is not 100% certainty but simply "more probably so"; that is, 51%. This is quite so. However, Sopinka J then went on to accept something similar to the drawing of an inference where there is an increase in risk. He did this in the case before him, and thereby

<sup>91</sup> Sopinka J did not distinguish between a legal inference and a factual inference, although *Wilsher* took the view that *McGhee* drew a factual inference. Sopinka J cited a number of cases as examples – see para. 25 of his judgment.

<sup>92</sup> See in particular paras. 22 and 27, Sopinka J judgment.

<sup>93</sup> As he sees them in para. 22.



accepted this looser causal test even in *Wilsher* type cases. He effectively did this because he went on to state that there is not so much a shifting of the evidential burden of proof, but the plaintiff may lead evidence which results in an adverse inference being drawn against the defendant, if the defendant cannot lead evidence to the contrary, even where positive or scientific proof of causation has not been adduced. Sopinka J felt that if these points are remembered and applied with the traditional causal requirements, they are sufficient to deal with most situations.

Sopinka J seemed to distinguish between two types of inference. There is an inference of causation drawn from the evidence led by the plaintiff, although positive or scientific proof of causation has not been adduced, and there is an absence of evidence to the contrary being led by the defendant; and then there is the inference that has been drawn by judges where there has been an increase in the risk of harm to the plaintiff and an injury occurred within the area of that risk. The former is acceptable to Sopinka J and the Supreme Court of Canada even in *Wilsher* type cases. The latter the Court felt did not create a sufficient connection between the injury and the defendant such as to justify a finding of causation, at least in a *Wilsher* type case where there are some “innocent” causes. But is there a great difference between the two?

In *Snell* it was established that in the type of case *Snell* is, where there are other possible causes which are innocent and the defendant has nothing to do with, the traditional test of causation is adequate. But the traditional test of causation should not be applied too strictly. A positive opinion from a doctor is not necessary. It may be possible to draw an inference from the circumstances that the negligent conduct of the defendant caused the injury in the absence of evidence to the contrary being led by the defendant. And this would simply be the application of common sense. However, this could effectively amount to the same as an increase in risk creating an inference of causation because in the circumstances there was no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself. This can be seen by the fact that Sopinka J admitted that the finding of causation in the case before the Court could be on either basis:

The finding in the last paragraph can be read as a finding of causation inferred from the circumstances and in the absence of evidence to the contrary in satisfaction of the evidential burden cast upon the defendant. Or it could be interpreted as accepting Lord Wilberforce’s formulation in *McGhee* which reverses the ultimate burden upon finding that a risk was created and an injury occurred within the area of risk. If the former was intended, I am of the opinion that such an inference was fully warranted on the evidence. On the other hand, if the latter is the interpretation to be placed on that statement, and I am inclined to think that it is, then I am satisfied that had the trial Judge applied the principles referred to above he would have drawn an inference of causation between the appellant’s negligence and the injury to the respondent.<sup>94</sup>

Sopinka J is advocating the drawing of a factual inference in these types of cases as opposed to the drawing of a legal inference. Why does the Court assert the application of traditional principles of causation but then advocate an application of those traditional

<sup>94</sup> *Snell* per Sopinka J at para. 43.

principles that effectively reduces the requirement to establish causation to the same level as *McGhee*, and do so even in *Wilsher* type cases? One possible reason is that the Court wanted to retain the structure of the traditional rules of causation and avoid the evidential difficulties in some cases by saying that those traditional rules need not be applied so strictly. This allowed them to find causation even where the connection between the defendant's negligence and the injury is more tenuous. They allowed this even in *Wilsher* type cases. At this point, therefore, the approach taken by the Canadian Supreme Court is arguably more relaxed than the approach taken by the House of Lords at the equivalent time.<sup>95</sup> At this point, the House of Lords had decided *McGhee* and *Wilsher* but not yet *Fairchild*. *Wilsher* had interpreted the decision in *McGhee* as the drawing of a factual inference of causation based on the facts of that particular case; a one-off decision, laying down no new principle on the test of causation. But it would not draw an inference in *Wilsher* itself. *Fairchild* had yet to resuscitate *McGhee* and draw from it any relaxed test for causation.

In *Snell* we can see an application of traditional principles and a following of precedent. In the application of the traditional principles we see such a loose application that those traditional principles are able to embrace/encompass cases where evidential difficulties make it impossible to establish the exact cause of the injury.

In the case of *Athey v Leonati*,<sup>96</sup> the Supreme Court of Canada robustly and confidently stated that causation will be established if the negligent acts of the defendant caused or materially contributed to the plaintiff's injuries. The general test is the "but for" test, but the court recognised that the "but for" test is "unworkable" in some circumstances. The Court did not, however, elaborate on what these circumstances are. The Court repeated what was said in *Snell* – the test is not to be applied rigidly; scientific precision is not required; it is a practical question that can be answered by common sense (quoting from Lord Salmon in *Alphacell Ltd V Woodward*);<sup>97</sup> it is not necessary to establish that the defendant's negligence was the sole cause of the injury; and although the burden of proof remains with the plaintiff, in some circumstances an inference of causation can be drawn from the evidence without positive scientific proof.<sup>98</sup>

In support of all this the Court referred to, amongst others, the cases of *McGhee*, *Snell*, and *Bonnington Castings*. As in *Snell*, therefore, although there is the distinct causal test of materially contributing to the harm (as opposed to materially increasing the risk of harm), by insisting on it being applied not too rigidly, the Court blurred the line between the tests of causing or materially contributing to the harm, both of which ensure that there is a strong connection between the defendant's negligence and the injury; and the drawing of an inference of causation in the circumstances, without positive scientific proof, which can result in a weaker connection satisfying causation. On the facts of the case, causation was actually established on the basis of a material contribution to the harm. No inference was needed. The plaintiff in *Athey* was involved in two motor vehicle accidents. He had pre-existing back problems before the accidents. The trial judge concluded that the accidents were a necessary ingredient to the extent of 25% in bringing about herniation. The Supreme Court held that a 25% contribution fell outside the *de minimis* range. Therefore

<sup>95</sup> *Snell* was decided in August 1990.

<sup>96</sup> *Athey v Leonati* [1997] 1 WWR 97.

<sup>97</sup> *Alphacell v Woodward* [1972] AC 824.

<sup>98</sup> *Athey* per Major J at para. 16.

the accidents materially contributed to the injury and the defendants were fully liable for the damages flowing from the herniation.

In the case of *Walker Estate v York Finch Hospital*<sup>99</sup> the Supreme Court held that in cases involving negligent blood donor screening by blood banks, the appropriate test for establishing causation was whether the defendant's negligence materially contributed to the plaintiff's harm. The "but for" test was inappropriate because it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened (although on the facts of this case the Court felt that the "but for" test was actually satisfied in this case, though not required in this type of case.) There was no reference to a looser causal connection.

The Supreme Court case of *Resurfice Corp. v Hanke*<sup>100</sup> appeared to cast doubt on even the fundamental principles of causation. The place in the rules of causation for a factor which materially contributes to the injury to be enough to satisfy causation in "normal cases" is called into question. The Supreme Court of Canada purported to clarify the law of causation in *Resurfice*, in particular the circumstances in which material contribution will suffice to establish causation. Unfortunately, in no sense of the word can *Resurfice* be said to clarify any aspect of the law of causation. In one short judgment, the Chief Justice managed to intensify the causal confusion. This is mainly because the Supreme Court referred to the "but for" test and the "material contribution" test. The Court did not say to what the defendant materially contributes to – the harm itself or to the risk of injury. It appears that the Court meant materially contributing to the risk of injury when it referred to the "material contribution" test.

On the facts there was no need to deal with the more relaxed tests for causation in cases of evidential difficulty because the case before them did not fall into this category. The Supreme Court seized on pronouncing on this area of causation because the Court of Appeal had raised the causal test of the defendant's negligence material contributing to the injury. The Supreme Court mistakenly took this as the Court of Appeal advocating the use of an inference of causation because the defendant's act had increased the risk of injury. By confusing the two concepts, the Supreme Court reshaped the causation test. It actually formulated a wider set of circumstances where the relaxed material contribution to the risk of injury test will apply than the House of Lords did in *Fairchild and Barker*.

In *Resurfice*, the Plaintiff was burned by a fire caused by the plaintiff filling the gasoline tank of an ice-resurfacing machine with hot water instead of the water tank. The plaintiff claimed that the two tanks were similar and placed close together, making it easy to confuse the two. He brought an action against the distributor and the manufacturer for design defects. The trial judge found that there was no evidence that the plaintiff in fact had been confused by them and found it was operator error that had caused the accident.

The Supreme Court began by emphasising that the basic test for causation remained the "but for" test, even where there is more than one potential cause of an injury. The Chief Justice referred to *Snell* and quoted Sopinka J where he made the point that the "but for" test recognised that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct"<sup>101</sup> was present. It

<sup>99</sup> *Walker Estate v York Finch Hospital* [2001] 1 SCR 647.

<sup>100</sup> *Resurfice Corp. v Hanke* 2007 SCC 7.

<sup>101</sup> *Resurfice* per McLachlin CJ at para 23.

ensured that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone".<sup>102</sup> The Chief Justice then went on to say that the "material contribution" (to risk of injury) test is an exception to the "but for" test to be applied in special circumstances. Broadly speaking, there were to be two requirements:

1. It would be impossible for the plaintiff to prove that the defendant's negligence caused the injury using the "but for" test. The impossibility must be due to factors outside the plaintiff's control; for example, current limits of scientific knowledge;
2. The defendant breached a duty of care owed to the plaintiff and thereby exposed the plaintiff to an unreasonable risk of injury, and the plaintiff suffered that form of injury (so the injury fell within the ambit of the risk created by the defendant's breach).

The material contribution test would be allowed, the Chief Justice said, because it would offend basic notions of fairness and justice to deny liability if the "but for" test was applied. A *McGhee* type case would be covered, but so too would a *Wilsher* type case, because there is no restriction in the first requirement that the various potential causes all stem from the defendant or that they all need be a result of negligence, or that the potential causes all need to involve the same agent or at least that they involve an agent acting in the same causative way. The Court almost completely ignored the Sopinka J approach in *Snell* of applying a less-strictly-applied-traditional-rules approach by finding an inference of causation. "Material contribution" was now an exception to the traditional "but for" test, to be applied in special circumstances. The circumstances do not actually appear to be that special when the two requirements are examined.

This reshaping of the causation rules also failed to recognise that there will be situations where there is more than one cause of an accident and where the defendant's negligent act was not the dominant cause and thus cannot pass the "but for" test, but did materially contribute to the injury itself. In such a situation it is not that it is impossible to establish that the negligent act was the dominant cause because of some impossibility outside the plaintiff's control, such as limits on scientific knowledge; but simply because the negligence was not the sole dominant cause, but rather, was a contributing factor. It can, however, be proven that on a balance of probabilities, the negligence materially contributed to the injury. Was the Supreme Court saying that in such cases, the plaintiff could not recover? Even if the Supreme Court's "material contribution" was meant to also include material contribution to the injury itself, their two requirements prevented recovery in such a situation.

The Chief Justice gave two examples of situations where these principles would apply: (1) where it is impossible to say which of two tortious sources caused the injury. For example, where two shots are carelessly fired at the victim, but it is impossible to say which injured him. See *Cook v Lewis*

However it should be noted that the material contribution to the risk of injury test was not applied here. The Court followed *Summers v Tice* and were primarily persuaded by fairness and justice, and perhaps by a reversal of the burden of proof. In any case, the test of material contribution to the risk of injury would not establish causation in *Cook v Lewis*

<sup>102</sup> *Resurfice* per McLachlin CJ at para 23.

because the “innocent” defendant did not contribute to the injury in any way and did not even contribute to the risk of injury by the “guilty” defendant.

(2) where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the “but for” chain of causation.

The Supreme Court refers to *Walker Estate* as an example, but the court in that case stated that material contribution to the harm itself could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. The Court did not say materially increasing the risk of harm was sufficient.

It is interesting to note that the Supreme Court in *Resurfice* made no mention of *McGhee*, *Fairchild*, or *Barker*. It said that it is “neither necessary nor helpful to catalogue the various debates”.<sup>103</sup> The Court “simply”<sup>104</sup> asserted the general principles that have come from the cases. In an area of law that is not straightforward and where the current applicable law is not clear, it is unfortunate that the Supreme Court did not at least disclose the cases that influenced its conclusions on the applicability of the “material contribution” test, not least because it is not obvious that the law has applied a “material contribution” test of the kind the Supreme Court had in mind in any case before this one.<sup>105</sup>

Because the trial judge found on the basis of the evidence led before him that the plaintiff had not been confused between the two tanks and that it was purely operator error that was the cause of the accident, the Supreme Court found that the Court of Appeal had erred in applying the material contribution test, meaning the material increase in the risk of injury. The Supreme Court said that only if it is the “but for” cause will causation be established in all but the special cases. They said that the Court of Appeal erred in suggesting that where there is more than one potential cause of injury, the material contribution test must be used, and then in applying the material contribution test. However, they confused the meaning of material contribution. The Court of Appeal took material contribution from *Athey* and the meaning to be material contribution to the injury itself. The Court of Appeal meant that where there was in fact (and it can be proved on a balance of probabilities) more than one cause of the injury, one of which is the negligence and the other or others are innocent, using the material contribution to harm test, establishes causation. There can in fact be more than one cause of the harm and that can be proven to the civil standard; and in that case, material contribution *to the harm itself* is the correct test.

In *Resurfice*, the Supreme Court moved from the traditional “but for” test to the opposite extreme, to material increase in risk satisfying causation in fairly broad circumstances. There was no recognition of causation being satisfied by the defendant’s negligence being a material contributing factor to the injury, out of a number of causes; a causal connection which sits in between the two extremes. The case of *Marszalek Estate v Bishop*,<sup>106</sup> a decision by the British Columbia Supreme Court after *Resurfice*, is an example of the confusion that was created by the decision in *Resurfice*. The British Columbia Supreme Court took the meaning of material contribution from *Athey*, that is, to mean material contribution to

<sup>103</sup> *Resurfice* per McLachlin CJ at para. 20.

<sup>104</sup> *Ibid.*

<sup>105</sup> See *Resurfice* per McLachlin CJ at para. 24 of the judgment.

<sup>106</sup> *Marszalek Estate v Bishop* [2007] BCJ No. 472.

the injury itself, but it took the circumstances in which it should be applied from *Resurfice*. The Court then had to manipulate the case to enable it to say that the case fell within the exception requirements in *Resurfice*. It did this by saying that the case was similar to *Walker* because it was impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act, thus breaking the “but for” chain of causation (although this could be said to apply in the majority of cases). The second risk requirement was met and so material contribution applied. Before the decision in *Resurfice*, a court would not have had to go to these lengths. The British Columbia Court had to engage in legal gymnastics in order to apply the *Athey* meaning of material contribution. The courts had to fit the case before them into the *Resurfice* requirements simply to apply the basic historic material contribution test. The result at that point was that the traditional test of material contribution to harm was actually more difficult to apply.

The British Columbia Court of Appeal, in the case of *Sam v Wilson*,<sup>107</sup> was able to achieve what the Supreme Court had not. It brought some clarity to the legal position. Smith JA, who gave the majority judgment, distinguished between the two types of material contribution; the material contribution as it was applied in *Athey v Leonati* and the material contribution test applied in *Resurfice*, the development of the latter principle, having been traced by him in *B.M. v. British Columbia (Attorney General)*,<sup>108</sup> from its inception in *McGhee* through to *Fairchild*. Although Smith JA stated that the *Resurfice* material contribution test is not a test of causation at all but rather a rule of law based on policy, he nevertheless accepted it as a valid exception to the “but for” test in specific circumstances; when it is impossible for the plaintiff to prove that the defendant’s negligent conduct caused the plaintiff’s injury using the “but for” test, where it is clear that the defendant breached a duty of care owed to the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury, and where the plaintiff’s injury falls within the ambit of the risk.

Another decision of the Supreme Court that touched on causation is *Fullowka v Royal Oak Ventures Inc.*<sup>109</sup> Unfortunately, it lacked the clarity of *Sam v Wilson*. The causation issue was admittedly not the main issue;<sup>110</sup> nevertheless, the Court did have to deal with it. Cromwell J, who gave the judgment of the Court, did not seem to appreciate the historical confusion that the Supreme Court has created because he actually referred to *Resurfice* as clarifying the law of causation. He simply reiterated that decision, so that in the view of the Supreme Court there are two tests for causation; the “but for” test and the *Resurfice* material contribution test. Thus, the two meanings of material contribution remain, though not currently recognised by the Supreme Court. The *Athey v Leonati* material contribution to harm lies dormant. The material increase in risk test was at that time a genuine alternative to the “but for” test in the right circumstances. Whilst the highest civil court in the United Kingdom was ruing the day *Fairchild* was decided, the Canadian Courts were shambling along with the new increased risk test by virtue of the confusion and misunderstanding on the part of the Supreme Court.

Then the Supreme Court decided *Clements (Litigation Guardian of) v Clements*.<sup>111</sup> The Chief Justice took the opportunity to eliminate the confusion that had been created in the

<sup>107</sup> *Sam v Wilson* 2007 BCCA 622.

<sup>108</sup> *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, 31 B.C.L.R. (4th) 61.

<sup>109</sup> *Fullowka v Royal Oak Ventures Inc* (2010) 315 DLR (4th) 577 (SCC).

<sup>110</sup> The main issue was the existence of duties of care and their breach.

<sup>111</sup> *Clements (Litigation Guardian of) v Clements* 2012 SCC 32.

*Resurfice* case. The case of *Clements* involved a husband and wife, where the wife sustained severe traumatic brain injury as a result of falling off a motorbike that she was riding pillion with her husband. The road was wet from the rain. The motorbike was 100 pounds overloaded. Unbeknown to the couple, there was a nail in the rear tyre. The husband accelerated and began to overtake another vehicle.

The nail came out of the rear tyre, which deflated, causing the motorbike to wobble. The husband lost control of the bike. The issue was whether the wife could establish that the husband's actions in overloading the bike and driving too fast had caused her accident. The evidence could not establish that the accident would not have occurred but for the husband's negligence. The nail and the deflation of the tyre may themselves have been enough to have caused the accident.

McLachlin CJC managed to bring the case within the "but for" test by applying that test in a "robust common sense fashion",<sup>112</sup> as it was applied, she said, by Sopinka J in *Snell*. Her approach came suspiciously close to accepting a material increase in risk as a sufficient causal connection, through the back door. She was, however, clear in her judgment that it is simply a common sense application of the "but for" rule. She then went on to describe when the material increase in risk test will apply and managed even to explain the basis for the material increase in risk test, as formulated in *Resurfice*, still in terms of the "but for" test, "viewed globally".<sup>113</sup> The case of *Sienkiewicz*, McLachlin declared, is not to be followed in Canada. Accordingly, she could confidently assert that the "but for" test was still the main rule on causation in Canada, avoiding any criticism of the type to which the United Kingdom Supreme Court has been subjected. Her loose application of the "but for" test and the re-explaining of the basis for the decision of *Athey v Leonati*, and *Walker*, however, require further comment.

McLachlin CJC began by asserting that the "but for" test must be applied in a robust common sense fashion and referred to Lord Bridge in *Wilsher* and *Snell* in support of this. As part of this, a common sense inference of "but for" causation "usually flows without difficulty".<sup>114</sup> As a result, she said, the evidence may allow the judge to infer that the negligence probably caused the loss, and she again relied on *Snell* and *Athey*. However, as discussed above, Sopinka J drawing of an inference from the circumstances, and the defendant being unable to lead evidence to the contrary, was indeed the common sense application by Sopinka J of the "but for" test, but it arguably amounted to the same as an increase in risk creating an inference of causation. And although the approach in *Snell* was confirmed in *Athey v Leonati*, as discussed above, in that case, the material contribution to harm test was applied. It was not necessary to draw any inference of causation from the evidence.

McLachlin recognised the two different terms, "material contribution to the injury" and "material contribution to risk", but she did not recognise that they have different meanings. She said that whilst cases and scholars have referred to both, "material contribution to risk" is the more accurate formulation.<sup>115</sup> So McLachlin CJC completely disregarded the difference in meaning of the two tests and therefore disregarded the role that material

<sup>112</sup> *Clements* per McLachlin CJC at para. 9.

<sup>113</sup> *Clements* per McLachlin CJC at para. 40.

<sup>114</sup> *Clements* per McLachlin CJC at para. 10.

<sup>115</sup> *Clements* per McLachlin CJC at para. 15.

contribution to the harm has played in causation to that point. According to her, *Athey* is an application of the “but for” test because although it was a material contribution (to harm) approach that was used by Major J, “read in context”<sup>116</sup> that did not detract from the fact that it was an application of the “but for” test. So the 25% contribution was in effect enough to satisfy the “but for” test.

She also said that *Walker* was an example of causation in the usual sense, though again, as discussed above, *Walker* actually applied the material contribution to harm approach. *Snell* was taken to be a robust and common sense application of the “but for” test. Her summary was that although the Supreme Court recognised that there may be special circumstances where material contribution to risk may be a valid approach to causation, the Supreme Court has never had to resort to this because it has always applied a robust and common sense “but for” test (for this translate – an inference drawn from the evidence). She could only say this, though, because she had glossed over the Supreme Court decisions that she refers to. If *Snell* really was a common sense application of the “but for” test, then common sense application must mean a loose application of the “but for” test to the point where its true meaning is ignored. *Snell* was a *Wilsher* type case – if the “but for” test had properly been applied, the court could not have found for the plaintiff.

Having established that every relevant Supreme Court case has applied the “but for” test, McLachlin CJC completed the *Resurfice* test of material contribution to risk, establishing the “but for” basis of that test and when in the future that test will apply. The test will be available when there are a number of possible tortfeasors. All are at fault, but it is impossible to say which in particular caused the injury. However, one or more has in fact caused the plaintiff’s injury. Viewed globally, the “but for” test is met because the plaintiff would not have been injured “but for” their negligence. She explained *Sienkiewicz* as the only case where material contribution to risk was applied to a single tortfeasor case (she did not mention *Barker* at all) and that the United Kingdom felt bound by precedent to apply the approach to that type of case. Canada she stated, has no reason to adopt this approach to single tortfeasors. She continued:

The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

(1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss “but for” the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant’s negligence caused her loss. Scientific proof of causation is not required.

(2) Exceptionally, a plaintiff may succeed by showing that the defendant’s conduct materially contributed to the risk of the plaintiff’s injury, where (a) the plaintiff has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or “but for” cause of her injury, because each

<sup>116</sup> *Clements* per McLachlin CJC at para. 23.



can point to one another as the possible “but for” cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.<sup>117</sup>

Applying this to the case before her, the trial judge she said, used language that was “tantamount” to finding “but for” causation. He found that the husband’s speed and overloading of the bike materially contributed to the injuries of the wife. So McLachlin CJC equated material contribution of *harm* to the “but for” test. This loose application of the “but for” test encompassed the material contribution to harm test. The Supreme Court ostensibly at least, followed *Snell* and *Athey* and so followed principle and precedent and even the special rule which allowed a material increase in risk alone to satisfy causation, is based on the “but for” test “viewed globally”.

Lebel J dissenting, questioned how even a robust common sense inference that the breaches of duty caused the accident could be drawn on the basis of the findings of fact of the trial judge. It has to be said that the McLachlin CJC approach seems to stretch the “but for” test beyond its capabilities even taking into account that there did not need to be scientific evidence of the precise contribution the defendant’s negligence made to the injury.

On the face of it, there can be little criticism of a Supreme Court who applies the traditional rules of causation in a common sense way. On paper the Court is applying well established principle. However, this common sense application of the “but for” test can in effect amount to an acceptance that a material contribution to the harm that is only just over *de minimis*, or even an increase in the risk, can meet that “but for” test. Is this covert relaxation of causal rules a better approach than the transparent creation in the United Kingdom of an exception to the general rule? In the United Kingdom the circumstances where special causal rules are to apply have been openly and clearly explained. Arguably the legal basis for the United Kingdom’s current exception is tenuous. A common sense application of the “but for” test, on the other hand, which allows an inference of causation to be drawn from the evidence, is arguably more inconsistent in result /effect because it is completely without boundaries and is subjective. Yet it is more consistent in law because it constitutes the repeated application of the “but for” test to all cases, and therefore on paper is unimpeachable. It is arguably more consistent with the rule of law, where all are to be treated equally before the law. We can perhaps see the same approach with the doublets the risk test in the United Kingdom. Latterly it has been treated as satisfying the “but for” test rather than being an alternative to it.<sup>118</sup> Perhaps the courts are realising this is the way to bring in relaxed causal requirements; embrace them as in effect satisfying the traditional tests by relaxing the application of the traditional test itself, by applying the traditional test(s) in a common sense way.

In Australia the courts also adopted a common sense approach to causation and allowed evidence of an increase in risk to inform the drawing of an inference. But the level of increase in risk that has been accepted as informing such an inference has varied.

<sup>117</sup> *Clements* per McLachlin CJC at para. 46.

<sup>118</sup> See above in the Scotland and England section, in particular the *Novartis* case and the *Jones* case.

## AUSTRALIA

The common law principles applicable to causation in Australia are generally laid out in *March v Stramare*<sup>119</sup> and *Bennett v Minister of Community Welfare*.<sup>120</sup> The majority in *March* held that a common sense approach was to be taken to causation. Deane J stated: "... whether conduct is a 'cause' of injury remains to be determined by a value judgment involving ordinary notions of language and common sense".<sup>121</sup>

The "but for" test may be an aid to determine causation but it was not the definitive test. According to Mason CJ, the results of its application "must be tempered by the making of value judgments and the infusion of policy considerations".<sup>122</sup> McHugh J, who dissented, felt that the problem with common sense notions of causation was that "common sense" was actually subjective and in fact was actually a policy choice. He felt that the "but for" test should be the exclusive test except where there were two or more separate and independent causes each of which was sufficient to cause the damage.

The case of *Chapel v Hart*<sup>123</sup> highlighted the subjective nature of the common sense approach to causation. Each member of the Court applied the common sense approach, but the majority and those dissenting came up with different answers. In *Chapel* a doctor performed surgery with due skill and care, but he had not warned the patient that there was a risk of injury to her voice, despite the patient asking the doctor about possible risks of the surgery. The oesophagus was perforated during the operation and there was infection, with the result that the patient's voice was impaired. The patient would have required the surgery at some point, but she argued that had she been warned of the risk in question, she would have delayed the surgery and had it performed by the most experienced surgeon in the field. It was held that the doctor's negligent failure to advise the patient of the risk of physical injury materially contributed to the injury. The majority took the view that the chances of the perforation and infection happening were slim such that the chances of this happening on another occasion were almost non-existent. The dissenting judges took the view that the risk of the perforation and infection was the same whoever did the operation and whenever it was done, as it was not a result of negligence; therefore the failure to advise of the risk did not materially contribute to the injury.

However, the common sense approach to causation continues to be applied in Australia in areas governed by the common law principles of causation.<sup>124</sup> It has given the assessment of causation in Australia a degree of flexibility which would not otherwise

<sup>119</sup> *March v Stramare* 171 CLR 506.

<sup>120</sup> *Bennett v Minister of Community Welfare* 107 ALR 617. In most states the burden of proof remains at all times with the plaintiff – see *March v Stramare*; *Luxton v Vines* (1952) 85 CLR 352 and *Flounders v Millar* 2007 WL 5111402; [2007] NSWCA 238. In Western Australia, the defendant has an evidential burden where a prima facie causal connection is made out by the plaintiff, (which occurs when the plaintiff demonstrates that a breach of duty has occurred followed by injury within the area of foreseeable risk). The defendant has an evidential burden to lead evidence that the breach had no effect or that the injury would have occurred even if the duty had been performed. If the prima facie case is displaced, the plaintiff has to show that the injury was caused by the defendant's negligence. See Steytler P and McLure JA in *Amaca Pty Ltd v Hannell* [2007] WASCA 158.

<sup>121</sup> *March v Stramare* per Deane J at 524.

<sup>122</sup> *March v Stramare* per Mason CJ at 516.

<sup>123</sup> *Chapel v Hart* 195 CLR 232.

<sup>124</sup> See for example the Australian High Court decision of *Roads and Traffic Authority v Royal* 2008 WL 2030897; [2008] HCA 19, and in particular per Kirby JJ (though dissenting) for a review of the main authorities on causation. See also Ipp JA in *Flounders v Millar* 2007 WL 5111402; [2007] NSWCA 238.

have been possible. It has allowed judges, on a case by case basis, to take into the whole causation equation an increase in the risk of harm without departing from the basic orthodox principles. Furthermore, although the common sense approach and the “but for” test are the mainstay of causation in Australia, evidence to establish that the negligent act made a material contribution to the loss was taken to be sufficient to establish causation in the Australian High Court case of *Bennett v Minister of Community Welfare*.<sup>125</sup> So too in the case of *Chapel v Hart*.<sup>126</sup> It continues to be sufficient to establish causation<sup>127</sup> and is recognised as distinct from the “but for” test. This combination of a common sense approach to causation and a material contribution being sufficient to establish causation has meant that an increase in risk at least in the state courts has played an informal part in establishing causation when gaps in science have left gaps in the evidence.<sup>128</sup> Although on the face of it the Australian courts apply relatively orthodox principles of causation, this has not completely prevented plaintiffs who meet evidential problems due to gaps in scientific knowledge from recovering compensation.

The initial straightforward application of orthodox principles to cases of mesothelioma can be seen in the New South Wales case of *Bendix Mintex v Barnes*,<sup>129</sup> where the Supreme Court of New South Wales Court of Appeal held that the causal test that had to be established on a balance of probabilities was that the defendants caused or materially contributed to the mesothelioma. *Bonnington Castings* and *March v Stramare* were applied. The Court said that this test was not met by establishing that a particular matter could not be excluded as a possible cause of the injury. The majority felt that the medical evidence did not support a finding that the asbestos exposure due to the defendants’ negligence caused or materially contributed to the claimant contracting mesothelioma. Mason P stated that the position in Australia at that time was that the law did not equate the situation where the defendant had materially increased the risk of injury with one where he had materially contributed to the injury. In that particular case, the evidence suggested that the period of employment with the Royal Navy had created the greater risk of the claimant contracting mesothelioma than any of the other employers, but the Royal Navy was not a defendant in the case.

The courts in New South Wales then, rather than creating a special causation rule for these types of cases, began to accept particular forms of expert evidence that allowed the court to hold that the negligent exposure to asbestos fibres contributed to the triggering of the cancerous process.<sup>130</sup> For example, in the case of *E M Baldwin & Son Pty Ltd v Plane*,<sup>131</sup> the Supreme Court of New South Wales Court of Appeal applied the same causation test, but this time found that there was medical evidence led to support the claimant. Fitzgerald AJA emphasised that common sense, experience, and policy considerations should be part of the causation assessment, relying on *March v Stramare*. He seemed to say that although

<sup>125</sup> *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.

<sup>126</sup> *Chapel v Hart* 195 CLR 232. See also McHugh J in *Henville v Walker* (2001) 206 CLR 459. For application of material contribution see *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410; 1 ALR 125.

<sup>127</sup> See for example the Australian High Court decision of *Roads and Traffic Authority v Royal* 2008 WL 2030897; [2008] HCA 19.

<sup>128</sup> For further discussion of this see below. For the position of the High Court of Australia see further below.

<sup>129</sup> *Bendix Mintex v Barnes* [1997] 42 NSWLR 307.

<sup>130</sup> Jane Stapleton, “Factual Causation and Asbestos Cancers”, *Law Quarterly Review*, CXXVII (2010), p. 355. For a recent example see the decision of the Supreme Court of New South Wales in the case of *Amaba Pty v Booth* 2010 WL 5079458; [2010] NSWCA 344, which has been upheld by the High Court.

<sup>131</sup> *E M Baldwin & Son Pty Ltd v Plane* [1999] NSWCA 130.

the test is that the wrongdoing must cause or make a material contribution to the harm, all relevant circumstances must be considered. This included an increase in the risk to the plaintiff from the defendant's breach of duty. In this case, there was a more equal risk that the two defendants' exposure of asbestos to the claimant had caused the mesothelioma. So although the law applied on the face of it seemed to be the same as in *Bendix*, the evaluation of the evidence brought a more favourable result.

In New South Wales the President of the Dust Diseases Tribunal has expressed the view in the case of *Stavar v Caltex Refineries (NSW) Pty Ltd*<sup>132</sup> that all exposure to asbestos in an acceptable latency period makes a material contribution to the disease and that this view was now beyond controversy. His decision was appealed on other points but not on this conclusion. This meant that in New South Wales a plaintiff can establish causation even where the exposure to asbestos that the defendant was responsible for is relatively low.<sup>133</sup> In *Amaba Pty v Booth*<sup>134</sup> the Court of Appeal of the Supreme Court of New South Wales upheld the application of the material contribution test and a finding on the evidence that exposure to asbestos fibres had materially contributed to the plaintiff's mesothelioma. Risk played an important part in the evidence that was accepted by the court in this decision and this decision has been upheld by the High Court of Australia.<sup>135</sup>

Outside New South Wales, although material contribution is still sufficient to establish causation, courts have sometimes found that the exposure to asbestos has not been enough to amount to a material contribution.<sup>136</sup> An increase in the risk of contracting the disease, relative to the background risk, and where that risk eventuates, is relevant. It can be taken into account, along with other factors, to draw an inference that the particular wrongful exposure caused or materially contributed to the injury. This was the view taken by Martin CJ in the Western Australian case of *Amaca Pty Ltd v Hannell*.<sup>137</sup> In his opinion if the Relative Risk<sup>138</sup> was 2 or over, that can be taken into account, along with other evidence, that the particular exposure caused or materially contributed to the disease. He relied heavily on Spigelman CJ in *Seltsam v McGuinness*<sup>139</sup> a case of non-mesothelioma cancer. Mr. Hannell had only experienced low level non-occupational exposure to respirable asbestos fibres other than background exposure experienced by the general population. The evidence was that the Relative Risk was calculated at between 1.3-1.4. Martin CJ felt this was not enough to say that the wrongful exposures made a material contribution to the mesothelioma. However, the majority of the Court (Steytler P and McLure JA) found that in this case, unlike in *Seltsam*, there was a direct and admitted relationship between the risk of harm giving rise to the breach and the particular injury suffered. The only question was whether

<sup>132</sup> *Stavar v Caltex Refineries (NSW) Pty Ltd* [2008] NSWDDT 22.

<sup>133</sup> See Jane Stapleton, note 130 above, p. 351 and *McNeill v Seltsam Pty Ltd* [2005] NSWDDT 4, referred to in that article. This case was successfully appealed to the Court of Appeal of the Supreme Court of New South Wales (see *Seltsam Pty Ltd v McNeill* 2006 WL 1731456; [2006] NSWCA 158) but on the argument that there was no duty of care owed in the circumstances. The Court stated in its judgment that it would not have upheld the grounds of appeal relating to causation if disposition of them had been necessary.

<sup>134</sup> *Amaca Pty v Booth* 2010 WL 5079458; [2010] NSWCA 344.

<sup>135</sup> *Amaca Pty v Booth* 246 CLR 36.

<sup>136</sup> See Jane Stapleton, note 130 above, p. 351 and case of *Amaca Pty Ltd v Moss* [2007] WASCA 162 referred to in that article.

<sup>137</sup> *Amaca Pty Ltd v Hannell* [2007] WASCA 158.

<sup>138</sup> Relative Risk ("RR") is defined as the ratio of the incidence of disease in exposed individuals compared to the incidence in unexposed individuals.

<sup>139</sup> *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262.

one or the other or both sources of asbestos caused or materially contributed to the injury.<sup>140</sup> They saw the two sources of asbestos fibres, on the basis of evidence led, to be cumulative rather than alternative causes. The majority application of the scientific evidence was as follows:

As previously noted, the expert evidence is to the effect that asbestos fibres directly and indirectly produce DNA damage in mesothelial cells some of which cells survive the body's defence mechanisms and, over a very lengthy period, the damage in turn produces gene mutations some of which are dangerous and, in combination with other processes, cause disordered growth resulting in the contraction of mesothelioma. Inhaled asbestos from exposures within the long latency period each contribute to sufficient accumulated DNA damage which is a precondition to the contraction of the disease. Thus, asbestos fibres from all sources make a cumulative contribution to the contraction of the disease. The next question is whether the contribution is material. That can be assessed by reference to the quantitative assessment of the respective levels of asbestos fibre contribution. Based on Dr Francis' assessment of the dose of asbestos likely to have been inhaled by the respondent from the specific exposures and Professor Berry's calculation of the RR at between 1.3 and 1.4, that would on any view be a material contribution to the contraction of the disease. A RR at 1.14 which involves a mortality increase of one person per hundred thousand from a background level of six per hundred thousand would also qualify as a material contribution to the contraction of the disease.<sup>141</sup>

The majority found a *prima facie* case that the specific exposures caused the respondent's mesothelioma.<sup>142</sup> The appeal by the defendants was in fact successful but on the issue of the existence of a duty of care, not causation. The majority were willing to accept that the specific exposure had made a material contribution to the injury even though there was a low level of exposure. In the similar case of *Amaca Pty Ltd v Moss* however, the same composition of the Supreme Court of Western Australia felt that an even lower specific exposure than in *Hannell*, could not be said to have been a materially contributing factor. The Relative Risk was calculated to be somewhere between 1.004-1.006, which was recognised as a particularly low exposure to asbestos relative to background risk.

This approach of the lower Australian Courts – where there is an acceptance of various exposures to asbestos as being a cumulative cause of mesothelioma and where risk informs the assessment of a material contribution – has been accepted by the High Court of Australia in *Booth*. Booth brought an action against two companies who had manufactured most of the brake linings on which he had worked. Booth had three other brief exposures to asbestos other than these wrongful exposures, including one as a child. The “innocent” exposures were as a result of home renovations and truck loading. The trial judge in *Booth* found that all exposure to chrysotile asbestos other than trivial or *de minimis* exposure materially contributed to mesothelioma. He accepted evidence that the single fibre theory was discredited. The majority of the High Court accepted the material contribution to injury test as valid on the basis of the evidence that had been accepted by the trial judge.

<sup>140</sup> *Hannell* per Steytler P and McLure JA at para. 387.

<sup>141</sup> *Hannell* per Steytler P and McLure JA at para. 415.

<sup>142</sup> See note 120 above regarding Western Australia's burden of proof.

The reasoning of French CJ was as follows – an explanatory causal mechanism was proposed by expert medical evidence. There was therefore a causal connection between the wrongdoing and the injury, although other causative factors “may have played a part”. That causal connection was inferred by an expert in the relevant field considering the nature and incidents of the correlation. This inference drawn by the expert can include reference to relative risk ratio as an indicator of the strength of the association. This inference can itself support an inference, drawn by the judge in the particular case, when injury has actually taken place, that the defendant’s conduct was a cause of the injury. French CJ referred to Dixon J in *Betts v Whittingslowe*,<sup>143</sup> who said that an inference of causation can be drawn from the breach of duty; the fact the injury occurred and in the absence of any sufficient reason to the contrary. Therefore in French CJ’s reasoning, an inference drawn by an expert on the evidence can itself support an inference drawn by the judge on the “facts” of that particular case.

A modified concept of causation as was adopted in *Fairchild* was not required because the cumulative effect mechanism was accepted by the trial judge in *Booth* and so the material contribution test could be met. Gummow, Hayne, and Crennan JJ in their separate judgement recognised that the material contribution to injury test was valid in this type of case, distinguishing it from the case of *Amaca Pty Ltd v Ellis*<sup>144</sup> which the High Court had dealt with just the year before, but which had involved alternative causes and the plaintiff there had not shown that exposure to asbestos had made a material contribution to his lung cancer. Heydon J, dissenting, argued that risk and cause had been conflated both in the expert evidence accepted by the trial judge and also by the trial judge himself. The “but for” test was not satisfied, he pointed out. There was, surprisingly, little discussion by any of the High Court Justices of the common sense approach to causation. However, the High Court in this decision, at least in relation to mesothelioma cases, is clearly allowing risk to inform causation through the material contribution to injury test and the drawing of an inference.

This is not how the science has been interpreted in Britain. The Australian approach allows the material contribution test to deal with cases of mesothelioma caused by asbestos exposure. The line of reasoning goes something like this – multiple exposures to asbestos have a cumulative effect on the development of the disease because the more exposure to asbestos there is, the increase in the risk of contraction of the disease, to the extent that an inference can be drawn that the wrongful exposures materially contribute to the cause of the disease. But in the same way as some have dealt with the issue in the United Kingdom (Lord Bingham and Rodger in *Fairchild*), there is a jump from increase in risk to materially contributing to the disease in that particular case. The gap is bridged by the inference which is allowed by virtue of the application of common sense. In the United Kingdom the Supreme Court, instead of bridging a gap, chose to create a new principle of law and created a distinct exception. The courts in Australia have not adopted the *Fairchild* principles in cases of mesothelioma because they have not needed to.

In cases where asbestos exposure has resulted in lung cancer, as opposed to mesothelioma, the State courts have also relied on evidence that they feel has established that asbestos has probably contributed to the victim’s lung cancer. In such cases the

<sup>143</sup> *Betts v Whittingslowe* (1945) 71 CLR 36.

<sup>144</sup> *Amaca Pty Ltd v Ellis* 2010 HCA 5.

multiple exposures are often of different types. There will be exposure to asbestos, but there will be also be something like the plaintiff's own self-imposed exposure to tobacco. The common sense approach to causation that has been such a feature of Australian causation has allowed risk to be part of the consideration in these type of cases as well. In *Cavanough v Workers Compensation (Dust Diseases) Board*<sup>145</sup> the New South Wales Compensation Court applied the common sense notion of causation and that the wrongdoing must cause or materially contribute to the injury. Although the judge took into account the fact that exposure to asbestos increases the risk of lung cancer, he did this in the context of taking all evidence into account, including epidemiological evidence and in applying common sense, and concluded that the exposure of asbestos made a material contribution to the cancer, along with smoking.

The Court of Appeal of the Supreme Court of New South Wales in *Seltsam Pty v McGuinness* also took into account the increase in risk shown in epidemiological evidence in their common sense consideration of causation. Such evidence was, according to Spigelman CJ, part of strands in a cable in a circumstantial case and can in combination with other relevant facts establish an inference that a particular exposure caused or materially contributed to the injury. In this particular case, the majority of the court did not find that the increase in risk amounted to anything more than a possibility. It has to be probable that the risk came home.<sup>146</sup> Spigelman CJ referred to the use of Relative Risk by the United States courts and said that in Australia, the closer the Relative Risk ratio approaches 2.0, the greater the significance that can be attached to the studies for the purposes of drawing an inference of causation in an individual case.<sup>147</sup> The result was that the majority found that on a balance of probabilities the asbestos exposure in this case did not cause or materially contribute to the plaintiff's renal cell cancer. The plaintiff had been a moderate smoker and suffered from obesity throughout most of his life. These were the other competing causes for his cancer which were generally accepted as having a causal relationship with renal cell cancer. In the New South Wales case of *Judd v Amaca Pty*,<sup>148</sup> Curtis J applied the doubles the risk test but held that the evidence had not established that the plaintiff's exposure to asbestos had doubled the risk of him contracting lung cancer, and therefore that it was more probable in that individual case that the exposure to asbestos had caused the cancer either alone or due to the synergistic effect of exposure to asbestos and smoking.

The High Court decision in *Roads and Traffic Authority v Royal*<sup>149</sup> involved a road traffic accident rather than exposure to asbestos, although risk played some role in the arguments of the parties. Causation was discussed in some detail. The Court seemed to downplay the role of a simple increase in risk that was beyond a *de minimis* increase. Kiefel J said this of the place of risk in the causative assessment:

The present state of authority does not accept the possibility of risk of injury as sufficient to prove causation. It requires that the risk eventuate. Kitto J in *Jones v Dunkel* said that one "does not pass from the realm of conjecture into the realm of inference" unless the facts enable a positive finding as to the existence of a specific

<sup>145</sup> *Cavanough v Workers Compensation (Dust Diseases) Board* [1998] NSWCC 35.

<sup>146</sup> See judgement of Spigelman CJ in *Seltsam Pty v McGuinness*; and also Mason P in *Bendix*; and Luxton v Vines (1952) 85 CLR 352.

<sup>147</sup> *Seltsam Pty* per Spigelman CJ at para. 137.

<sup>148</sup> *Judd v Amaca Pty Ltd* [2003] NSWDDT 12.

<sup>149</sup> *Roads and Traffic Authority v Royal* 2008 WL 2030897; [2008] HCA 19.

state of affairs. Spigelman CJ pointed out in *Seltsam Pty Ltd v McGuinness*, with respect to an increased risk of injury, that the question is whether it *did* cause or materially contribute to the injury actually suffered. This enquiry is consistent with the commonsense approach required by *March*.<sup>150</sup>

The Supreme Court of South Australia and the Queensland Court of Appeal seem to have followed this approach to risk of injury.<sup>151</sup> Furthermore, in non-mesothelioma cancer cases, where there has been exposure to asbestos fibres, the High Court of Australia has rejected the material contribution test where there are alternative possible causes, if the epidemiological evidence and thereby the relative risk, is not strong enough to allow an inference to be drawn that the exposure to asbestos materially contributed to the cancer. In the Supreme Court of Western Australian case of *Ellis*, the plaintiff had died of lung cancer after many years as a smoker but had also experienced relatively low level exposure to asbestos fibres. The lung cancer was not one that was peculiarly associated with exposure to asbestos and therefore was not indicative of the cause. The two potential causes were tobacco smoke and asbestos fibres. The majority of the Supreme Court of Western Australia saw this as a case of cumulative multiple causes and applied the *Bonnington Castings* case and material contribution test. It found that the two periods of exposure to asbestos, acting in combination with the exposure to tobacco smoke, made a material contribution to the development of the tumour. The plaintiff had argued the case on the basis that causation was to be decided by applying the “but for” test; there was no argument that an increase in risk was sufficient to establish causation. However, she argued that an inference could be drawn, on epidemiological evidence, to establish the “but for” test.

In the appeal to the High Court of Australia, the High Court held that the epidemiological evidence that was led could not support such an inference. It applied the “but for” test and, in the circumstances, rejected the material contribution test. The plaintiff had relied heavily on epidemiological evidence. The High Court found that the epidemiological evidence was not sufficient to say that the asbestos exposure made a material contribution to the lung cancer because an initial connection between Mr. Cotton’s inhaling asbestos and his developing cancer was not demonstrated. The High Court in assessing the epidemiological evidence found that it was more probable than not that smoking was a cause of (in the sense that it was a necessary condition for) Mr. Cotton’s lung cancer. The risks and probabilities associated with asbestos, whether alone or in conjunction with smoking, were low, and not sufficient to found the inference that it was more probable than not that exposure to respirable asbestos fibres was a cause of (a necessary condition for) Mr. Cotton’s cancer. It said that material contribution was not a suitable test in this type of case; that of multiple exposures of different types. There were two different types of injurious substance from different sources and the question was whether one of those injurious substances caused injury in this case. The Court contrasts this with the *Bonnington Castings* type of case where the material contribution test originated. This was not a case of asking whether one source of the same substance contributed to an accumulation of that substance.

<sup>150</sup> *Royal* per Kiefel J at para. 144.

<sup>151</sup> For the Supreme Court of South Australia see *Van Den Heuvel v Tucker* (2003) 85 SASR 512; and for the Queensland Court of Appeal see *Batiste v State of Queensland* [2002] 2 Qd R 119. See Ipp JA in *Flounders v Millar* [2007] NSWCA 238.



The High Court of Australia is therefore sending a clear message to the lower courts that material contribution cannot be used to get round the lack of scientific evidence of a causal connection between the exposure to a carcinogenic substance and the disease suffered. In non-mesothelioma cases this is not a way round causation difficulties. The Court does not, however, reject the approach of finding an inference of causation; but it states that there does at least have to be clear epidemiological evidence that establishes the relative risk or probabilities of the victim developing his cancer from exposure to asbestos fibres, whether alone or in combination with smoking, to be higher than with just smoking. Risk can therefore still play a part in the causative assessment by virtue of the drawing of an inference. It will however be *part* of the assessment.

The High Court stated that on top of epidemiological studies of risk and probability, the studies relied on must be related to the case in hand. It needs to be shown that the particular case before the court conforms to the pattern described by the epidemiological studies. The High Court points out that such a step is not inevitable. The High Court accepts that without more evidence than simply epidemiological evidence that a small percentage of cases of cancer were probably caused by exposure to asbestos, a court would not be able to draw an inference of causation in any particular case. This was because of the limits of knowledge about what causes cancer. So although there had been no argument that the court should leap the evidential gap and use simply the increase in risk principle of *Fairchild*, to establish causation, it is not true to say that the High Court took no account of risk in their causative assessment. Risk does not play the same role as in mesothelioma cases because of the inapplicability of the cumulative mechanism theory as in mesothelioma cases, and thereby the inapplicability of material contribution in the mesothelioma sense, because there is more than one agent. However, risk still has a role to play in the drawing of an inference and in the application of common sense to causation.

The High Court of Australia has therefore reigned in the State courts' looser application of orthodox causation principles at least in cases of multiple different causes. A material contribution to harm and the "but for" test are distinguishable as separate tests. Common sense is to be applied to both, and an inference on the facts may be drawn in either, with risk playing an important part in the establishing of that inference. Increase in risk by itself has no place in the equation unless a *Fairchild* argument is being made; that is currently no part of Australian law. Consequently, in Australia an increase in risk of harm, although it has not been formally adopted as a sufficient test to satisfy causation in itself, can be seen to be taken into account when the court is considering whether the exposure has caused or materially contributed to the harm. This is done as part of the common sense consideration of causation which can allow an inference to be drawn.

## CONCLUSION

It is evident that of the three jurisdictions, Canada adopts the loosest application of the "but for" test in causation in tort. The Supreme Court in that jurisdiction has included as meeting the "but for" test when there is a material contribution to the harm and also, effectively, when there is an increase in the risk of harm. Even the formal clearly defined exception, where an increase in risk of harm can itself satisfy causation, has been set within the "but for" test "viewed globally". Canada and Australia both emphasise the common sense approach, but Australia does distinguish between the "but for" test and the material contribution to harm test. Both jurisdictions allow risk to inform the drawing of a

factual inference by virtue of a common sense approach, to meet their tests for causation. The United Kingdom, just as Australia, distinguishes between the “but for” test and the material contribution to harm test, but has chosen to take a more transparent approach to situations where a strict application of the “but for” test cannot be met and, in its opinion, material contribution is not appropriate. It has defined a particular exception where an increase in risk itself will be sufficient to establish causation, but it has, for now, restricted this exception to mesothelioma cases. However, there is evidence of the lower courts in the United Kingdom beginning to allow risk to inform the “but for” test in non-mesothelioma cases through the application of the doubles the risk test, which is being taken to satisfy the “but for” test.

In the cases following *Barker* and the Compensation Act 2006, had the United Kingdom restricted the risk exception to *Fairchild* and *McGhee* type cases, on the basis of something like the global “but for” justification that the Supreme Court in Canada has formulated, there might have been a greater acceptability of increased risk informing causation in other types of difficult evidential cases, where increased risk could be considered, along with other factors, to allow an inference of causation to be drawn within orthodox rules, in appropriate cases.

In Australian mesothelioma cases the material contribution test has allowed increased risk to form part of the consideration for the drawing of an inference to bridge the gap to establish causation. In non-mesothelioma cases, where there are a number of possible causes a mere increase in risk that is just beyond *de minimis* is not enough to allow an inference to be drawn to establish causation. An increase in risk can be relevant but needs to be significant enough to show, along with any other relevant factors, a probable link between the disease and the wrongdoing. If the relative risk is double, this will allow an inference to be drawn.

The Canadian and Australian looser approach where the orthodox rules allow risk to play a role is a more legally consistent approach because the same rule is applied to all parties. The inconsistency lies in the effect or result because by their nature the rules are so pliable (particularly in Canada) as to give the judges considerable scope for their own subjective views and for policy to play a large role. Greater justice can be achieved in individual cases, but outcomes can be difficult to determine. The United Kingdom approach provides clarity in practice because the exception to the strict application of the orthodox rule is clearly defined and consistently applied. In law however, the approach is not coherent because the exception that has been carved out has not been adequately justified in law. The United Kingdom approach also entails a lack of flexibility in future cases where similar evidential difficulties may arise that do not involve mesothelioma. This means that individual justice is more difficult to achieve.

As technology has developed, so too has the array of toxic chemicals to which individuals are exposed. As our medical and scientific knowledge increases and becomes more sophisticated, our understanding of the aetiology of diseases and respective “causes” of injuries has also improved. Sometimes this actually highlights how much we still do not know about certain diseases. But with this increase in knowledge and the remaining gaps in our scientific knowledge comes a realisation that a strict application of traditional approaches to causation in personal injury cases cannot deal adequately with delictual/tortious wrongs that result in such injuries and disease, in the sense of carrying out the primary roles of tort/delict of compensation and deterrence, and the provision of justice. The Honourable Justice Beverley McLachlin, back in the 1980s, recognised that

there would need to be a greater flexibility in the rules on causation to deal with modern expectations.<sup>152</sup> Her judgment in *Clements* gives the United Kingdom food for thought, as does the approach in the Australian courts.

<sup>152</sup> Justice Beverley McLachlin, in Mullany and Linden, note 76 above, p. 34.