Causation After Fairchild

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The imperus for writing this article was the case of Fairchild v. Glenhaven Funeral Services, decided by the House of Lords in spring 2002. It seriously modifies the rules relating to proof of causation in civil litigation. The case was "worth" about £1.5 billion in compensation, which will be paid to both the actual claimants and those who will claim following the success of the former. In the analysis I will try to briefly review the relevant English law.

Traditionally, the essential elements of a tort of negligence have consisted of the existence of duty of care, breach of that duty, damage and a causal link between the breach and the damage. The claimant has to prove each of these on a balance of probabilities, i.e. s/he has to show that they are more likely to have occurred than not.

However, these requirements can sometimes result in serious problems for people who, judged from a moral point of view, should obtain some compensation. Victims of strange and complicated illnesses may have to prove that their condition had been triggered by side effects of negligently manufactured drugs as opposed to some natural causes. Everyone is to some extent endangered by the so-called background risk, namely, the risk that s/he would have developed the illness anyway. In the world of imperfect knowledge of all possible interactions of medication, food, working and living conditions etc., it may be difficult to point one's finger at one single cause. But that is exactly what the law of tort demands. The misfortune which the victims face in these circumstances is called the indeterminate defendant (or plaintiff) problem because when we consider a group of such people we really cannot be sure whose loss was brought about negligently and whose not.

A similar, although somewhat different situation arises where the claimant is able to prove that someone has negligently caused her loss, but there are more than one negligent tortfeasors (possible defendants) and the claimant cannot attach the blame to any one particular. For instance, in Cook v. Lewis, two hunters, Mr. Cook and Mr. Akenhead, negligently shot in the direction of Mr. Lewis. It was impossible to ascertain which one of them caused his injuries. It was equally clear that one of them did injure Mr. Lewis. The court could either accquit them both of all responsibility, or hold them both liable and so make the "innocent" one pay in the same manner as the "guilty" one. "Innocent" must be explained properly: the person did something wrong, s/he was negligent. But negligence does not fly in the air; it is always related to the damage. If you drive just a bit faster than is allowed and a pedestrian runs in front of your car so that you cannot avoid the collision and you would not have avoided it even if you had compiled with the law, why should you be blamed for the accident and the pedestrian's injuries? Likewise, in the situation of Cook v. Lewis, each of the defendants could contend that he might have been held liable for someone else's acts. Responsibility could not be assigned more specificaly than to a group of negligent tortfeasors. This is called the indeterminate defendant problem.

Let us now approach the way how English courts deal with both scenarios. To understand the ratio in Fairchild, one has to follow the line of precedents relating to the law of causation, beginning probably with Bonnington Castings Ltd. v. Wardlaw in the 1950s.

In that case, the pursuer contracted a pulmonary disease as a result of inhaling silica dust at work. The severity of the disease, pneumoconiosis, is increased by any additional amount of dust. The dust came from two sources, a pneumatic hammer and swing grinders. Only the dust from the grinders involved a breach of the employer's duty to protect the employees, the other could not be reasonably prevented at that time. The House of Lords held that any material (i.e. not negligible) contribution to the injuries was actionable and so the claim succeeded.

As the illness was aggravated by additional dust, it was at least partially caused by the breach of duty. There was only one negligent employer, the defender. That is why the pursuer did not have to deal with either of the problems of "the indeterminate".

The later case of McGhee v. National Coal Board is different: although there was also only one employer, the pursuer contracted dermatitis. That condition was instigated by dust as well; but once started, it was not worsened by any additional quantity of the noxious agent, or at least, the pursuer could not prove by medical evidence that it was.

The employer was not negligent as far as the working conditions were concerned. They were only at fault in not providing showers for the workers so that the dust would have been removed there and then and not later, when the workers arrived home.

All medical experts who gave evidence were unable to say anything more than that the pursuer was subjected to a higher risk than was necessary. Because of the nature of the work, he could have developed the disease anyway, without fault on the part of the defender. They said that the disease was triggered by dust, but the increased amount of dust only made it more likely that the illness would occur. The state of medicine at the time did not allow them to assert that additional dust would affect the severity of the dermatitis.

After much argument, the House of Lords decided that in circumstances where the knowledge of all material factors could not be sufficiently complete, the legal concept of causation had to be based on a broad, more practical perspective. Law has to keep pace with an ordinary course of life. The majority of the Lords refused to draw a hard and fast line between "material increase in the risk of injury" and "material contribution to the injury" and found in favour of the pursuer. On the other hand, Lord Kilbrandon, although he also decided in favour of the pursuer, drew an inference of fact: if the risk was increased, so was the probability that that...
increased risk sparked off the illness. The pursuer only had to "satisfy the court of a probability, not to demonstrate an irrefragible chain of causation". The minority approach has its certain advantage: its application does not require altering the traditional rules of causation. However, the increase in the risk must be quite enormous to become a probability. Simple mathematics govern. Ignoring all other evidence, the increase in risk must be over 100 per cent to make the additional risk the probable cause of the disease. Fortunately or not, law (let alone medicine) is not mathematics. How can the experts be expected to calculate the chances with such accuracy? In any event, the majority apparently preferred to change the then-existing law.

In Wilsher, the court was faced with a variation of the indeterminate claimant scenario. A prematurely-born baby suffered a condition, which could have resulted from five separate causes. Only one of these five risks materialised, the others did not, but no one could say which one did. Only one of the alternatives involved negligence on the part of the hospital.

The House of Lords, in a unanimous judgment, reverted to the traditional approach. The claimant could not prove on the balance of probabilities that the hospital caused his injury, for all five traditional approaches were equally likely and four of them did not include any liability of the defendant. Accordingly, the court weighed up the respective probabilities and found that the probability in favour of the claim was only 20 per cent.

In McGhee, the Lords did not count probabilities, perhaps apart from Lord Kilbrandon. As a result, that case had to be distinguished. It was done on the basis that in Wilsher, five distinct noxious agents could have set the disease off, whereas in McGhee there was only one candidate, the brick dust. Therefore, according to the Lords McGhee was in fact similar to Wardlaw.

Both McGhee and Wilsher had a common ground. In both cases the loss could have been brought about by either negligence or by causes not involving liability in tort. Both cases are instances of the indeterminate claimant problem. However, thanks to the difference mentioned in the previous paragraph, in one case the claim succeeded and in the other it did not. In addition, the Lords in Wilsher denied that McGhee was in any way meant to affect the traditional principles of causation.

However, in Fairchild v Glenhaven Funeral Services their Lordships changed their mind again. This case was a consolidated appeal of several claims against employers. The claims were brought by workers, or their relatives, who, in various ways, had to handle asbestos at work and later contracted mesothelioma, a fatal cancerous disease.

The Lords expressly confirmed that the McGhee principle may sometimes be applied, namely, that a material increase in the risk may equal a material contribution to the injury. If the defendant creates an additional risk, she is going to be taken to have caused the resulting injury, provided that there is only one "noxious agent" (e.g. dust) and that the claimant, because of limits of the current medical science, cannot obtain evidence as to the extent of causal link between the risk and the injury.

The number of agents of injury may seem as a somewhat arbitrary reason for distinguishing between the authorities. After all, why should the precise number matter? In Fairchild, the Lords were not unanimous on this point; Lord Hoffmann dissented. Unfortunately, he chose an esoteric criterion instead. He suggested that in McGhee, the duty of care of the employer towards the employee would have been emptied had the claim failed. On the other hand, in Wilsher, the National Health Service still had some duty to treat the patients without negligence, even if Wilsher's claim did not succeed.

However, application of this principle depends completely on the way one puts the question. If one asked what was left of the duty of NHS to prevent that particular negligence which occurred and maybe caused the harm, the answer would have to be - nothing. So it rather seems that the Lords were not prepared to hold the publicly-funded NHS liable, whereas a group of private industrial companies and their insurers did not give rise to such worries.

The troubles do not end there. It has already been noted that in Fairchild the workers contracted mesothelioma. This condition affects only about one person in a million per year in the general public (who are not exposed to asbestos at work), but it is up to 1000 times more frequent in relation to people working with asbestos.

It should be emphasised here that because of the difference in risk between a group of workers and the general population, the chances allowed to comfortably exclude the indeterminate claimant are relatively high. The magnitude of the difference made up for any possible inaccuracies. Thanks to this rather unique state of affairs, made possible by long and detailed studies of a large number of instances of asbestos-related diseases, it was highly likely that the claimants did not suffer their condition as a result of some natural cause ("background risk").

The claims failed in the Court of Appeal because of the other problem: the indeterminate defendant scenario. Medical experts gave evidence to the effect that mesothelioma might be triggered by one single asbestos fibre. If there had been only one defendant, the claimants would have obtained compensation without difficulty. However, because there were multiple employers, each of them could contend that the workers might have contracted the fatal asbestos fibre while working for someone else, who should consequently be made to pay.

The House of Lords recognised the unappealing prospect of denying compensation to people who clearly deserved it from a moral viewpoint. But how should the law be altered? What authority should the change be based on?

The leading speech of Lord Bingham contains several lines of reasoning. First, he reviewed in much detail the case-law, partly discussed above, to establish that the relaxation of rules of causation is in full accord with it. McGhee was especially emphasised. However, one might argue that that case is an authority on somewhat different situations. In Fairchild, it would have been easy to recover had there been only one defendant. In McGhee, there was only one employer, but it was a complicated issue anyway. The court had to address the possibility that Mr. McGhee's injuries were set off by causes not involving tort; in Fairchild, natural causes were excluded. McGhee is an indeterminate claimant case;
Fairchild is the indeterminate defendant one. The difference between these cases, clear from paragraph 2 of the judgment onwards, had to be overcome by means of analogy.

On the other hand, the court's approach has its justifications. McGhee offered the closest analogy among the precedents, so the Lords were unlikely to avoid using it. After all, the case suggests that the strictness of causation rules may sometimes be relaxed in order to make law work in practice. Moreover, the parallel is based on the fact that further exposure to asbestos at work increased the risk of contracting the fatal cancer. Similarly, Mr. McGhee's prolonged exposure to brick dust increased the risk of dermatitis.

In my opinion, the arguments in favour of the analogy do not weigh as much as the arguments against it. I do not wish to assert that the decision in Fairchild is wrong, but I see some logic in the proposition that most of what was said about McGhee in Fairchild was, strictly speaking, obiter and the Lords actually created a new, separate legal rule. In addition to the above-mentioned McGhee principle, dealing with indeterminate claimants, the Lords might have invented a new Fairchild rule to deal with indeterminate defendants. It remains to be seen in future decisions, whether this observation is correct.

Moreover, Lord Bingham relied to a large degree on the persuasive authority of other countries' statutes and precedents. One has to admire the volume of space devoted to foreign legal systems in an English judgment. In Lord Bingham's opinion, the development of the law in England cannot of course depend on a head-count of decisions and codes adopted in other countries around the world... If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions... this must prompt anxious review of the decision in question. In a shrinking world... there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.

The third and perhaps most important consideration for the House of Lords was public policy. The Lords openly admitted that they tried to choose the lesser of the two evils. If the defendants could not prove their case only because the two defendants were multiple, the court was happier to let the consequences fall on those who created the risk of mesothelioma, the negligent employers, rather than the workers, who could do little to prevent the danger. Otherwise, the defendants and their insurance companies would have obtained full immunity against the claims. Their duty to protect the workers against inhaling asbestos dust would have been left without content.

Obviously, the eminent judges realised the vast impact their decision bound to have on English law. Therefore, they wished to warn the potential litigants that their judgment was limited to mesothelioma claims. Of course, its principles may be applied whenever the courts see fit, but that will by no means be automatic. The Lords argued strongly in favour of the traditional, case-by-case approach. Liability should be extended gradually and with utmost caution. Cynics might add that only that method can allow the judges to reflect the social and political repercussions of any particular litigation and the popular support for the result. After all, when Fairchild claims failed in the Court of Appeal, one of the campaigners on behalf of the claimants said they would move heaven and earth to obtain compensation. Still, that should perhaps have been addressed to Parliament rather than the courts.

Of all possible defendants (employers who breached the duty of care), only some took part in the litigation. Others were not sued because they were not worth it or because they no longer existed. The question is, therefore: how should the defendants divide liability among themselves? Without any proof of causation available, those who will pay the compensation will have serious problems when trying to get fair contribution from the others. They will inevitably pay more than would be strictly appropriate. In any event, the Lords considered the only alternative, the failure of the claims in Fairchild, to be an even worse prospect.

In my opinion, this was rightly so, but respect should be had for those who do not share this view. In any event, further important judgments regarding causation and the "indeterminate scenarios" are, undoubtedly, on the way.

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2. I.e. a civil wrong other than breach of contract or trust.
5. In Scotland, a claimant is called "pursuer" and a defendant "defender". The precedent is strictly speaking an authority only as regards Scots law, but the English law of causation is the same.
6. Both pneumoconiosis and silicosis affect the lungs, particularly affecting miners and workers in similar jobs. Breathing becomes more difficult and the disease may even result in death.
8. Which is a general name for a range of inflammatory skin diseases.
11. Lord Hutton was the only judge who took a somewhat distinct line of reasoning but his analysis differs in words rather than in principles and he reached the same result as the majority.
12. See Fairchild, paragraph 22 per Lord Bingham and paragraph 149 per Lord Rodger for the majority view.
15. See also the speech of Lord Rodger of Earlsferry for a similar account of foreign and historical law.
16. Fairchild, paragraph 32.
17. See e.g. Fairchild, paragraph 33 per Lord Bingham.