fundamental right to bodily integrity, although the case proceeded upon the basis that the claim was for "economic loss" caused by the costs of bringing up a healthy child born as a result of a failed sterilisation. However, their Lordships did not go into detail about what is entailed in the infringement of bodily integrity caused by pregnancy and childbirth. In contrast, Hale L.J. has spelt out the more obvious features that are the consequence of unwanted pregnancy. In *Parkinson*, although she recognised that the responsibility of parenthood can bring with it great joys and great compensations, she characterised unwanted pregnancy and childbirth as a "fundamental invasion". She discussed the risks and suffering associated with pregnancy and childbirth, and the infringement of autonomy that pregnancy brings and that remains in terms of the mother's parental responsibility for the child: "literally, one's life is no longer just one's own but also someone else's". Thus, as she made clear in *Rees*, the principal detriment suffered by anyone who becomes a parent against their will is the legal and factual responsibility to look after and bring up the child. This is an interesting perspective: it may be correct to classify the claim in cases like *Rees* as one for "economic loss", since the mother's claim was for certain financial costs, but Hale L.J.'s approach suggests that, whatever the law may say, the harm to the mother in cases like *Rees* is not simply "economic loss" and the temporary pain and suffering experienced during pregnancy and childbirth, but, amongst other things, the severe curtailment of personal autonomy associated with motherhood.

JESSE ELVIN

MAKING IT MORE LIKELY *v.* MAKING IT HAPPEN

WHEN the gods looked down and spied lusty Ares entangled with lovely Aphrodite in the net which her grimy husband used to entrap them, there arose on Mount Olympus "unquenchable laughter"—in Homer's words "asbestos gelos". In the modern world, however, asbestos is no laughing matter: inhale the fibres of that mineral wool and you may contract asbestosis, a debilitating lung disease, or, as was discovered 30 years later, mesothelioma, a fatal cancer. Asbestosis is cumulative—you get worse the more you inhale—so that everyone who culpably fails to protect you contributes to your ultimate condition. Mesothelioma is quite different, for it is most likely caused by a single fibre: of course the more you inhale, the greater the risk of getting that fatal fibre, but

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until you get it, exposure makes you no more likely to get it, and once you have got it, you are a dead man, and further exposure makes no difference. Thus if you get mesothelioma after being exposed to fibres in six successive employments, each employer has contributed to the risk of your getting the disease, but the disease itself is due to only one of them. To ascertain in which employment the fatal fibre struck is, however, quite impossible and will likely remain so whatever advances are made in medical science, since the symptoms take up to forty years to manifest themselves, and before then no one can tell whether, much less when, the victim has been hit.

Asbestos affects lawyers, too. Cases of asbestosis have induced the Court of Appeal to hold, in flagrant deviation from the established rule that a person whose fault contributed to the occurrence of harm is liable for all of it, that an employer is liable only to the extent of his contribution, proportional to the period of employment (*Holtby* v. *Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421), and now, in a mesothelioma case, the House of Lords, going the other way, has imposed full liability on all those who exposed the victim to the risk of the fatal fibre even though only one of them can actually have been responsible for it: *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2002] 3 W.L.R. 89. Novel though it is to hold in an English case that there are (un)certain circumstances in which it is enough for a claimant to show that the defendant's fault probably contributed not to the occurrence of the harm but only to the risk of its occurrence, the speeches in the House of Lords, unanimous in reversing a unanimous Court of Appeal, are Olympian in their assurance. Their Lordships' conviction was supported by principle, authority and the "wider jurisprudence".

Principle we must, in a case note, leave to works on the narrower jurisprudence. The "authority" was *McGhee* v. *National Coal Board* [1973] 1 W.L.R. 1 (H.L.). How silly we were to suppose that it had been demolished as an authority in 1988 when Lord Bridge, with the concurrence of all his brethren, had said that *McGhee* had turned on a bold inference of fact and "had added nothing to the law". Now we know that Lord Bridge was wrong to say so and that *McGhee* laid down a brand new, indeed revolutionary, rule of law, that, in Lord Reid's words, there is "no substantial difference between saying that what the [defenders] did materially increased the risk of injury to the [pursuer] and that what [they] did made a material contribution to his injury". He did, however, preface this with the words "From a broad and practical viewpoint", which is hardly the introit to a proposition of law, and

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Lord Hoffmann has now explained that Lord Reid didn't mean what he said but rather that "a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease", a fiction now turned into a proposition of law.

But this is water over the bridge. No longer does a claimant always have to prove that the defendant's misconduct actually contributed to the harm he is complaining of; it may be enough for him to prove that it probably contributed to the risk of the occurrence of that harm. So the question is: When can he profit from this alleviation? Lord Bingham and Lord Rodger list six requirements each, Lord Hoffmann only five, while Lord Nicholls calls for considerable restraint and adds that "It is impossible to be more specific". It appears—to begin with, at any rate, until claimants' attorneys really get the bit between their teeth—that the standard test of causality will be relaxed only for a claimant who cannot possibly prove that the defendant's breach of duty actually contributed to the harm actually suffered, provided that the harm is of a kind against the risk of his suffering which it was the actionable duty of the defendant to guard him. Thus if a healthy young woman has unsafe sex with six partners, each of whom fails to disclose that he is HIV positive, all of them will be liable if she contracts AIDS: one of them must have infected her but she cannot possibly show which. It must be a comfort that if a child is born, medical science can now tell which was the actual father, or they would all be paying maintenance.

The "wider jurisprudence" (with which the House was supplied at its own suggestion) shows that other systems sometimes dispense with the need to prove causation in the old sense. The *tour d'horizon* was admittedly superficial. Omitted is the salient fact that in almost none of the jurisdictions glanced at would the claimants in *Fairchild* have succeeded: in most places an employee simply cannot sue his employer in tort, since workmen's compensation or social security takes its place. We, too, have some social security, but the fact that these claimants were entitled to industrial disablement benefit was not mentioned in the speeches: indeed, the speeches rather suggest that unless the claimants could get damages in tort, they would get nothing at all. This might affect one's view of the unfairness of the rule now overturned. Of its effect, too, for now that the claimants do get damages, the state can claw back what it paid out: the decision consequently effects a huge transfer to the public purse from private insurers still reeling from Acts of God and his followers. This is surely to add a new twist to "public policy".

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In the 1988 case Lord Bridge ended by saying "... whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases." Their Lordships in *Fairchild* seem to disagree with him on this, too.

TONY WEIR

OCCUPIERS' LIABILITY: UNHEEDED WARNINGS

Is there a difference between the duty of care owed by an occupier to a trespasser under the Occupiers' Liability Act 1984 and that owed to a lawful visitor under the Occupiers' Liability Act 1957, as far as personal injuries are concerned? Not really, in the light of *Tomlinson* v. *Congleton Borough Council* [2002] EWCA Civ 309, where the Court of Appeal (Ward and Sedley L.JJ., Longmore L.J. dissenting) held the defendant Council liable for spinal injuries sustained by an 18-year-old who dived into the Council's lake, having seen one or more notices reading "DANGEROUS WATER: NO SWIMMING", and hit his head on the bottom. His damages were reduced by two-thirds for contributory negligence.

The lake in the centre of Brereton Heath Park was admitted by the Council to be a magnet to the public in hot weather. There were attractive sandy beaches where people picnicked (as lawful visitors), and sometimes as many as 100 at a time swam or ventured out in rubber boats. Over the years, several swimmers got into difficulties, and the Council was so concerned about the risks that as well as posting the notices, which were generally ignored, it employed rangers to give oral warnings and hand out leaflets explaining the risks of cold water, weeds, waterborne diseases and other hazards; the rangers' efforts met with little success and sometimes with abuse. In desperation, the Council decided to cover the beaches with soil and plant reeds at the water margin, but the planting was deferred because of financial constraints and had only just been started when the claimant's accident occurred.

At first instance Jack J., who dismissed the claim, held that the claimant became a trespasser when he entered the water, and this was conceded by the claimant on appeal (although, as Longmore L.J. pointed out, it is difficult to say whether such a transformation took place when an intending swimmer started to paddle or only on accomplishing some greater degree of immersion). This finding

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