

Risk and the damage requirement in negligence liability

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Applying the Fairchild exception in Barker, Lord Hoffmann sought to justify apportionment of liability by reformulating the gist of the negligence action as the risk of mesothelioma rather than the mesothelioma itself. This paper examines the notion of risk to show that it cannot coherently be recognised as damage. By distinguishing risk from the related concept of probability, it is apparent that risk is a forward-looking concept that is incompatible with the role in which it is cast in the backward-looking causation inquiry when mesothelioma is an essential ingredient of liability. This paper goes on to consider whether ‘pure’ risk could form the gist of a negligence action and suggests that it lacks the moral significance to constitute damage. Furthermore, the damage requirement would be subsumed into the breach inquiry, effectively being lost as a distinct element of the negligence inquiry. This is incompatible with the traditional loss-based model of negligence.

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INTRODUCTION

The central question addressed in this paper is whether exposure to the risk of harm can itself be regarded as actionable damage for the purposes of the negligence inquiry. This question arises in the particular context of the *Fairchild* exception,¹ which allows a claimant to overcome the evidentiary gap relating to proof that any particular defendant’s negligent asbestos exposure was a cause of his or her mesothelioma by imposing liability where that defendant’s negligence materially increased the risk of mesothelioma. Applying the *Fairchild* exception in *Barker v Corus*,² the House of Lords held that liability should be imposed on an aliquot basis, so compensation for the claimant’s mesothelioma was apportioned according to the extent of the defendant’s contribution to the total risk (although Parliament rapidly restored joint and several liability in respect of mesothelioma).³ There is an obvious attraction to the idea of apportionment of liability in this context; given the claimant-friendly solution

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1. *Fairchild v Glenhaven Funeral Services (t/a GH Dovener & Son)* [2002] UKHL 22, [2003] 1 AC 32.
2. *Barker v Corus (UK) plc* [2006] UKHL 20; [2006] 2 AC 572 (HL).
3. Compensation Act 2006, s 3.

adopted in *Fairchild*, apportionment would also balance the defendants' interests against those of the claimant and would 'smooth the roughness of the justice which a rule of joint and several liability creates'.⁴ If a defendant is to be held liable in circumstances in which it cannot be proved on the balance of probabilities that his negligence was a cause of the claimant's illness then, the majority considered, it seems 'fair' that he should benefit from that liability being merely several rather than joint and several.⁵ Explaining the decision to apply aliquot liability in *Barker*, Lord Hoffmann went further and reasoned that if it is only possible to prove that the defendant's negligence made a material contribution to the risk of mesothelioma then it is appropriate to regard the risk, rather than the mesothelioma, as forming the gist of the negligence action.⁶ Whereas mesothelioma is an 'indivisible' disease, which therefore attracts joint and several liability, risk is 'divisible', so it appropriately attracts several or aliquot liability. Lord Hoffmann's reformulation of the gist approach was approved in Lord Phillips' dissenting judgment in *Durham v BAI*.⁷ Yet the majority of the Supreme Court there emphatically held that the actionable damage in these cases remains the mesothelioma, and the House of Lords in *Rothwell v Chemical and Insulating Co Ltd* held that, in the absence of mesothelioma materialising, the risk of mesothelioma does not constitute actionable damage.⁸

In this paper, it will be argued that under the *Barker* apportionment approach, the gist of the negligence action is still the physical harm rather than the risk of that harm. Moreover, in the absence of physical harm, pure risk cannot be regarded as damage for the purposes of the negligence inquiry. The paper examines the notion of risk and distinguishes it from the related concept of probability. It will be argued that risk, properly understood, is a forward-looking concept that is incompatible with the role in which it is cast by Lord Hoffmann in the backward-looking causation inquiry. This paper will also question the moral significance of risk as damage, and explore the difficulties of explaining why risk might be considered deserving of compensation. It will be argued that the primary obstacle to accepting risk as damage in negligence is that risk is already addressed under the heading of breach of duty. If risk were to be recognised as actionable damage, the result would therefore be to subsume the damage requirement into the breach inquiry, effectively transforming negligence liability from a system of corrective justice to a punitive system focused solely on the defendant's wrongdoing in isolation.

First, in order to contextualise the discussion of risk, it is necessary to explain the decisions in *Fairchild* and *Barker* in more detail.

1. BACKGROUND

The decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* concerned three conjoined cases involving mesothelioma victims. Each of the victims

4. *Barker*, above n 2, at [43] (Lord Hoffmann). Note, however, that in his dissent Lord Rodger stated that 'the desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me' [90].

5. *Ibid*, at [40]–[42] (Lord Hoffman), [109] (Lord Walker), [127] (Baroness Hale).

6. *Ibid*, at [35].

7. *Durham v BAI (Employers' Liability Insurance 'Trigger' Litigation)* [2012] UKSC 14, [2012] 1 WLR 867.

8. *Rothwell v Chemical and Insulating Co Ltd and another* [2007] UKHL 39, [2007] 3 WLR 876.

had been exposed to asbestos during a number of periods of employment. Although it was established that each defendant employer owed their employee a duty of care, and that the asbestos exposure constituted a breach of that duty, the difficulty for the victims lay in proving on the balance of probabilities that any individual employer's negligence was a factual cause of his mesothelioma. This causation problem arose because of the conjunction of a number of factors: mesothelioma is an indivisible disease,⁹ each victim had been exposed to asbestos by a number of former employers, and there existed an 'evidentiary gap' surrounding the aetiology of mesothelioma. Although it was known that mesothelioma is caused by asbestos, medical science was unable to explain how it is caused. Crucially, it was not known whether mesothelioma could be caused by a single 'rogue' fibre, or whether an accumulation of fibres was necessary and, if so, at what stages in the development of the disease the fibres play a causative role.¹⁰ This meant that it was not possible to say that any individual employer's negligence was a 'but for' cause, nor that it had materially contributed to the victim's mesothelioma. Motivated by policy considerations, notably the injustice of leaving an innocent claimant uncompensated, the House of Lords in *Fairchild* revived the *McGhee* test.¹¹ This test departs from traditional principles and allows the claimant to leap the evidentiary gap preventing proof of causation by holding the defendant liable on the basis that his negligence merely materially increased the risk of harm.

The House of Lords in *Barker v Corus* addressed the application of the *Fairchild* principle to a further three conjoined appeals concerning victims of mesothelioma. Two of the appeals involved cases like those in *Fairchild*, where the victims had only been exposed to asbestos by former employers. Mr Barker, however, had also exposed himself to asbestos during a period of self-employment and it was argued by the defendant employer that the *Fairchild* test should not apply in this case. Alternatively, it was argued that if the *Fairchild* test applies in these circumstances, then exceptionally, liability for the mesothelioma should be apportioned rather than being joint and several. The House of Lords held that the *Fairchild* principle applied but also accepted the argument that liability should be apportioned. In these cases, apportionment is to be calculated according to the extent of each individual's contribution to the total risk of mesothelioma. The result is that if a negligent former employer cannot be traced, the victim will not be compensated for the portion of the loss attributed to that

9. A distinction is drawn between damage that is said to be 'divisible' or 'indivisible'. If the harm is divisible, then this means that it is dose-related, so each exposure to the relevant harmful agent increases the severity of the harm. This means that each exposure causes a portion of the total harm. See eg *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421 (CA). In contrast, indivisible harm is 'all-or-nothing'; the severity of the disease is unaffected by the dose of the harmful agent. This means that each causal factor is a cause of the whole loss (although, as between defendants in an action for contribution, we may then divide up responsibility based on blameworthiness, but *vis-à-vis* the victim each defendant is a cause of the whole of his indivisible disease).

10. The single rogue fibre theory has been largely discredited (see *Amaca Pty Ltd v Booth* [2011] HCA 53 [19]), but significant scientific uncertainty remains. For a more recent account of the understanding of mesothelioma, see Lord Phillips' speech in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 WLR 523 at [19] and annex (providing detailed information obtained from the judgment of Rix LJ in *Durham v BAI (Employers' Liability Insurance 'Trigger' Litigation)* [2010] EWCA Civ 1096, [2011] 1 All ER 605).

11. *McGhee v National Coal Board* [1973] 1 WLR 1 (HL).

employer. It is the reasoning behind the decision to apportion liability that is relevant to this paper.

Baroness Hale said very clearly that the damage forming the gist of the action was still mesothelioma.¹² However, since the departure from traditional principles in *Fairchild* had been motivated by a broad policy concern to avoid unfairness to innocent claimants facing an evidentiary gap, there should also be an attempt to reach a solution that is fair to the defendants. Given that the existence of the evidentiary gap meant that it could not be proved that any individual defendant was actually a cause of the claimant's loss, joint and several liability imposed an unfair burden on defendants who, while negligent, were potentially 'innocent' in the sense that their negligence had not caused any damage. Apportionment of liability achieved a balance between the competing interests of claimants and defendants.¹³ In Baroness Hale's view, the extent of the defendant's contribution to the total risk provided a sensible basis on which to apportion liability, but she was clear that mesothelioma rather than risk was the gist of the action.¹⁴

In contrast, Lord Hoffmann, giving the lead judgment,¹⁵ said that risk was to be regarded as the gist of the action: 'consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance'.¹⁶ This was accompanied by a subtle development in the wording of the *Fairchild* test, with 'material contribution to the risk of harm' being used interchangeably with 'material increase in the risk of harm'. The phrase 'material contribution to the risk of harm' has the attraction that it echoes the *Wardlaw* test of 'material contribution to harm',¹⁷ and simply replaces 'harm' with 'risk of harm' to signal the change in the gist of the action. In contrast to mesothelioma, which is 'indivisible', Lord Hoffmann explained that if the risk of mesothelioma is regarded as damage, 'then it does not matter that the disease as such would be indivisible. Chances are infinitely divisible and different people can be separately responsible to a greater or lesser degree for the chances of an event happening'.¹⁸ Since risk is divisible damage, it appropriately attracts several liability, so liability is apportioned according to the extent of the defendant's contribution to the total risk.¹⁹ The earlier decision of

12. *Barker*, above n 2, at [120].

13. *Ibid*, at [127] (Baroness Hale).

14. *Ibid*, at [126] (Baroness Hale).

15. Lords Scott and Walker concurred with his decision and the reasons for it, and provided their own reasons in addition.

16. *Barker*, above n 2, at [35] (Lord Hoffmann). Lord Hoffmann has acknowledged extra-judicially that he sought to create a new cause of action in respect of risk, explaining 'My own proposal to treat *Fairchild* as creating a special new cause of action, that is, creating a risk of injury which has subsequently eventuated, could not be found in any opinion in *Fairchild*, except possibly my own, and certainly not in *McGhee*. I was rewriting history'; Lord Hoffmann 'Fairchild and after' in A Burrows, D Johnston and R Zimmerman (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: Oxford University Press, 2013) p 67.

17. *Bonnington Castings v Wardlaw* [1956] AC 613 (HL).

18. *Barker*, above n 2, at [35] (Lord Hoffmann).

19. A 'divisible' damage is one which is dose-related, so that each exposure to the harmful agent causes the damage to be more severe. This means that each exposure is a cause of a distinct portion of the overall damage suffered, so a defendant's liability is limited to the portion of the total damage that he caused. See M Hogg 'Causation and apportionment of damages in cases of divisible injury' (2008) 12 Edin L R 99 at 101.

the Court of Appeal in *Barker*,²⁰ which continued to apply joint and several liability in respect of the physical harm, had been criticised because '[t]o find that a defendant's breach of duty caused one phenomenon (a material increase in the risk of harm) but then hold that defendant liable for another phenomenon (the whole of the ultimate injury) is to negate the whole function of the causal inquiry'.²¹ In contrast, Lord Hoffmann's subsequent reformulation of the damage as the risk of harm seems to restore the function of the causation requirement.

If negligence is to be taken as a corrective justice-based system of liability,²² Lord Hoffmann's approach initially appears to be a welcome development, because the defendant is ostensibly being held liable only for the damage that he has been proved to have caused; that is, exposure to the risk of mesothelioma. If the actionable damage is the risk of mesothelioma, then the centrality of the causation requirement is maintained, since the claimant must still prove on the balance of probabilities that the defendant's breach of duty caused this damage. It will be argued, however, that on closer inspection this approach is not consistent with corrective justice. There are two reasons for this. First, the continued insistence that the claimant must have developed mesothelioma undermines the claim that the gist has been changed to the risk of mesothelioma. In other words, the damage for which the claimant was compensated was still the mesothelioma itself, but liability was apportioned to reflect the degree of uncertainty surrounding proof of the causal link. Secondly, even if the courts were to abandon the requirement that the claimant must suffer the physical harm, exposure to risk cannot be considered to be damage within corrective justice, because it adds nothing to the breach inquiry. Conduct is characterised as wrongful if it exposes the claimant to an unreasonable risk of harm. Corrective justice does not punish this wrongful behaviour, but requires the wrongdoer to repair the damage when his wrongdoing causes harm to another. If a defendant commits a wrong by exposing a claimant to an unreasonable risk of harm but this risk does not materialise, then he is not liable because there is no damage for him to correct. If the law was to hold that exposure to risk does constitute harm, then the requirement of damage would effectively be lost and the basis for liability would not be corrective justice but a retributive form of justice.

2. RISK AS DAMAGE, BUT ONLY IF THE RISK MATERIALISES

Although Lord Hoffmann said that the gist of the action was the risk of mesothelioma, it was still a condition of liability that the claimant must have developed mesothelioma. This requirement of physical harm may be a practical way of limiting the number of cases where the *Barker* principles apply, but it is conceptually problematic because it means that the gist was not actually redefined as the risk of harm. Lord Hoffmann stated:

20. *Barker v Saint Gobain Pipelines plc* [2004] EWCA Civ 54, [2005] 3 All ER 661.

21. S Green 'Winner takes all' (2004) 120 Law Q Rev 566 at 570.

22. Prevailing academic opinion is that corrective justice corresponds most closely to the tort of negligence: see eg E Weinrib *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); E Weinrib 'Corrective justice' (1992) 77 Iowa L Rev 404; A Beever *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2009); I England 'The system builders: a critical appraisal of modern American tort theory' (1980) J Legal Stud 27; S Perry 'The moral foundations of tort law' 77 Iowa L Rev 449; J Coleman 'The practice of corrective justice' in DG Owen (ed) *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995).

Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has actually been contracted. [Counsel for the defendant] was reluctant to characterise the claim as being for causing a risk of the disease because he did not want to suggest that someone could sue for being exposed to a risk which had not materialised. But in cases which fall within the *Fairchild* exception, that possibility is precluded by the terms of the exception. It applies only when the claimant has contracted the disease against which he should have been protected.²³

This reasoning is inadequate to support his assertion that the gist could be redefined as the risk of harm while still requiring the claimant to have developed mesothelioma. If the gist of the action is exposure to risk but the risk must have materialised before the action can be brought, then there is an internal inconsistency between the content of the rule and the scope of application of the rule. Far from justifying the risk as damage approach, this inconsistency undermines the rule. Indeed, Beever says that 'the refusal to compensate the defendant's former employees unless they suffer mesothelioma reveals that the actionable damage is the mesothelioma and the consequences thereof, and not the risk of mesothelioma . . . The idea that these cases involve liability for risk creation is an illusion.'²⁴

This was an important factor in the Supreme Court decision in *Durham v BAI*.²⁵ This decision addressed a number of conjoined appeals concerning employers' liability insurance in the context of mesothelioma claims. There were two issues to be resolved. The 'construction issue' required the court to determine whether the words 'sustained' and 'contracted' used in the insurance contracts referred to the date at which the mesothelioma was caused or the date at which the disease actually developed. This in turn required the court to address the 'causation issue' concerning the effect of the *Fairchild/Barker* principle. If the *Fairchild/Barker* principle is a special rule that adopts a relaxed approach to causation, and deems employers who have exposed their employees to asbestos to be a cause of the employees' mesothelioma, then causation of the disease can be established for the purpose of triggering the employers' liability insurance. If, however, the *Fairchild/Barker* principle is correctly understood as creating liability for exposing the employee to the *risk* of mesothelioma, this is insufficient to trigger the employers' liability insurance to compensate for the disease itself. The majority in the Supreme Court adopted the first of these approaches, with Lord Mance explaining:

In reality, it is impossible, or at least inaccurate, to speak of the cause of action recognised in *Fairchild* and *Barker* as being simply 'for the risk created by exposing' someone to asbestos. If it were simply for that risk, then the risk would be the injury; damages would be recoverable for every exposure, without proof by the claimant of any (other) injury at all. That is emphatically not the law.²⁶

Lord Clarke similarly suggests that 'Lord Hoffmann cannot have intended to hold, without more, that the basis of liability was the wrongful creation of the risk or chance

23. *Barker*, above n 2, at [48] (Lord Hoffmann). Affirmed in *Rothwell*, above n 8.

24. Beever, above n 22, p 487. See also D Nolan 'Causation and the goals of tort law' in A Robertson and HW Tang (eds) *The Goals of Private Law* (Oxford: Hart Publishing, 2009) p 178; L Khoury 'Causation and risk in the highest courts of Canada, England and France' (2008) 124 Law Q Rev 103 at 126.

25. *Durham v BAI*, above n 7.

26. *Ibid*, at [65].

of causing the disease because there would be no liability at all but for the subsequent existence of the mesothelioma'.²⁷ While it seems inevitable that the decision of the majority was motivated by the desire to trigger the employers' liability insurance,²⁸ in an area where liability rules have been shaped from the outset in *Fairchild* by a policy concern to compensate victims of mesothelioma, their decision was evidently also justified by the continued physical harm requirement.

In his dissent in *Durham*, Lord Phillips sought to distinguish the *effect* of the *Fairchild/Barker* principle,²⁹ which is to impose liability to compensate the victim's mesothelioma, from the *juridical basis* of *Fairchild/Barker*, which in his view creates a cause of action in respect of the increase in risk, rather than the disease itself. He explained:

It would, I think, have been possible for the House in *Barker* to have defined the *special approach* in *Fairchild* as one that treated contribution to risk as contribution to the causation of damage. The important fact is, however, that the majority did not do so. They were at pains to emphasise that the *special approach* was not based on the fiction that the defendants *had* contributed to causing the mesothelioma. Liability for a proportion of the mesothelioma resulted from contribution to the risk that mesothelioma would be caused and reflected the *possibility* that a defendant might have caused or contributed to the cause of the disease.³⁰

Yet if it is possible to draw such a sharp distinction between the effect of a rule and the juridical basis of that rule, surely this highlights the conceptual weakness of that rule. The requirement that the claimant must have developed mesothelioma thus undermines the 'risk as damage' approach so severely that it cannot simply be explained away by Lord Hoffmann as a requirement for the application of the *Fairchild* principle. If he was willing to adopt the 'risk as damage' approach because he prioritised 'consistency of approach', then the physical harm requirement should have been abandoned in order to actually achieve consistency of approach. As noted by Scherpe, '[n]othing is gained by replacing one fiction with another but much can be lost'.³¹

There is a danger that this argument seems to focus solely on the *appearance* of inconsistency that arises when the court says that the gist is the risk of mesothelioma while still insisting that the claimant must have developed mesothelioma. Indeed, the purpose of this paper is to extend the analysis beyond this point of inconsistency, to examine the notion of risk itself. It will challenge the notion that risk can form the gist of the negligence action by examining the nature of 'risk' to show that this problem is not just apparent, but goes to the essence of the concept of risk. The following section will look more closely at what 'risk' is, to show that risk is a forward-looking concept and that, properly understood, the extent of the risk created by a particular defendant is measured at the time it is created. There is an inherent mismatch between risk as a forward-looking concept and the backward-looking role in which risk is being cast in Lord Hoffmann's approach. Here, the extent of the defendant's contribution to risk is only measurable once the risk has materialised and all the other sources of the same kind of risk have been identified. This means that the extent of the risk that the

27. Ibid, at [82].

28. See eg *ibid*, at [73] (Lord Mance), [88] (Lord Clarke).

29. Ibid, at [116].

30. Ibid, at [130].

31. J Scherpe 'A new gist?' (2006) 65 *Camb L J* 487 at 488.

defendant created will vary in size depending on how many other sources of asbestos the claimant was exposed to, whereas risk is actually a forward-looking concept and measurable independently of other sources of risk. This mistaken use of risk seems attributable to the subtle shift in the phraseology of the *Fairchild* exception, which originated as ‘material increase in risk’ in *McGhee* and has morphed into ‘material contribution to risk’ in *Barker*.

3. THE NOTION OF RISK

What is risk?

Perry has said that ‘[i]n ordinary language conduct is typically said to be risky when it gives rise to a chance of a bad outcome of some kind. The concept thus involves two main elements: first, a notion of chance or probability, and second, a notion of harm.’³² It involves a state of uncertainty as to the future. The measure of a particular risk is a product of the extent of the possible harm that may be produced and the probability of this harm materialising. Notably, probability is a factor in calculating risk, but it is not synonymous with risk. In *Risks and Legal Theory*, Steele set out a range of different meanings assigned to the word ‘risk’. She explained that for some theorists we can only truly speak of ‘risk’ when the probability of the relevant outcome can be calculated. If the probability cannot be calculated, then the situation ought to be described as involving uncertainty, indeterminacy or ignorance. Others use the word ‘risk’ to describe any situation involving a hazard, regardless of whether the probability of harm can be calculated. She says that the latter approach ‘reflects an increasing colloquial and theoretical understanding of risks as *threats*, rather than as statistical probabilities’.³³ Notably, the notion of risk relates to the future in all of these forms. ‘Risk’ is also sometimes used as shorthand for a particular decision making method. In this sense, ‘risk’ does not refer to a danger that necessitates a decision making method in order to be managed, but refers to a way of approaching a problem or danger.³⁴ Steele also notes that ‘risk’ and ‘probability’, ‘though related, are distinct terms’.³⁵ Risk will sometimes depend on a formal assessment of probability, and always depends on the likelihood of an outcome. Probability can be used for analysis of past events – for example, ‘what is the probability that X caused Y?’ – so probability does not always entail a risk assessment. In contrast, risk generally concerns the future, although it can be used to debate the past;³⁶ for example, to assess what would in the past have been a rational way to behave.³⁷ Once again, we see that probability is one element of risk, but it is not synonymous with risk. This means that it is crucial that the two terms, ‘risk’ and ‘probability’, are not used interchangeably.

So while probability may be used to analyse past events, risk is a forward-looking concept. It describes a situation of uncertainty as to whether a particular outcome will occur. When a risk materialises it causes an outcome, so it is no longer a ‘risk’ but a cause. Of course, there may be uncertainty as to what caused a particular event – that

32. SR Perry ‘Risk, harm, and responsibility’ in Owen, above n 22, p 322.

33. J Steele *Risks and Legal Theory* (Oxford: Hart Publishing, 2004) p 7.

34. *Ibid*, p 7.

35. *Ibid*, p 19.

36. *Ibid*, p 20.

37. *Ibid*, p 9.

is, uncertainty as to which risk(s) materialised – and as Steele noted above, probability can aid the analysis of causation. It would be incorrect to say that if a risk has materialised it has contributed to the risk of the outcome – this is just circular. In other words, a ‘risk’ is only a ‘risk’ while the outcome is still prospective. Once the outcome occurs, then the relevant question is whether the risk materialised and made a causal contribution. Weekes explains:

By definition the concept of risk is a limitless one. The meaning of a factual cause is binary: a given activity either causes or does not cause the damage in question. The limit of a factual cause is where a given activity does not result, in whole or in part, in the certain damage. Risk, however, is defined by degree. A risk which is proven to have resulted in damage is of course a risk that has been realized, or more properly, ‘a cause’.³⁸

Beever explains the same idea through the analogy of a raffle that is held, with 100 tickets each costing £2 and a single prize of £1,000 (where the ticket has no value other than the fact that it provides a chance to win the £1,000 prize). Before the raffle is drawn, he explains, ‘your ticket is worth £10, that being one hundredth of £1,000. But imagine now that the raffle is held and you do not win. How much is your ticket worth now? It is worthless.’³⁹

Is risk regarded as damage?

Lord Hoffmann considered in *Barker* that mesothelioma is no longer the actionable damage for which the claimant recovers. Instead, the actionable damage for which the claimant recovers is the risk of mesothelioma to which the defendant exposed him. However, the claimant cannot claim in respect of this exposure to the risk of mesothelioma until he actually develops mesothelioma, and on Lord Hoffmann’s reckoning it is then possible to establish how much the defendant contributed to the total risk to which the claimant was exposed. It will be argued that what this approach actually achieves is to make the defendant liable for the mesothelioma itself, but to discount the extent of his liability to reflect the uncertainty over whether the risk he created was the risk that actually materialised. The method used to calculate the appropriate discount is the *probability* that it was the defendant’s risk rather than another source of risk that materialised. It cannot be the case that exposure to risk is the damage that is being compensated here, because risk is forward-looking and only exists before the outcome occurs. After the outcome has occurred, the risk that the defendant created either is or is not a cause of that outcome. Since risk is forward-looking, the extent of the risk is measurable at the time of exposure to the risk and its value is fixed at that time. In contrast, in Lord Hoffmann’s approach, the measure of the defendant’s liability will vary with each subsequent exposure of the claimant to the same type of risk. This variability shows that it simply cannot be ‘risk’ that is actually being compensated in Lord Hoffmann’s approach. Instead, he is awarding partial compensation for the mesothelioma to reflect the *probability* that the defendant caused it. But we must remember that ‘probability’ is *not* synonymous with ‘risk’ – probability is one element of risk calculation, but whereas probability can look both forwards

38. R Weekes ‘Not seeing the wood for the trees – risk analysis as an alternative to factual causation in *Fairchild*’ (2003) 12 Nott L J 18 at 27.

39. Beever, above n 22, p 486.

and backwards, risk only looks forwards. This means that so-called ‘risk’ employed as an arithmetical tool to calculate apportionment of damages is not truly risk, but probability. This is the argument that will be elaborated in more detail here.

Calculating risk and probability

As explained, risk is a forward-looking concept and is a product of the extent of possible harm and the probability of that harm occurring. When an employer negligently exposes an employee to asbestos dust, he exposes the employee to the risk of a number of asbestos-related diseases such as lung cancer, asbestosis and mesothelioma. The risk can be measured at that time on the basis of the extent of the loss the employee would suffer if the risk were to materialise and the probability of it materialising. If the employee chose to take out a health insurance policy, it would take into account the increased risk of the employee suffering these illnesses in the future – it is the increase in the probability of the disease that we tend to focus on, because the extent of the loss does not vary. This focus on the probability aspect of risk may explain why Lord Hoffmann uses the term ‘risk’ when he is actually referring to ‘probability’.

The relevant risk in these cases is the risk of mesothelioma. To provide a concrete example, in *Sienkiewicz v Greif*,⁴⁰ the risk of mesothelioma created by the environmental exposure to asbestos was 24 cases per million. The risk of mesothelioma created by the occupational exposure to asbestos was 4.39 cases per million.⁴¹ The occupational exposure was therefore said to have increased the risk of the claimant developing mesothelioma by 18%.⁴² ‘Risk’ here is a predictive tool that informs us how likely it is that the employee will develop mesothelioma. On the basis of the duration and extent of the exposure to asbestos dust, and the type of dust, it tells us how much more likely it is that the employee will develop mesothelioma than if she had not been exposed to each source of asbestos dust. If, hypothetically, the claimant had then been exposed to the same kind of risk by a later employer, this would not alter the fact that the defendant had increased the risk of mesothelioma by 18%. The risk that was created by the defendant does not increase or diminish when the employee is exposed to the same kind of risk by subsequent employers.

This can be explained through an equivalent variation on Beaver’s raffle analogy. In that example, 100 tickets were sold for a raffle with a single prize of £1,000. If *A* has one ticket, his ticket is worth £10, since that is one hundredth of £1,000. In terms of ‘risk’, the value of the ‘risk’ is £10, because it is a product of the value of the possible outcome, £1,000, and the probability of that outcome, 1/100. If *B* gives his ticket to *A*, he has added another 1/100 to the probability that *A* will win £1,000. If *C* has two tickets and gives these to *A*, he has added another 2/100 to the probability that *A* will win £1,000. *A*’s initial ticket is still worth £10 because it has a 1/100 chance of winning, and the ticket he got from *B* is still worth £10 because it has a 1/100 chance of winning.

40. *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229 (SC).

41. For the purposes of this example it is assumed that these figures are accurate, although McIvor notes that the judge calculated them himself from limited evidence and without the help of epidemiologist expert witnesses; C McIvor ‘Debunking some judicial myths about epidemiology and its relevance to UK tort law’ [2013] 21 Med L R 553 at 572.

42. $(4.39/24) \times 100 = 18.29$.

Lord Hoffmann said that ‘the basis of liability is the wrongful creation of a risk or chance of causing the disease’.⁴³ If this was the case, then the value of the risk created by a particular defendant would be fixed at the time of the exposure to that risk and would not vary. But this is not how Lord Hoffmann’s approach works, so the reality must be that liability is not actually being imposed in respect of risk. Starting with the raffle analogy, the equivalent to developing mesothelioma would be *A* winning the raffle prize of £1,000. The 99 losing tickets are worthless; the one winning ticket is worth £1,000. In the first scenario where *A* only has one ticket, this is the ticket that has been drawn and Lord Hoffmann would say that *A* contributed the whole of the ‘risk’ of winning. In the second scenario where *A* had another ticket given to him by *B*, Lord Hoffmann would say that *A* contributed 50% of the ‘risk’ of winning, and *B* contributed the remaining 50%. And in the final scenario where *A* was given a further two tickets by *C*, Lord Hoffmann would say that *A* contributed 25% of the ‘risk’ of winning, *B* contributed 25% of the ‘risk’ of winning and *C* contributed 50% of the ‘risk’ of winning. So the extent of the ‘risk’ created by *A* varies, as does the extent of the ‘risk’ created by *B*. But we know that risk is a forward-looking concept and that its measure does not depend on other subsequent exposures to the same kind of risk, so Lord Hoffmann cannot actually have made ‘risk’ the actionable damage. Once again, the problem appears to be that he treats ‘risk’ as synonymous with ‘probability’, perhaps because of the role that probability plays in allowing us to calculate risk. As noted above, we also have a tendency to focus only on the probability element of risk when comparing risks of the same outcome, because the value of the possible outcome is a constant and the risk-creator increases the probability of this outcome occurring. Since the outcome has occurred, *A* has won £1,000, one of his tickets is worth £1,000 and the remaining three are worth nothing. There is a 1/4 probability that it is his own ticket, a 1/4 probability that it is the ticket he received from *B* and a 2/4 probability that it is a ticket he received from *C*. If we were to make him divide up the prize according to these probabilities, keeping £250 for himself, and giving £250 to *B* and £500 to *C*, we would be allocating the prize according to the purely statistical probability that each person was responsible for the winning ticket. It may be that in cases of evidentiary gap this is the best the court can achieve, to apportion liability according to the statistical probability that the defendant caused the disease. But since causation of the physical outcome cannot be proven on the balance of probabilities, the decision to impose proportionate liability for possible causation cannot be based on corrective justice. If we want to recognise exposure to the risk of mesothelioma as actionable damage in itself, then we need to understand that this damage occurs at the time of the exposure and has value that is independent of other exposures to the same kind of risk.

‘Increase in risk’ or ‘contribution to risk’?

This conflation of risk and probability is hidden in the subtle, yet significant, shift in the wording of the *Fairchild* principle. The *Fairchild* principle is expressed both as a test of ‘material increase in the risk’ of harm, and of ‘material contribution to the risk’ of harm. These phrases seem similar, but insight into the notion of risk gained in the previous section allows us to see that they actually imply different exercises, and so

43. *Barker*, above n 2, at [35] (Lord Hoffmann).

should not be used interchangeably. This issue was highlighted by the recent Court of Appeal decision in *Williams v University of Birmingham*.⁴⁴

The claim in *Williams* was brought by the widow of a mesothelioma victim who had been exposed to asbestos while carrying out experiments as a physics student at the University of Birmingham. The university accepted that Mr Williams had been exposed to all three types of asbestos fibres, but they argued that the extent and circumstances of the exposure were *de minimis*, so that they had not breached their duty of care, and also that their asbestos exposure was not a cause of his mesothelioma. The university was responsible for low-level asbestos exposure for a period of 52–78 hours over 8 weeks, and the judge at first instance found that the victim must also have been exposed to substantial amounts of asbestos from some other source during his lifetime, considering the amount of asbestos fibres found in his lungs at post-mortem examination.⁴⁵ At first instance, there was some confusion concerning the role of the *Fairchild* principle in determining both breach and causation. The judge held that since the asbestos exposure was more than *de minimis*, the defendant had materially increased the risk of mesothelioma and had therefore breached its duty of care. Turning to causation, she held that once a breach of duty has been established, the victim has contracted mesothelioma, and the evidentiary gap prevents the court from discovering which exposure caused his mesothelioma, the defendant is liable.⁴⁶

Although the appeal largely focused on identifying the correct approach to the breach issue, the defendant also argued that the judge had applied the wrong test for causation. They argued that Supreme Court decision in *Sienkiewicz* confirms that the claimant must prove on the balance of probabilities that the negligence caused a material, as opposed to *de minimis*, increase in the risk of mesothelioma.⁴⁷ The defendant argued that by comparison with the overall probable exposure to asbestos, which must be inferred from the high levels of fibres discovered in the claimant's lungs *post mortem*, the exposure in the tunnel was *de minimis*.

The defendant thus highlighted two very different questions regarding the risk that is attributable to the defendant. We can ask 'in absolute terms the question of whether Mr Williams' exposure to asbestos in the tunnel was *de minimis* or the increase in the risk of him suffering from mesothelioma as a result of that exposure was *de minimis*'.⁴⁸ Or we can undertake a comparative exercise and ask whether it was material 'by comparison with the other exposures to asbestos that he encountered'.⁴⁹ Their argument was that at no stage should the court address the risk in absolute terms – the breach inquiry asks whether the risk of asbestos-related disease was reasonably foreseeable (and whether the defendant took reasonable care to avoid that risk), and the causation inquiry requires the comparative exercise.

The decision of the Court of Appeal is to be noted for its clarity in reminding us that the *Fairchild* principle applies only to the causation element of the negligence inquiry, and that the other elements are unchanged.⁵⁰ This means that the claimant must prove

44. *Williams v University of Birmingham* [2011] EWCA Civ 1242, [2012] PIQR P4.

45. (Belcher J) at first instance (unreported) cited in *Williams* (CA), above n 44, at [64].

46. (Belcher J) at first instance (unreported) cited in *Williams* (CA), above n 44, at [39]–[40], [73].

47. *Sienkiewicz*, above n 40.

48. *Williams*, above n 44, at [19].

49. *Ibid*, at [19].

50. *Ibid*, at [31] (Aikens LJ).

that the defendant owed him a duty of care and that the defendant breached that duty by exposing him to an unreasonable risk of asbestos-related illness, factual causation must be established using the *Fairchild* test, and the usual rules of remoteness apply.⁵¹

The question, then, that has bearing on the *Fairchild* principle is whether risk should be measured in absolute terms or in comparative terms.

The defendant argued that the correct approach was the comparative exercise. They relied on Lord Phillips' speech in *Sienkiewicz*:

The reality is that, in the current state of knowledge about the disease, the only circumstances in which a court will be able to conclude that wrongful exposure of a mesothelioma victim to asbestos dust did not materially increase the victim's risk of contracting the disease will be where that exposure was insignificant compared to the exposure from other sources.⁵²

The Court of Appeal in *Williams* considered that this means that it is open to a judge to undertake a comparative exercise, but ultimately the judge is making a finding of fact based on the evidence in each individual case, and can do this by any means available and is not obliged to undertake a comparative exercise. This flexibility in the approach to measuring risk is problematic because it conceals a lack of clarity as to the notion of risk itself.

Asking whether the defendant's negligence materially increased the risk of harm reflects the forward-looking concept of risk. As the above analysis of the concept of risk has shown, an increase in risk is measurable at the time of the exposure and if it is a 'material' increase then this will not change because the measure of the risk is unaffected by later exposures. It therefore requires the court to undertake the absolute exercise. In contrast, asking whether the defendant's negligence made a 'material contribution to the risk' does require a comparison with the other sources of risk. The contribution that the defendant made to the total 'risk' will be greater or smaller depending on how many other employers exposed the claimant to asbestos, over what period and with that intensity. As discussed above, this variability in the measure of the so-called 'risk' shows that actually we have shifted to measuring probability of causation.

This change in the terminology seems to have occurred in academic discussion following *Fairchild*.⁵³ Whether conscious or unconscious, it is possible that it reflects a desire to draw a parallel with the *Wardlaw* test of 'material contribution to harm' that is a standard test for causation. While such a development might make the *Fairchild* exception more palatable by aligning it with the orthodox 'material contribution to harm' test of causation, this is likely to result in confusion by detracting from the exceptional nature of the *Fairchild* principle. Furthermore, this is problematic because 'risk' has been cast into a backward-looking role, so that the shift from a test of 'material increase in risk' to a test of 'material contribution to the risk of harm' has been accompanied by an unnoticed shift in meaning from 'risk' to 'probability'.

So far, it has been shown that requiring the claimant to have developed mesothelioma before allowing him to bring a claim means that the gist of the negligence action has not been redefined as the risk of mesothelioma. The focus will now

51. Ibid.

52. *Sienkiewicz*, above n 40, at [111] (Lord Phillips).

53. See eg J Stapleton 'Lords a'leaping evidentiary gaps' (2002) 10 Torts L J 276.

turn to the question of whether ‘pure’ risk could form the gist of a negligence action if the physical harm requirement was to be abandoned.

4. CAN RISK CONSTITUTE DAMAGE IN CORRECTIVE JUSTICE?

This section focuses on risk solely in the forward-looking sense that the term properly implies. The question is whether exposing somebody to the risk of mesothelioma or of other harm is capable of constituting damage within a corrective justice-based system of negligence law. In this forward-looking sense, it is still important to note that causal processes are either deterministic or indeterministic. Reece has explained that where a process is ‘deterministic’, this means that the ‘hypothetical chain of events is *fully determined by the events which have occurred*’.⁵⁴ This means that in a deterministic world, given sufficient knowledge, the cause of anything could be discovered and the future could be predicted with certainty. In contrast, if a process is indeterministic, it cannot be predicted even with unlimited knowledge. It is only in indeterministic processes that we can appropriately say that there is a ‘chance’ of an outcome occurring and that the probability of this outcome is ‘objective’. In contrast, in a deterministic process there is no objective probability of something occurring – either it will or it will not, and theoretically this can be predicted with certainty. So when probability is used to describe the chance of such an event, the probability is not objective but epistemological; it is an expression of the likelihood of an event given the limited knowledge that is available.

Recalling that probability is one element of risk, along with the possible outcome, risk can be objective or subjective even though it is based on epistemological probability. The term ‘risk’ denotes uncertainty as to the likelihood of a future outcome, so it incorporates epistemological probability. The harmful agent/risk agent has the potential to cause an outcome – in other words, it has the potential to form part of a deterministic causal process – but the limits of our knowledge prevent us from saying whether it will or will not cause harm to a particular individual. But there is a limit to this, because the relevant outcome has an objective nature. With an indivisible harm such as mesothelioma, one only creates an objective risk of mesothelioma if the potential victim has not already contracted the disease. Of course, an employer will not usually know whether the employee has already contracted mesothelioma, so from his perspective, exposing the employee to asbestos exposes the employee to a risk of mesothelioma, so in this subjective/epistemic sense the conduct creates a risk of harm. So even though risk relies on epistemological *probability*, the objective nature of harm means that we can talk about objective *risk* and subjective/epistemic *risk*. The following sections will consider whether risk, in either sense, can constitute damage in the negligence inquiry.

54. H Reece ‘Losses of chances in the law’ (1996) 59 Mod L Rev 188 at 192. She provides the following explanation from Laplace: ‘We ought then to regard the present state of the universe as the effect of its anterior state and as the cause of the one which is to follow. Given for one instant an intelligence which could comprehend all the forces by which nature is animated and the respective situation of the beings who compose it – an intelligence sufficiently vast to submit these data to analysis – it would embrace in the same formula the movements of the greatest bodies of the universe and those of the lightest atom; for it, nothing would be uncertain and the future, as the past, would be present to its eyes’; P-S Laplace *Philosophical Essay on Probabilities* (Berlin: Springer-Verlag, 1819; English translation 1995) p 4.

Objective risk: the evidentiary gap prevents proof that the defendant created an objective risk

A criticism of the ‘risk as damage’ approach that has emerged in academic writing is that the evidentiary gap also prevents the claimant from proving that the defendant’s negligence increased the risk that he would develop mesothelioma.⁵⁵ Scherpe has explained:

The aetiology of the disease is such that once contracted further exposure does not matter and certainly cannot increase the risk of contracting it. If the disease was contracted during the first employment, all following exposure did and could not increase the risk and hence there could not be a contribution to the risk. But whether that was the case, we do not know – which is exactly the point: we do not know whether all exposure actually increased the risk. Assuming that it did is therefore also resorting to a fiction.⁵⁶

In other words, it is only before mesothelioma has been contracted that exposure to asbestos actually creates an objective risk that the individual will develop the disease. Since the evidentiary gap prevents us from saying when the disease was contracted, it is also impossible to say that any exposures other than the first exposure actually created a risk of the disease for this individual.

Nolan has addressed a potential criticism of this argument:

It could be argued that this is to adopt the wrong perspective. From the point of view of the defendant at the time of the breach of duty, a risk *was* imposed on the claimant . . . and indeed this must always be the case where the defendant has been negligent *towards the claimant*, as he has to be in order to be liable. But even if we assume that this was the perspective the House of Lords had in mind when they said that in cases falling within the *Fairchild* principle, the defendant was deemed to have caused the injury when he could be shown to have materially increased the risk of its happening, this switch from objective risk to subjective risk cannot rescue the risk as damage idea. This is because even if we accept the premise that an unrealised risk is a form of harm, this claim can surely be sustainable only if the defendant’s action did *in fact* create a risk for the claimant.⁵⁷

Since the evidentiary gap prevents us from being able to say whether the defendant exposed the claimant to an objective risk of mesothelioma, risk in the objective sense cannot help overcome the problem of the evidentiary gap.

Subjective/epistemic risk: lacks the moral significance to be damage

The only remaining sense in which risk may therefore constitute damage, if it is to assist the courts in overcoming the evidentiary gap, is the subjective sense. As explained above, a lack of knowledge will often prevent an employer from knowing whether his employee has already developed mesothelioma, so exposing the employee to asbestos exposes him to a risk of mesothelioma in a subjective, or epistemic, sense.

55. See Nolan, above n 24, p 178; Beever, above n 22, p 486; Scherpe, above n 31, at 488.

56. Scherpe, above n 31, at 488.

57. Nolan, above n 24, p 179.

This is what enables the conduct to be characterised as wrongful, or negligent.⁵⁸ Since the standard of care in negligence is an objective standard, for the avoidance of confusion the label ‘epistemic’ will be used instead of ‘subjective’.

As noted above, Nolan argued that while the *Fairchild* principle may be based on the fact that from the defendant’s perspective he exposed the claimant to the risk of mesothelioma, this does not rescue risk as a form of damage. It will be argued that Nolan’s assertion is correct and that epistemic risk cannot constitute damage in negligence. One barrier is the difficulty of explaining why this sort of risk matters and should be deserving of compensation. The other, far greater, barrier is that it adds nothing to the negligence inquiry. Corrective justice requires a wrongdoer to repair the loss that he caused the victim to suffer through his wrongdoing. If the concept of ‘loss’ is the same as the concept of wrongdoing – that is, the creation of an unreasonable risk – then loss is effectively subsumed into the concept of wrongdoing and liability is imposed for the sole fact of wrongdoing towards the claimant. An entire aspect of the equation has been removed, and the focus is solely on the defendant’s wrongdoing, so the justification for liability can no longer be corrective justice, but must be a defendant-focused form of justice such as retributive or distributive justice.

The difficulty of explaining why epistemic risk deserves compensation

In terms of the negligence doctrines, Stapleton has argued that the question of what constitutes ‘gist damage’ or actionable damage is ‘rarely addressed squarely by courts’, and that the word ‘damage’ is ‘bandied about in a number of different contexts, usually without clear definition yet equally without apparent awareness of the importance of precision in its use’.⁵⁹ This highlights one of the key difficulties with accepting risk as damage in cases involving the evidentiary gap – should exposure to the risk of harm be considered damage for the purposes of corrective justice-based liability? This question was not addressed head-on by the House of Lords in *Barker*. Amirthalingam has therefore argued that ‘*Barker* is an unsatisfactory decision in that it does not explain why “increased risk” should qualify as the gist of negligence’.⁶⁰ Furthermore, it does not account for why the risk of mesothelioma, and possibly of other diseases whose aetiology involves the same kind of evidentiary gap, is considered to be damage but the risk of other physical harm is not regarded as damage. It will be argued that any limit on what kinds of risk qualify as damage will necessarily be arbitrary because of the more fundamental problem that the risk of harm simply cannot constitute damage. Each of these objections must be addressed in greater detail.

A significant barrier to accepting that the risk of harm constitutes damage is that it is difficult to say why risk has value and what that value is. Voyiakos explains that ‘we cannot decide whether persons exposed to risk of physical harm should be entitled to claim compensation unless we have some rough idea of what they would demand to

58. Clearly asbestos exposure is also wrongful because it creates a risk of other asbestos-related illnesses too.

59. J Stapleton ‘The gist of negligence, part 1: minimal actionable damage’ (1988) 104 Law Q Rev 213 at 213.

60. K Amirthalingam ‘The changing face of the gist of negligence’ in J Neyers, E Chamberlain and S Pitel (eds) *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) p 474.

be compensated *for*'.⁶¹ And risk itself does not have a value as a proportion of the value of the physical harm to which it relates:

[W]hen I make it 40 per cent more likely that you will suffer lung cancer, I am not causing you 40 per cent of the harm that lung cancer brings about. The quantity of risk and the quantity of physical harm do not seem to be related in any such straightforward way. We therefore have reason to object to the latter being taken as a measure of the former.⁶²

Instead, Voyiakis focuses on the concrete effects that exposure to the risk of harm can create, notably preventive medical care and the increase in the cost of health insurance or life insurance. Finkelstein similarly argues that the costs of medical monitoring mean that risk exposure constitutes damage because it affects the individual's objective level of welfare.⁶³ Yet her account is problematic because she also supports what she labels the 'Absorption Thesis', that risk as damage is 'absorbed' into the physical damage if that outcome eventuates. So she argues, 'the person who is harmed in a car accident surely does not think of himself as worse off than the person who sustains the same injuries through an intentional battery'.⁶⁴ This means that the risk of harm only constitutes damage if the risk fails to materialise, but once the risk materialises and results in physical damage then the period of risk exposure no longer constitutes an independent form of damage. Yet as Perry argues, 'the status of agent-imposed risk as harm in itself should not depend on whether the threatened physical harm has materialized'.⁶⁵ If risk exposure itself is characterised as damage when the outcome remains prospective, then once physical harm occurs it is inconsistent to say retrospectively that the period of risk exposure is no longer considered damage. In respect of the concrete effects of risk, Steele has distinguished the 'utility value' of risk from its 'mathematical value' and explained that the utility value of any particular risk depends on the individual involved. She says that 'if the possible losses are *not* purely financial, it is much harder to attach the risk "value" in any calculable form at all'.⁶⁶ So even the question of whether a risk has a financial impact will depend on the individual and whether he or she is inclined to have health/life insurance anyway.

Similarly, risk cannot be valued according to the anxiety it causes the claimant. The House of Lords held in *Rothwell* that the risk of future asbestos-related illness is not actionable damage, nor is anxiety related to this risk, nor is the combination of the two.⁶⁷ Green supports this conclusion, noting that human beings necessarily operate within a notion of risk meaning that:

the degree to which any individual might or might not actually be at risk of an adverse outcome need bear no resemblance whatsoever to his *perception* of that risk. Therefore, any anxiety founded upon such a necessarily epistemic conception

61. E Voyiakis 'The great illusion: tort law and exposure to danger of physical harm' (2009) 72 Mod L Rev 909 at 915.

62. Ibid, at 917.

63. C Finkelstein 'Is risk a harm?' (2003) 151 U Pa L Rev 963 at 971.

64. Ibid, at 993.

65. Perry, above n 32, p 331.

66. Steele, above n 33, p 25.

67. *Rothwell v Chemical and Insulating Co Ltd and another* [2007] UKHL 39, [2007] 3 WLR 876.

of that risk is a step further removed from the defendant's breach of duty than is anxiety consequent upon actual harm resulting from the tort.⁶⁸

This conclusion reflects the considerations of corrective justice that underpin negligence liability. Corrective justice operates to correct wrongful losses, and the characterisation of a loss as 'wrongful' depends not only on it being caused by wrongdoing, but also allows the law to limit the definition of wrongful loss to those losses that go beyond what everybody is expected to tolerate as part of everyday life.⁶⁹

It is also difficult to reconcile risk as damage with the decision in *Cartledge v E Jopling & Sons Ltd.*⁷⁰ The claimant there had suffered damage to his lungs caused by inhalation of silica dust and it was held that the fibres caused actionable damage before producing symptoms that were noticeable in everyday life. If physical damage is actionable before it is discoverable by the claimant, then risk exposure ought to also be actionable regardless of whether the claimant is aware of the risk. Yet risk exposure only seems to acquire significance if the claimant is aware of it. If the claimant is unaware of the risk, then he is unaffected unless it materialises in physical harm.

Amirthalingam has also noted that limiting recovery for risk to mesothelioma, or to risks arising in the course of employment, would be arbitrary – there is nothing marking these contexts out as ones in which the claimant and defendant regard the risk of harm as damage in advance of their interaction. Amirthalingam suggests that 'unacceptable risk' might be considered damage. He explains that this 'provides a normative framework for courts to determine what sort of risks should be classed as unacceptable, and incrementally develop the law'.⁷¹ This solution is too vague to be applied in practice, and it still does not explain *why* a particular risk is unacceptable.

Epistemic risk: the conflation of damage and breach

The more fundamental obstacle to the recognition of epistemic risk as damage in negligence is that the damage requirement would be subsumed into the breach inquiry; damage would effectively be lost as an element of negligence. This is problematic in any reasonable conception of negligence because damage is an essential ingredient for liability. It is even the case that Stevens, who prefers the 'rights model' of torts over the traditional 'loss model', argues that pure risk cannot be actionable in negligence. He explains, 'a legal system must choose: either it is to be concerned with outcomes and protect our right to bodily safety or it is to be concerned with risks. Making the defendant pay both for outcomes and for exposure to risk would mean the defendant has to pay twice over. All of the rights we have good against the rest of the world protect us from adverse outcomes. Consequently, we do not have rights good against everyone else not to be exposed to the risk of harm which has not yet occurred'.⁷²

Prevailing opinion is that corrective justice provides the most coherent justification for negligence liability, and understanding the role of damage within corrective justice-based liability highlights the extreme impact of subsuming the damage

68. S Green 'Risk exposure and negligence' (2006) 122 Law Q Rev 386 at 388.

69. G Turton 'Defining damage in the House of Lords' (2008) 71 Mod L Rev 987 at 1012–1014.

70. [1963] AC 758 (HL).

71. Amirthalingam, above n 60, p 475.

72. R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007) p 44.

requirement into the breach inquiry.⁷³ Corrective justice addresses justice in interactions between individuals and is concerned with correcting wrongful losses.⁷⁴ It is not primarily concerned with issues of punishment or compensation, each of which focuses on just one of the parties involved. Instead, it is concerned with the relationship between the wrongdoer and the victim, which is evidenced by wrongdoing and a corresponding loss.⁷⁵ It is the relationship of causation between the defendant's negligence and the claimant's loss that joins the parties together in an interaction. When one party causes a wrongful loss to another, corrective justice requires him to repair that loss to restore the pre-transaction equality between the parties. If epistemic risk were to be recognised as constituting actionable damage, the damage requirement would be subsumed into the breach inquiry. Consequently, liability would be based entirely on wrongdoing rather than on the interaction of the two parties, so it would no longer be a system of corrective justice.

In *Fairchild*, Lord Rodger suggested that '[a]t best, it was only good luck if any particular defendant's negligence did not trigger the victim's mesothelioma'.⁷⁶ This is true, but should not impact on corrective justice-based liability since this addresses wrongful loss. The causation requirement has been criticised as introducing an element of 'moral luck' into negligence liability,⁷⁷ and if the focus of liability was the wrongdoing of the defendant alone, then there may be some force to this argument. However, since the focus of corrective justice is not on either of the parties alone, but is on the inequality that occurs when the wrongdoing of one person causes a loss to another person, it is only concerned with equality in transactions. When two people interact there is only a transaction when something passes between them; in other words, when one causes a loss to the other. As Steele has explained, 'if the defendant is lucky and does not cause damage, then potential victims are lucky too and do not suffer any'.⁷⁸ The claimants in these cases have not been 'lucky' overall because we know that they have developed mesothelioma, but this does not mean that it was caused by the particular defendant. If the defendant was lucky and did not trigger the claimant's mesothelioma but simply created a risk of mesothelioma by exposing him to asbestos dust, then there has been no corrective justice transaction between the defendant and the claimant.

The relationship between the *Fairchild* test and breach of duty was considered by the Court of Appeal in *Williams v University of Birmingham*.⁷⁹ As noted above, the main issue to be decided in that case was whether the defendant had breached his duty of care towards the claimant. The judge at first instance said that the legal standard of

73. See above n 22, and below n 74.

74. See further E Weinrib, above n 22, at 403; E Weinrib 'Corrective justice in a nutshell' (2002) 52 U Toronto L J 349; R Wright 'Substantive corrective justice' (1992) 77 Iowa L Rev 625.

75. Note that 'damage' is not synonymous with 'loss', but the damage requirement in negligence addresses one particular aspect of the corrective justice notion of 'wrongful loss'. The damage requirement allows courts to distinguish between types of loss that might be considered 'wrongful' if caused by negligence and those kinds of loss that we might be expected to tolerate so are not actionable (see Turton, above n 69).

76. *Fairchild*, above n 1, at [155] (Lord Rodger).

77. D Howarth 'Many duties of care – or a duty of care? Notes from the underground' (2006) 26 Oxford J Legal Stud 449 at 461.

78. Steele, above n 33, p 116.

79. *Williams*, above n 44.

care was ‘to take all reasonable measures to ensure that [the claimant] was not exposed to a material increase in the risk of mesothelioma’.⁸⁰

In the Court of Appeal, however, it was held that this was inaccurate:

A reference to exposure ‘to a material increase in the risk of mesothelioma’ brings the test for causation in mesothelioma cases into the prior questions of the nature of the duty and what constitutes a breach of it. There is nothing in *Fairchild* or [*Sienkiewicz v Greif*] to suggest that the House of Lords or the Supreme Court has altered the ‘breach of duty’ test in mesothelioma cases so that a claimant only has to demonstrate that the defendant failed to take reasonable steps to ensure that the claimant or victim was not exposed to a ‘material increase in the risk of mesothelioma’.⁸¹

Instead, the duty of care is ‘to take reasonable care . . . to ensure that [the claimant] was not exposed to a foreseeable risk of asbestos related injury’.⁸² If the defendant did not materially increase the risk of harm, then it was clear that he had not breached his duty of care. But if his conduct did materially increase the risk of harm, then the court must still ask whether a reasonable person in the defendant’s place would have taken further steps to reduce the risk of harm. The test of breach of duty is therefore more demanding than the test of material increase in the risk of harm that is applied at the causation stage, so it is clear that epistemic risk is already subsumed into the breach inquiry. Subsuming the damage requirement into the breach inquiry would mean that the only remaining elements of the negligence inquiry would be the duty of care and the breach of duty.

As previously noted, wrongdoing and loss are distinct aspects of an interaction that triggers a corrective justice response, so they must also be distinct in the negligence inquiry. Thus, just as we know that negligence cannot coherently be explained as a system of compensation, nor can it be explained in terms that focus solely on the wrongdoer. Damage is therefore said to form the gist of the negligence action, it is an essential ingredient of negligence liability. If damage were to be subsumed into the breach inquiry, the negligence action would focus almost exclusively on the defendant, and would no longer be a system of corrective justice.

CONCLUSION

This paper has argued that, despite Lord Hoffmann’s attempt to reformulate the gist of the negligence action as risk in the context of the *Fairchild* exception, risk has not become the actionable damage in these actions – and nor can it. Writing extra-judicially, Lord Hoffmann has more recently suggested that in *Fairchild* ‘the most satisfactory outcome would have been for their Lordships in their judicial capacity to have adhered to established principle, wringing their hands about the unfairness of the outcome in the particular case, and recommend to the Government that it pass appropriate legislation’.⁸³ Given the difficulties highlighted in this paper of reconciling the *Fairchild/Barker* approach with traditional principles of corrective justice-based liability, his conclusion seems appropriate. On first impression, Lord

80. (Belcher J) at first instance (unreported) cited in *Williams* (CA), above n 44, at [39].

81. *Williams* (CA), above n 44, at [40] (Aikens LJ).

82. *Ibid*, at [40].

83. Lord Hoffmann, above n 16, p 68.

Hoffmann's reconceptualisation of the gist of the action as the risk of harm appeared to restore the function of the causation requirement, thus reconciling the *Fairchild* test with the principles of corrective justice. Since the claimant could only prove that the defendant's negligence exposed him to the risk of harm, he was only to be compensated for the risk exposure rather than the physical harm. The subtle change in the formulation of the *Fairchild* test also appeared to bring it in line with the *Wardlaw* test of material contribution to harm, the only difference being that the 'harm' to which *Fairchild/Barker* applies is 'the risk of harm'.

It is argued, however, that Lord Hoffmann's approach is conceptually problematic because it fails to scrutinise the notion of risk in sufficient detail. This paper distinguishes risk from the related concept of probability and argues that risk, properly understood, is a forward-looking concept. This is argued to be incompatible with the backward-looking role in which it is cast in Lord Hoffmann's approach. What his approach achieves, as the majority of the Supreme Court in *Durham v BAI* recognised, is to impose liability in respect of the claimant's mesothelioma with apportionment based on notions of fairness and intuitively calculated probability of causation.

The paper turned to consider whether risk, in the forward-looking sense, could constitute actionable damage in negligence if the physical harm requirement were to be removed. In addition to exploring the difficulty of attributing moral significance to risk as damage, it argues that risk is already addressed in a more demanding way under the rubric of breach of duty. If risk were to be recognised as damage, damage would therefore be subsumed into the breach inquiry and negligence would become a one-sided inquiry focusing on the defendant's wrongdoing rather than on his interaction with the claimant.

This highlights that we cannot simply reconceptualise the gist of the negligence action and assume that the solution is consistent with corrective justice-based liability. It is essential to adopt a clear understanding of the nature of the actionable damage requirement in negligence – what is damage and what is its function in the negligence inquiry. It also highlights the substantial change that was made in the seemingly subtle shift from a test of 'material increase in risk' to a test of 'material contribution to risk'. Even such a small development requires close scrutiny of the absolute or comparative measures implied by each test and the accompanying shift from measuring risk to measuring probability. While the *Fairchild* test has introduced incoherence to the factual causation stage of the negligence inquiry, this cannot be resolved simply by redefining the gist of the negligence action.