such analysis cannot make the convictions morally satisfactory. But the blame for that would then lie with the framing of the statute.

A.P. SIMESTER AND G.R. SULLIVAN

THE FAIRCHILD DOCTINE: ARGUMENTS ON BREACH AND MATERIALITY

IN *Williams v University of Birmingham* [2011] EWCA Civ 1242 the Court of Appeal reiterated that, though claimants are assisted with proof of causation in mesothelioma cases by the doctrine in *Fairchild v Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32, they must establish the other elements of the claim in the orthodox way.

Michael Williams died of mesothelioma aged 54. The University of Birmingham admitted it had exposed him to asbestos lagged pipes while he was carrying out experiments as an undergraduate in 1974. The trial judge found that this exposure lasted only between 52 and 78 hours and noted that the high level of asbestos present in Williams' lungs post-mortem suggested he had been exposed to substantial amounts of asbestos elsewhere.

The *Fairchild* doctrine allows a claimant to prove that the tortious exposure to asbestos due to the defendant made a material causal contribution to the victim's mesothelioma merely by showing that the exposure had materially increased the risk of the victim contracting that disease. The trial judge had imported the latter terminology into her statement of the University's common law obligation of care to Mr. Williams, namely as one "to take all reasonable measures to ensure that [he] was not exposed to a material increase in the risk of mesothelioma" (quoted at [39]).

In contrast, Aikens L.J., who gave the main judgment of the court, stated the obligation as one to take reasonable care (including precautions if necessary) to ensure that Mr. Williams was not exposed to a reasonably foreseeable and unacceptable risk of asbestos-related injury (at [40]) and that, accordingly, a number of detailed findings were necessary before the University could be found to have been in breach. First, a finding had to be made as to the actual level of asbestos fibres in the environment to which Mr. Williams had been exposed. This is because if that quantity was not material but only *de minimis*, no question of breach could arise: presumably on the basis that, like the law, the reasonable person does not concern himself or herself with trifles. Findings also had to be made concerning: what knowledge the University ought to have had in 1974 about the risks posed by that quantity of fibre; whether, with such knowledge, it should have been reasonably foreseeable to the University that Mr. Williams was likely to be exposed to a risk of asbestos related injury; and whether there had

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been reasonable steps the University ought to have taken in the light of that reasonably foreseeable risk which it had failed to take.

In fact, the trial judge had made no finding in relation to the specific knowledge the University should have had in 1974 on the dangers of exposure to asbestos at any particular levels, let alone that the condition of this pipe lagging should have alerted it to a reasonably foreseeable and unacceptable risk of asbestos related injury to Mr. Williams. Even if the correct test had been stated and applied there was, therefore, no factual basis on which the trial judge could have concluded that the University was in breach. (For a similar result see *Brett v University of Reading* [2007] EWCA Civ 88).

In an unfortunate dictum, Patten L.J. described the trial judge's formulation of the breach issue as:

> perfectly understandable in the light of the changes made to the test of causation in such cases. In most cases the common law duty of care is related to the nature of the harm which should have been envisaged and the issues of breach of duty, causation and remoteness are not readily distinguishable in terms of what has to be foreseen. There is therefore a respectable logic in the argument that the changes made to the test of causation should be reflected in the prior issue of breach of duty (at [81]).

With respect, there is no such logic. What should have been envisaged is not determined by the approach taken to proof of causation, whether under the orthodox approach or under *Fairchild*. On the contrary, it is only once the law has determined, in the light of what risks were reasonable foreseeable, what aspect of the defendant's conduct constituted a breach, that the analysis can turn to whether this aspect was a cause of the relevant outcome. The causation analysis is dependent on the breach analysis not vice versa.

On causation the University raised a novel argument: that, even if an exposure was in breach of duty, it might be *de minimis* and not material for the purposes of the *Fairchild* doctrine because the latter requires a judge to see if the wrongful exposure "is, by comparison with the other exposures, too insignificant to be taken into account" (at [69]). Aikens L.J. rejected the argument but his reasoning is, with respect, a little unclear, stating both that "it is clearly necessary to take into account all other possible sources of exposure to asbestos fibres" (at [71]) and that the judge "does not have to do a comparative exercise" (at [72]).

Where a defendant is held to have been in breach in relation to a certain quantity of asbestos fibre, this necessitates the conclusion that the law sees this quantity and the reasonably foreseeable level of risk it had posed as "material" for the breach issue. On what basis could the wrongful exposure then be ignored as immaterial in relation to the issue

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of the causation of the individual victim's mesothelioma? One basis might be that, though the defendant had been careless in creating such a dangerous environment, this victim had only spent a trivial amount of time in it. Another basis is developing scientific knowledge: it is now accepted that where a wrongful exposure occurred wholly within the five years before manifestation of the mesothelioma it can be ignored for the purposes of causation: *Sienkiewicz v Greif (UK) Ltd.* [2011] UKSC 10, [2011] 2 A.C. 229, at [19v] and [175]. But neither of these conclusions relies on a rigorous comparison of all the other exposures to which the victim was subjected.

Two dangers were averted by the court's rejection of the University's argument. First, such a requirement might have placed an insuperable evidentiary burden on claimants because they are unable to provide relative estimates of all exposures suffered by the victim. Secondly, the requirement might be thought to re-introduce the flawed reasoning on which the appellants in *Sienkiewicz v Greif UK Ltd.* [2011] UKSC 10, [2011] 2 A.C. 229 unsuccessfully relied, namely that the relatively much greater exposure from other sources provided, in itself, a valid basis for dismissing the legal relevance of exposure due to the defendant's tort. This is not the case because the aetiology of mesothelioma is unknown and, therefore, might involve a mechanism to which a very small number of fibres from the tortious source contributed even if the victim had been exposed to a vastly greater volume of fibre from other sources.

JANE STAPLETON

ABSURDITY AND AMBIGUITY – MAKING SENSE OF CONTRACTUAL CONSTRUCTION

IN his classic restatement of the principles of contractual construction in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896, Lord Hoffmann reaffirmed the vital distinction between the permissible judicial role of construing a contract and the forbidden role (outside a rectification action) of rewriting the contract. Nonetheless he discussed what the court should do when it is forced to "conclude from the background that something must have gone wrong with the language", and, by way of an answer, approved a dictum of Lord Diplock from *The Antaios* [1985] A.C. 191 that, "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense". Unfortunately, whilst all judges accept that there is a crucial line between making the parties' words "yield to business common sense" and

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