LIABILITY FOR ASBESTOS-RELATED ILLNESS: REDEFINING THE RULES ON 'TOXIC TORTS'

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I. INTRODUCTION

In Ireland, the Central Statistics Office reports that some 77,000 people suffer from work related illness in the course of a year, of which some 4,400 suffer respiratory problems.[1] Though further details are not provided, it is safe to assume that a significant number of such work-related respiratory illnesses arise from exposure to asbestos and it is widely expected that the number of claims for asbestos-related illness in Ireland will increase sharply in the coming years.[2] It is estimated that approximately 3,000 people die in Britain annually from asbestos-related diseases and the U.K. Health and Safety Executive predict as many as 10,000 deaths annually by 2025.[3] Currently, between one and two thousand of these die from mesothelioma, increasing from 154 in 1968 to 1009 in 1991. Indeed, some commentators refer to a 'mesothelioma epidemic', which is predicted to kill some 250,000 men in Western Europe over the next 30-35 years.[4] Indeed, it has been estimated that the total cost of asbestos claims worldwide will eventually reach around US$200 billion.[5]

In recent years, litigation over illness resulting from exposure to asbestos has led to the progressive development and clarification of the application of common law principles to claims relating to environmental injury. The joint burdens of establishing the necessary causal link between an activity and an injury and of establishing that the injury sustained ought to have been reasonably foreseeable have

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[1] See Buckley, A.J., "Causation and Compensation in Asbestos Related Disease Claims" (2002) *Commercial Law Practitioner*, 191.

[2] See for example, *The Irish Times*, 23 June 2003.

[3] See McIntyre, O., "Liability for Asbestos-Related Illness" (1996) 4 *Irish Planning and Environmental Law Journal*, 83 at 84.

[4] Peto, J., Decarli, A., La Vecchia, C., Levi, F. and Negri, E., "The European Mesothelioma Epidemic" (1999) 79 *British Journal of Cancer*, 666.

[5] See *The Economist*, 25 May 2002, p. 81.

traditionally proven very onerous for plaintiffs claiming for so-called 'toxic torts'. Also, the issue of liability for psychiatric illness caused by anxiety over past exposure to asbestos raises a number of difficult issues. However, the UK and Irish courts have, of late, taken a more innovative and progressive approach to establishing both vital requirements for a finding of liability and to defining the limits of liability in relation to psychiatric illness.

In particular, the House of Lords has recently ruled that the 'but for' test for causation[6] need not apply in mesothelioma claims entered by employees who suffered periods of exposure with more than one employer and where medical science cannot prove who among a number of employers caused the condition.[7] The decision effectively creates joint and several liability whereby the claimant will be entitled to recover damages in full against each defendant. Also, the English Court of Appeal has ruled in 1996 that liability arose in respect of exposure to asbestos resulting in mesothelioma despite the fact that the disease was not known to medical science at any time during the relevant period of exposure.[8] The Court reached this decision by employing a broad concept of injury for the purposes of establishing reasonable foreseeability. This development is significant in light of the emphasis placed on the requirement of foreseeability by the House of Lords decision in *Cambridge Water Co. v. Eastern Counties Leather*.[9] Finally, the Irish Supreme Court has recently clarified the position in relation to liability for psychiatric illness arising from unfounded anxiety over negligent exposure to asbestos dust, finding, as a matter of policy, that no liability arose in the absence of physical injury.[10]

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[6] The court must be satisfied that 'but for' the acts or omissions of the defendant, the claimant would not have suffered the loss or damage.

[7] Joined cases *Fairchild v. Glenhaven Funeral Services Ltd.*; *Fox v. Spousal (Midlands) Ltd.*; *Matthews v. Associated Portland Cement Manufacturers (1978) Ltd. and others* [2003] 1 A.C. 32 (H.L.(E)). See also Morgan, A., "Inference, Principle and the Proof of Causation" (2002) N.L.J. 1060.

[8] Unreported, 17 April 1996. See further McIntyre, O., "Liability for Asbestos-Related Illness" (1996) 4 *Irish Planning and Environmental Law Journal*, 83.

[9] [1994] 1 All ER 53 (H.L.).

[10] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003.

II. CAUSATION

Establishing causation in toxic tort actions has long proven a difficult and even insurmountable task. For example, in *Reay and Hope v. British Nuclear Fuels p.l.c.*[11] the scientific complexity of establishing on the balance of probability a causal link between the defendant's operations and the plaintiffs' leukaemia ultimately proved impossible.[12]

Similarly, in *Hanrahan v. Merck, Sharp & Dohme Ltd.*[13] the difficulties in establishing causation with regard to most of the alleged interferences ultimately proved insurmountable. However, recognising that the onus of proving the causal link between the polluter's activities and the alleged damage can involve great scientific and financial difficulty, the Supreme Court in *Hanrahan* admitted the possibility of reversing the burden of proving causation in such cases. The Scottish case of *Graham and Graham v. ReChem*,[14] provides an extreme example of the practical problems which can be involved in establishing causation in 'toxic tort' cases, involving an action in negligence and nuisance against the operator of a hazardous waste incinerator by local farmers for alleged damage to their cattle. The case lasted for 896 hours in court, spread over 198 days, and involved 80 lay witnesses and 21 expert witnesses on such issues as veterinary toxicology, agricultural accountancy, incinerator design, dioxin formation, pollution dispersion, analysis of trace organics and meteorology. The defendant's costs were estimated at Stg£4.5 million and the cost to the Legal Aid Board at Stg£1.5 million.[15] Ultimately, the case failed on the issue of causation as there were other possible explanations of the cattle's injuries.

The disease of mesothelioma, which refers to a cancer of the lining of the lung (pleura) or of the abdomen (peritoneum), raises a number of issues in relation to causation. First of all, though the aetiology of the disease is far from clear, there is a clear consensus

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[11] [1994] 5 Med. L.R. 1.

[12] In relation to the problems of establishing causation in such negligence actions, see Day, M., "Cancer: Proving the Causal Link, Tobacco, Radiation and Environmental Pollution" (1998) 66 *Medico-Legal Journal*, 141.

[13] [1988] I.L.R.M. 629 (S.C.).

[14] [1996] Env. L.R. 158 (Q.B.D.).

[15] See further Woolley, D., et al, *Environmental Law* (Oxford University Press, Oxford, 2000), p. 712.

that exposure to asbestos causes the overwhelming majority of cases. For example, of approximately 1,500 cases which occur in the UK annually, in only 50 or 60 cases is there no known history of exposure to asbestos dust.[16] Therefore, as fewer than 5% of mesothelioma cases arise in people with no known exposure to asbestos, a court is unlikely to consider an alternative cause of mesothelioma in a person occupationally exposed to asbestos. It is clear that increased exposure to asbestos will increase the risk of contracting the disease. However, it is not known whether a single fibre, the so-called 'single hit' theory, or multiple fibres trigger the onset of the disease, with each situation considered as likely as the other. Therefore, mesothelioma is classified legally as an 'indivisible' disease, as distinct from asbestosis which is 'divisible' or cumulative. In the case of asbestosis, once the threshold for exposure is exceeded, all inhaled fibres are considered to contribute proportionately and progressively to lung dysfunction. This creates obvious difficulty for a plaintiff mesothelioma victim who has been negligently exposed to asbestos by a number of defendants, usually successive employers, in terms of establishing causation.

In *Fairchild*, Curtis J. refused recovery at first instance to the estate of a mesothelioma victim suing two former owners of buildings in which he had worked and in which asbestos was present.[17] The Court found that there was no evidence of significant differences between the respective levels of exposure and was "unable to establish on the balance of probabilities that the breaches of duty by either defendant were a cause or a material contribution to the deceased's mesothelioma". During the course of the trial, Dr. Rudd, an expert witness, was adamant that science could not determine during which period of employment the fibre which 'caused' the disease was inhaled[18] and this evidence persuaded Curtis J. to conclude that:

> … it simply cannot be said in this case:

[16] See further Miller, C., "Judicial approaches to contested causation: *Fairchild v. Glenhaven Funeral Services* in context" (2002) 1 *Law Probability and Risk*, 119 at 128.
[17] Queen's Bench Division, unreported, Curtis J., 1 February 2001.
[18] See Miller, C., "Judicial Approaches to Contested Causation: *Fairchild v. Glenhaven Funeral Services* in Context" (2002) 1 *Law Probability and Risk*, 119 at 129-130.

> (i) whether a single fibre of asbestos is more or less likely to have caused the disease
> (ii) whether more than one fibre is more or less likely to have caused the disease
> (iii) even if multiple fibres are responsible, it cannot be shown that it is more likely than not those fibres came from one source
> (iv) no Court could find on the facts of this case that the deceased's fatal disease was caused cumulatively by the exposures …[19]

However, a mere five months after Curtis J.'s decision in Fairchild, the English High Court reached a very different conclusion on very similar facts.[20] Where a mesothelioma victim sued two of 15 employers who had exposed him to asbestos during the course of his working life, Mr. Justice Mitting, relying on the 1972 decision of the House of Lords in *McGhee*[21] justified his award of full damages against both defendants stating:

> The claimant was exposed by each defendant and by both defendants, to asbestos fibres, in quantities sufficient greatly to increase his risk of contracting mesothelioma.[22]

Indeed, Curtis J. declined to follow the earlier ruling of Phillips J. in a 1987 case,[23] again with strong evidential similarities to *Fairchild*, where he would appear to have anticipated the Lords' later interpretation in *Fairchild* of their original intention in *McGhee*,

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[19] Queen's Bench Division, unreported, Curtis J., 1 February 2001, at para. 3 of the unreported judgment.
[20] *Matthews v. Associated Portland Cement and British Uralite p.l.c.*, Queen's Bench Division, unreported, 11 July 2001. Indeed, Dr. Rudd, the principle expert witness in Fairchild, also acted in Matthews giving substantially similar evidence, see Miller, C., "Judicial Approaches to Contested Causation: *Fairchild v. Glenhaven Funeral Services in Context*" (2002) 1 *Law Probability and Risk*, 119 at 129.
[21] *McGhee v. National Coal Board* [1972] 3 All E.R. 1008 (H.L.), where it held that an employer who causes an indivisible disease such as dermatitis through exposure, only some of which is negligent, shall be liable in full for that injury.
[22] *Matthews v. Associated Portland Cement and British Uralite p.l.c.*, Queen's Bench Division, unreported, 11 July 2001, at 18F.
[23] *Bryce v. Swan Hunter Group p.l.c. and others* [1988] 1 All E.R. 658 (Q.B.D).

namely to prevent negligent employers escaping liability where scientific uncertainty makes the burden of proof unduly onerous. Phillips J. stated:

> Whether the defendants' breaches of duty merely added to the number of possible initiators of mesothelioma within the lungs of Mr. Bryce, or whether they also produced a cumulative effect on the reduction of his body's defence mechanism, they increase the risk of his developing mesothelioma. He developed mesothelioma. Each of the defendants must accordingly be taken to have caused the mesothelioma by its breach of duty.[24]

In finding for Mr. Bryce's estate, Phillips J. would appear to have also anticipated the Lords' later relaxation of the rigid application of the traditional 'but-for' test for causation:

> It follows that it is not possible for the plaintiff to prove on balance of probabilities that the additional fibres inhaled by Mr. Bryce as the result of breaches of duty by either defendant were a cause of his mesothelioma. It is equally impossible for either of the defendants to prove on balance of probabilities that their breaches of duty were not at least a contributory cause of Mr Bryce contracting the disease.[25]

The confused position with regard to an 'indivisible' disease contrasted with the approach of the courts to a disease with a cumulative aetiology, such as asbestosis, where it is accepted that "all dust contributes to the final disability"[26] and it is possible to effect a division of damages according to the relative duration or seriousness of each negligent exposure. In *Holtby* the Court of Appeal upheld a ruling of the Divisional Court which awarded damages to a marine fitter suffering from asbestosis as a result of

[24] *Bryce v. Swan Hunter Group p.l.c. and others* [1988] 1 All E.R. 658 at 671 (Q.B.D).
[25] *Bryce v. Swan Hunter Group p.l.c. and others* [1988] 1 All E.R. 658 at 671 (Q.B.D).
[26] *Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421 at 430 (C.A.).

workplace exposure against a firm who employed him for about half the relevant period of exposure. Clarke L.J. relied upon a 1957 pneumoconiosis case[27] to argue that a defendant whose negligence made a 'material contribution' should be liable in full unless he could "prove that a definable part [of the injury] was caused … by others".[28] In the same case, Stuart-Smith L.J. demonstrated something of the essential nature of a 'divisible' injury by referring to a 1984 occupational deafness case[29] in which Mustill J. was prepared to reduce damages in respect of damage incurred in the period before the effects of industrial noise were fully realised by medical science. Though *Holtby* would appear to place the onus on the defendant to prove the extent to which other persons contributed to the claimant's injury, the Court of Appeal has subsequently stated in relation to another 'divisible' occupational disease, vibration white finger, that :

> … in principle the amount of the employer's liability will be limited to the extent of the contribution which his tortuous conduct made to the employee's disability [and that it is for the Court to do] … the best it can on the evidence to make the apportionment ...[30]

The Court of Appeal heard conjoined appeals in both *Fairchild and Matthews* and two similar cases[31] and strongly approved Curtis J.'s reasoning in *Fairchild* at first instance. The Court would appear to have taken a very conservative approach to the development of the common law requiring that, once the disease has arisen, the claimants must prove, on the balance of probabilities, that the particular tortfeasor had actually caused the disease. The Court of Appeal relied on the *dicta* of Lord Bridge in *Wilsher v. Essex Area Health Authority*[32] to the effect that *McGhee* established no new principle of law whatever and that their Lordships in that case had reached their decision upon an inference of fact. The Court of

[27] *Nicholson v. Atlas Steel Foundry and Engineering Co. Ltd.* [1957] 1 All E.R. 776 (H.L.).
[28] *Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421 at 432 (C.A.).
[29] *Thompson v. Smiths Repairers (North Shields) Ltd.* [1984] 1 All E.R. 881 (Q.B.D.).
[30] *Allen v. British Rail Engineering Ltd.* [2001] E.W.C.A. Civ. 242 at para. 20 (C.A.).
[31] [2002] P.I.Q.R. P27 (C.A.).
[32] [1988] 1 All E.R. 871 (H.L.).

Appeal found that although

> … it could be properly said that each tortious exposure to asbestos dust increased the employee's risk of contracting the mesothelioma … the claim in each case is not based on an increased risk … the only damages that can be claimed are for contracting the disease.[33]

Therefore, where it could not be established on the balance of probabilities which exposure or exposures to asbestos fibres were responsible for causing or materially contributing to a plaintiff's mesothelioma, the Court of Appeal was not prepared to equate a material contribution to the risk that a disease will arise with a material contribution to the cause of that disease if it does in fact arise. The Court of Appeal decision raised the possibility that a large number of people suffering from the most common industrial diseases would be deprived of the right to claim compensation where they could neither establish that a particular period of exposure was more or less likely to have caused the disease nor that the disease was caused cumulatively by exposure in more than one employment.

However, the House of Lords judgment in *Fairchild*[34] now relaxes the traditional test for establishing causation where there are multiple potential tortfeasors, holding that, in the case of an 'indivisible injury' such as mesothelioma, any tortfeasor could be liable for the whole of the injury once liability has been established. The House of Lords relied on its earlier decision in *McGhee v. National Coal Board*[35] where it held that an employer who causes an indivisible disease such as dermatitis through exposure, only some of which is negligent, shall be liable in full for that injury. In this case, the plaintiff's employers failed, in breach of duty, to provide him with adequate washing facilities at his place of work and, having to cycle home covered in dust, he developed an extensive irritation of

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[33] [2002] P.I.Q.R. P27 at para. 105 (C.A.).

[34] Joined cases *Fairchild v. Glenhaven Funeral Services Ltd.*; *Fox v. Spousal (Midlands) Ltd.*; *Matthews v. Associated Portland Cement Manufacturers (1978) Ltd. and others* [2003] 1 A.C. 32 (H.L.(E.)). See also Morgan, A., "Inference, Principle and the Proof of Causation" (2002) N.L.J. 1060.

[35] [1972] 3 All E.R. 1008 (H.L.).

the skin diagnosed as dermatitis. The House of Lords unanimously allowed the appeal holding that if the defendant's conduct made a material contribution to his contracting the disease, he was entitled to succeed. The Lords stressed in *McGhee* that theirs was a 'common sense' understanding of causation having regard to the circumstances of such cases. According to Lord Reid:

> … it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.[36]

Interestingly, Lord Reid, who, in *McGhee*, devised the formula which the other Lords substantially accepted, had some years earlier rejected an excessively restrictive approach to the question of causation,[37] where an employee had contracted silicosis after inhaling dust from two sources, one tortious (*i.e.* swing grinders) the other not (*i.e.* pneumatic hammers), to which he was regularly exposed during the course of his employment in a foundry. He stated:

> … but I cannot agree that the question is which was the more probable source of [the plaintiff's] disease, the dust from the pneumatic hammers or the dust from the swing grinders. It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease.[38]

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[36] [1972] 3 All E.R. 1008 at 1011 (H.L.).
[37] *Bonnington Castings Ltd. v. Wardlaw* [1956] 1 All E.R. 615 (H.L.).
[38] *Bonnington Castings Ltd. v. Wardlaw* [1956] 1 All E.R. 615 at 618 (H.L.).

Unlike the Court of Appeal, a 4:1 majority of the House of Lords found that a new principle of law had been established in *McGhee* and that it was applicable in the present cases. Applying the *McGhee* principle, the Lords found that the traditional 'but for' test for causation was inappropriate for such cases, Lord Hoffman stating that "I think it would be both inconsistent with the policy of the law imposing the duty and morally wrong for your Lordships to impose causal requirements which exclude liability".[39] Indeed, Lord Bingham felt that it would be better expressly to "recognise that the ordinary approach to proof of causation is varied than to resort to the drawing of legal inferences inconsistent with the proven facts"[40] while Lord Nicholls stated clearly that "the Court is applying a different and less stringent test. It were best if this were recognised openly".[41] Significantly, Lord Hoffman approved the test for causation proposed by the Supreme Court of California in *Rutherford v. Owens-Illinois Inc*.[42], stating that "the causal requirements of the tort were satisfied by proving that exposure to a particular product was a substantial factor contributing to the … risk of developing cancer".[43] The fault of the defendant remains central however, Lord Hutton stating that "the approach taken by this house in McGhee is one which should be followed by trial judges … where the claimant can prove the employer's breach of duty materially increased the risk of him contracting a particular disease and the disease occurred".[44]

The Lords relied, to a considerable extent, on policy considerations to justify overturning the Court of Appeal's ruling in this case and removing a significant obstacle to claims for compensation for many victims suffering from industrial diseases. For example, Lord Bingham states that "… such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim".[45] Similarly, Lord Nicholls notes that "… a

[39] [2003] 1 A.C. 32 at 75 (H.L.(E.)).
[40] [2003] 1 A.C. 32 at 68 (H.L.(E.)).
[41] [2003] 1 A.C. 32 at 71 (H.L.(E.)).
[42] (1997) 67 Cal. Reptr. 2d 16 (S.C.).
[43] [2003] 1 A.C. 32 at 77 (H.L.(E.)).
[44] [2003] 1 A.C. 32 at 91 (H.L.(E.)).
[45] [2003] 1 A.C. 32 at 67 (H.L.(E.)).

former employee's inability to identify which particular period of wrongful exposure brought about the onset of his disease ought not, in all justice, preclude recovery of compensation".[46] Interestingly, each of their Lordships have sought to limit the scope of this principle, Lord Bingham, for example, referring only to claims relating to mesothelioma. However, considering the origin of the principle in *McGhee*, it is difficult to see how the principle would not apply to all 'indivisible' diseases, including less serious diseases such as dermatitis.

III. FORSEEABILITY

The unique characteristics associated with the disease of mesothelioma have also resulted in the English courts taking an innovative approach to the issue of foreseeability of damage for the purposes of liability. The disease can develop from a very short period of exposure, even from a single instance of exposure, but only manifests itself many years after exposure. According to statistics published by the insurer Munich Re, the average latency period for asbestos-related mesothelioma is 34 years[47] and epidemiology suggests that it is so rare for the latency period to be less than ten years that exposures within ten years of diagnosis may be excluded as causal.[48] The problems that such a long latency period might cause for a plaintiff were illustrated in a 1984 occupational deafness case, *Thompson v. Smiths Repairers (North Sheilds) Ltd*.[49] in which Mustill J. was prepared to reduce damages in respect of injury incurred in the period before the effects of industrial noise were fully realised by medical science.

In joined cases *Margereson v. J.W. Roberts Ltd. and Hancock v. J.W. Roberts Ltd*.[50] the plaintiffs sued an asbestos manufacturer after having contracted mesothelioma due to extensive asbestos

[46] [2003] 1 A.C. 32 at 70 (H.L.(E.)).
[47] Munich Re, Employers Liability Handbook. See further Buckley, A.J., "Causation and Compensation in Asbestos Related Disease Claims" (2002) *Commercial Law Practitioner*, 191 at 192.
[48] See further Miller, C., "Judicial Approaches to Contested Causation: *Fairchild v. Glenhaven Funeral Services* in Context" (2002) 1 *Law Probability and Risk*, 119 at 128.
[49] [1984] 1 All E.R. 881; [1984] Q.B. 405 (Q.B.D.).
[50] [1996] P.I.Q.R. P358 (C.A.).

contamination by the defendants of the district of Armley in Leeds where both plaintiffs had lived as children. Both sued in negligence and strict liability *(Rylands v. Fletcher)*[51] and/or nuisance, though only liability in negligence was considered by the court. It was never disputed by the defendant that the steps taken by them to mitigate the problems of asbestos dust contamination were woefully inadequate. At trial, Holland J. found for the plaintiffs despite the fact that at no material time was mesothelioma a concept known to medical science. It was established at trial that the relevant period was from 1925, when Mr. Margereson was born, to 1951, when Mrs Hancock left the immediate district. The association between asbestos and mesothelioma was first noted in 1960.[52] However, the Chief Inspector of Factories and Workshops condemned asbestos as early as 1898 as "necessarily injurious to a greater or lesser degree according to the constitution of the persons"[53] and again, in 1907, the Chief Inspector reported that "[t]here seems no question that the asbestos fibre is of a kind likely to injure the lungs …"[54]

The defendant appealed on the ground that there was no culpable lack of foresight on their part as they did not know and had no reason to believe that the risk of mesothelioma existed. They referred to a 'seminal report' from 1930,[55] presented in evidence at trial, the real purpose of which, they submitted, was "to highlight the risks of asbestosis among asbestos workers". The appellant argued that the trial judge had regarded the report as the trigger for the Asbestos Industry Regulations, 1931 (in force March 1933). It was contended that it was not until about 1933, on the judge's findings, that they could be regarded as fixed with adequate knowledge of the dangers of asbestos, and then, only with regard to the condition of asbestosis, a condition of gradual onset over a prolonged period of time. The

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[51] (1868) L.R. 3 H.L. 330 (H.L.).

[52] Wagner, J.C. et al, "Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province" (1960) 17 *British Journal of Industrial Medicine*, 266; Newhouse, M.L., et al, "Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area" (1965) 22 *British Journal of Industrial Medicine*, 261.

[53] *Report of the Chief Inspector of Factories and Workshops 1898*, British Parliamentary Papers (27) (Industrial Relations, Factories, 1898), p. 365.

[54] *Report of the Chief Inspector of Factories and Workshops 1907* (HMSO, London, 1908), p. 46.

[55] Merewether, E.R.A., and Price, C.W., *Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry* (HMSO, London, 1930).

respondents pointed out that the 1930 report also "spoke of local effects following the inhalation of dust including pulmonary and bronchial catarrh, bronchitis, fibrosis and secondary changes such as emphysema" and that there existed a great deal of additional written material on lung damage caused by exposure to asbestos dust. Some of this material dated from prior to the turn of the century.

The Court of Appeal rejected the appeal stating that liability would arise where the applicant should reasonably have foreseen a risk of some pulmonary injury, not necessarily mesothelioma, and, that the damage occurred at a time when the applicant was on actual or constructive notice as to the potential pulmonary damage that exposure to asbestos could cause. The Court also considered whether any distinction could sensibly be made between employees working within the factory and local residents. It asked "did the factory wall pose such a barrier that risk of injury to persons on the other side…amount at worst to no more than a 'mere possibility which would never occur to the mind of a reasonable man'?"[56] and agreed with the trial judge that if the conditions outside the factory are not materially different to those giving rise to a duty of care within, there is "no reason not to extend to that extramural neighbour a comparable duty of care".[57]

Therefore, the case extends liability to cover non-workers injured as a result of exposure to asbestos, but only where conditions were similar to those for asbestos workers. The trial judge, Holland J., made this requirement clear when he stated:

> Introduce the fact of distance and the balance of probabilities favours defendants. The inhalation that was condemned in the 1930 report and that founded the 1931 regulations is a concept that was then to be readily associated with the immediate environs of this factory, but not elsewhere.[58]

However, the decision still has implications for cases where environmental pollution causes personal injury to persons other than

[56] [1996] P.I.Q.R. P358 at 362 (C.A.) *per* Russell L.J.
[57] [1996] P.I.Q.R. P358 at 362 (C.A.) *per* Russell L.J.
[58] [1996] P.I.Q.R. P154 at 186 (Q.B.D.) *per* Holland J.

employees of the tortfeasor in that it further develops case-law relating to the extension of an employer's duty of care beyond the factory wall. The English courts had tended to be wary of extending the situations in which a duty of care applies. For example, in *Gunn v. Wallsend Slipway and Engineering Co. Ltd.*[59] it was held that no duty of care existed in respect of a woman who had died of mesothelioma after inhaling asbestos dust from work clothes worn by her husband while working in the defendant's shipyard. The Court of Appeal reached the same conclusion in *Hewett v. Alf Brown's Transport Ltd.*,[60] which concerned exposure to lead oxide on a worker's overalls. The decision in *Margereson and Hancock* appears to water down the onerous principle, requiring the tortfeasor to be aware of a particular risk, implicit in *Graham v. Co-operative Wholesale Society Ltd.*,[61] which concerned a claim for dermatitis caused by mahogany dust, and *Tremain v. Pike*[62] which concerned a claim for contracting Weil's disease. This approach appears to have been approved subsequently by the Court of Appeal in *Shell Tankers U.K. Ltd. v. Betty Irene Jeromson*[63] where, in facts very similar to *Margereson and Hancock*, Lady Justice Hale stated:

> The point which impressed the [trial] judge was the certain knowledge that asbestos dust was dangerous and the absence of any knowledge, and indeed any means of knowledge, about what constituted a safe level of exposure … But just as courts must beware using such later developments to inflate the knowledge which should have been available earlier, they must beware using it to the contrary effect. The fact that other and graver risks emerged later does not detract from the power of what was already known …[64]

It remains to be seen whether this decision has implications beyond personal injury actions[65] and whether the courts are prepared

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[59] *The Times*, 23 January 1989.
[60] (1992) 4 *Land Management and Environmental Law Review*, 48.
[61] [1957] 1 All E.R. 654 (C.A.).
[62] [1969] 1 W.L.R. 1556 (C.A.).
[63] [2001] E.W.C.A. Civ. 101, 2 February, 2001 (C.A.).
[64] [2001] E.W.C.A. Civ. 101, 2 February, 2001, para. 52 (C.A.).
[65] Following the House of Lords' decision in *Page v. Smith* [1996] A.C. 155 (H.L.), it is sufficient if any personal injury to a 'primary' victim is foreseeable.

to apply a less onerous test of foreseeability in cases of environmental damage generally. Where any particular class of environmental damage was foreseeable, liability might arise for any other type of damage in that class. Such a development would be of considerable significance in the light of *Cambridge Water Co. v. Eastern Counties Leather*[66] where the House of Lords held that foreseeability of damage was an essential requirement for liability under both nuisance and *Rylands v. Fletcher*. If the courts were to examine foreseeability in the context of broad classes of damage, the test of foreseeability, seen by many commentators as one of the factors responsible for the failure of tort to compensate for historic pollution, would effectively be relaxed. The test may now relate to the foreseeability of some relevant damage.

IV. NERVOUS ANXIETY

The Irish Supreme Court has recently had to decide on the availability of damages in negligence for nervous anxiety suffered by a plaintiff as a result of negligent exposure to asbestos during the course of his employment and his irrational fear of contracting mesothelioma in the future.[67] The plaintiff, who worked as a general operative in Leinster House, was engaged between 1985 and 1989 in assisting plumbers, electricians and fitters in the maintenance of the central heating system and was regularly obliged to remove lagging in order to enable these tradesmen to get access to pipe work. This work resulted in significant quantities of asbestos dust being released into the air in confined areas and the trial judge found as a fact that he had inhaled very large quantities of asbestos dust over the relevant period. O'Neill J. concluded on the facts that the defendants were guilty of 'gross negligence' and that no question of contributory negligence arose. In his expert evidence, Prof. Luke Clancy, a consultant respiratory physician and acknowledged expert on respiratory diseases resulting from exposure to asbestos, testified

[66] [1994] 1 All E.R. 53 (H.L.).

[67] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003. It should be noted that the Supreme Court has distinguished the more recent but factually similar case of *Swaine v. The Commissioners of Public Works in Ireland*, *The Irish Times*, 7 May 2003, as the defence had withdrawn any plea denying liability to pay damages and the case proceeded as an assessment of damages only.

that the plaintiff had been exposed to the risk of developing asbestosis and was also at an increased risk of lung cancer, but that he had not contracted either disease and that it was very unlikely that he ever now would. More significantly however, he also testified that as a result of his exposure to asbestos, the plaintiff was at risk of contracting mesothelioma in later life, though he concluded that this risk was 'very remote'. He based this conclusion on the fact that cases of mesothelioma are quite rare, with his practice encountering no more than three or four cases a year despite the fact that exposure to asbestos is widespread throughout the whole community. Also, though the plaintiff was likely to have inhaled asbestos fibres which would have remained in his body and caused microscopic scarring, on examination there were no manifestations of the scarring visible on x-ray and there were no signs of 'pleural plaques' which would have been indicative of the kind of damage likely to lead to the onset of mesothelioma. Despite such reassurances, however, the plaintiff continued to worry about the possible danger to his health and he was eventually diagnosed by a consultant psychiatrist, Dr. Griffen, as suffering from 'reactive anxiety neurosis', which, as the trial judge found, could not be assuaged by counselling or the best available medical advice. In his evidence, Dr. Griffin informed the Court that 'reactive anxiety neurosis' is a recognisable psychiatric disorder which would come within the international classification of psychiatric diseases. On these facts, the trial judge, O'Neill J., found that the plaintiff's psychiatric illness was the result of his exposure to asbestos, rather than his having become aware of the risk arising from such exposure, and that it was reasonably foreseeable that it could result for a person of normal fortitude. Therefore, he did not need to consider the Supreme Court decision in *Kelly v. Hennessy*[68] which provides that a plaintiff may only recover for psychiatric illness unaccompanied by physical injury where he has suffered a recognisable psychiatric illness as a result of a nervous shock. He found for the plaintiff, holding that he was entitled to recover for the psychiatric illness he had suffered as a result of the defendants' negligence, and assessed damages in the sum of £48,000. The defendants accepted the trial judge's findings of fact but appealed,

[68] [1995] 2 I.R. 253 (S.C.).

arguing that he had erred in law.

On appeal to the Supreme Court, Keane C.J. accepted that the consequences for the plaintiff ought reasonably to have been foreseen by the defendants and also established that a relationship of 'proximity' existed between the plaintiff and the defendants, which gives rise to the legal duty to take care that the foreseeable consequence was avoided. He referred approvingly to the majority decision of the House of Lords in *Page v. Smith*[69] which provides that once it was reasonably foreseeable that personal injury would occur as a result of the defendants' negligence, it was immaterial whether the injury actually sustained was psychiatric as distinct from physical. Further in relation to foreseeability, Keane C.J. found that, in determining whether the defendants ought to have foreseen that the plaintiff would be at risk of psychiatric injury, the injury need not be one which would have been suffered by a person of 'ordinary fortitude' and that the defendants must take their victim as they find him. In this regard, he adopted the approach taken by Lord Lloyd in *Page v. Smith* and by Geoffrey Lane J. in *Malcolm v. Broadhurst*[70] whereby there was no distinction between an 'eggshell skull' and an 'eggshell personality'. Therefore, he could conclude that:

> The fact that the advice he received was that he was at no more than a very remote risk of contracting the disease would not be a reason, in principle, for relieving the defendants of liability *in limine* ...[71]

Also, in relation to the distinction made by the English courts in so-called 'nervous shock' cases between 'primary victims' and 'secondary victims', the Chief Justice was satisfied that, as an employee, the plaintiff was not in any sense a 'secondary victim', whose relationship to the primary victims was not sufficiently close or whose nervous shock was not the result of a sufficiently direct or immediate perception of the traumatic event in question. Indeed, he endorses the Circuit Court decision of His Honour Judge McMahon

[69] [1996] A.C. 155 (H.L.).
[70] [1970] 3 All E.R. 508 (Q.B.D.)
[71] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 26 of the unreported judgment.

in *Curran v. Cadbury (Ireland) Ltd*.[72] to the effect that an employee who suffers nervous shock as a result of negligence in the workplace does not have to be characterised as a 'primary' or 'secondary' victim. Therefore, the limitations on the extent of admissible claims by secondary victims developed by the English courts[73] would have no bearing on the plaintiff's case.

Keane C.J. also felt compelled to consider whether this case constituted a 'nervous shock' claim, in which case there would exist authority for the award of damages for a specified psychiatric disorder unaccompanied by any physical injury, provided the conditions laid down by Hamilton C.J. in *Kelly v. Hennessy* were met.[74] However, having regard to the dicta of, *inter alia*, Lord Ackner who stated in *Alcock*[75] that "shock … involves the sudden appreciation by sight or sound of a horrifying event, which violently affects the mind"[76] the Chief Justice concluded that:

> In the present case, there was no shock of that nature: no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognisable psychiatric illness supervened.[77]

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[72] [2000] 2 I.L.R.M. 343 (C.C.).

[73] See for example *McLoughlin v. O'Brian* [1983] A.C. 410 (H.L.); *Alcock & Others v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 (H.L.(E.)); *White v. Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 (H.L.).

[74] [1995] 2 I.R. 253 (S.C.). The five conditions may be paraphrased as follows:

1. The plaintiff must establish that he/she actually suffered 'nervous shock', comprising 'any recognisable psychiatric illness'.
2. A plaintiff must establish that his/her psychiatric illness was 'shock induced'.
3. A plaintiff must prove that the nervous shock was caused by the defendant's act or omission.
4. The nervous shock sustained by the plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.
5. The plaintiff must show that the defendant owed him/her a duty of care not to cause him/her a reasonably foreseeable injury in the form of nervous shock.

[75] [1992] 2 A.C. 455 (H.L.). See also the examples of psychiatric illness which could not be said to be induced by shock provided by Brennan J. in the Australian case of *Jaensch v. Coffey* (1984) 155 C.L.R. 549 (H.C.A.), including psychiatric illness resulting from the stress caused to a spouse in caring for an injured spouse or to a parent in coping with the wayward conduct of a brain-damaged child.

[76] [1992] 1 A.C. 310 at 401 (H.L.(E.).

[77] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 30 of the unreported judgment.

Therefore, it was necessary to consider whether liability in negligence could arise in respect of a plaintiff suffering a psychiatric illness brought about otherwise than by nervous shock, an issue which the Chief Justice described as "uncharted territory for our courts"[78] and one which could only be resolved "by determining whether or not the extension of the law to permit the recovery of damages in cases such as the present should be excluded on policy grounds".[79]

Keane C.J. readily accepts that policy considerations have a significant role to play in determining whether particular categories of negligence which have not hitherto been recognised by judicial decision should be so recognised and illustrates this position by pointing out that "the ground for not extending liability to all forms of economic loss … is the undesirability of courts extending the range of possible liability in so uncontrolled and indeterminate a manner without any legislative intervention".[80] The Chief Justice articulates the general policy arguments mitigating against an extension of liability to cover general psychiatric injury, including the 'floodgates' argument, concern that the prospect of compensation would not assist a plaintiff's recovery, and the desirability of legislative action in the area, but he goes on to consider a number of specific policy considerations which, in the case of 'fear of disease cases', argue even more powerfully against the imposition of liability. The first of these involves the undesirability of awarding damages to a plaintiff whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease as this would reward a plaintiff "who prefers to rely on the ill-informed comments of friends or acquaintances or inaccurate and sensational media reports rather than the considered view of an experienced physician".[81] As McNulty J. stated in the Appellate Court of Illinois

[78] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 30 of the unreported judgment.
[79] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 31 of the unreported judgment.
[80] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 31 of the unreported judgment.
[81] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 35 of the unreported judgment.

in *Majca v. Beekil*[82] "such broad recovery rewards ignorance about the disease and its causes". The second such policy consideration relates to the potential negative implications of such an extension of liability for the health care field and the Chief Justice quotes at length from the judgment of Baxter J. giving the majority opinion of the Supreme Court of California in *Potter and Others v. Firestone Tyre and Rubber Company*:[83]

> New data about potentially harmful effects [of new drugs] may not develop for years. If and when negative data are discovered and made public, however, one can expect numerous law suits to be filed by patients who currently have no physical injury or illness but who nonetheless fear the risk of adverse effects from the drugs they used. Unless meaningful restrictions are placed on this potential plaintiff class, the threat of numerous large, adverse monetary awards, coupled with the added cost of insuring against such liability (assuming insurance would be available) could diminish the availability of new, beneficial drugs or increase their price beyond the reach of those who need them most.[84]

Keane C.J. was also impressed by Baxter J.'s related argument that there would be serious implications for medical negligence cases grounded on the fear of plaintiffs having contracted a disease as the result of having been prescribed a particular drug. He points out that two cases involving claims for emotional distress arising out of exposure to asbestos have come before the United States Supreme Court and that, largely due to the policy considerations enumerated above, in each a majority concluded that, in order to recover for emotional distress, the plaintiff should have sustained a 'physical impact' and that mere contact with asbestos-laden insulation dust did not constitute such an impact.[85]

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[82] (1997) 682 N.E. 2D 253 (C.A.).
[83] (1993) 25 Cal. Rptr. 2d 550 (S.C.).
[84] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 36 of the unreported judgment.
[85] *Consolidated Rail Corporation v. Gottshall* (1993) 512 U.S. 532 (S.C.) and *Metro North Commuter Railroad Company v. Michael Buckley* (1997) 521 U.S. 424 (S.C.).

A similar approach was adopted by the Supreme Court of Texas,[86] where Hecht J., delivering the unanimous judgment of the Court, expressed concern that as:

> … most Americans are daily subjected to toxic substances in the air they breath and the food they eat. Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest diseases for the legal system's limited resources.[87]

Basing his decision very much on policy, Geoghegan J. took pains to point out that "this court is into virgin territory" and that "[i]n the absence of firm precedent this court must consider whether control mechanisms are necessary in 'fear of disease' cases and if so what those mechanisms should be".[88] In so doing, he states that the court:

> … must consider unguided by any Irish precedent whether damages were properly recoverable in this case. For this purpose I think it helpful to review a number of authorities cited in the appeals, not necessarily on the basis that they give direct guidance in these cases … but rather because of the recognition shown by judges in those cases of the necessity for control mechanisms in relation to the recovery of damages for psychiatric disease.[89]

Therefore, he sets out to divine the accepted boundaries for the extension of liability in negligence for psychiatric injury having regard to the wealth of indirectly relevant case law concerned with

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[86] *Temple – Inland Forest Products Corporation v. Carter and Another* (1998) 993 S.W.R. 2D (S.C.).
[87] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 39 of the unreported judgment.
[88] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 16 of the unreported judgment.
[89] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 16 of the unreported judgment.

the issue.[90]

He was particularly impressed by judicial statements found in five leading nervous shock cases. He quotes at length from the judgment of Lord Wilberforce in *McLoughlin v. O'Brian*[91] where the plaintiff was informed of a road accident involving several members of her family, who forcefully concludes that foreseeability does not of itself lead to liability and that policy considerations have a key role to play in determining the limits of liability. His Lordship asserted that:

> … at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says … that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether … one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary.[92]

He also refers with approval to comments in the judgment of Gibbs C.J. in the Australian case of *Jensch v. Coffey*[93] another road accident case, to the effect that, in nervous shock cases, foreseeability cannot be the sole criterion for the existence of a duty of care and that there may also be other considerations, including policy considerations, which ought to negative, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise. Goeghegan J. also refers, for the purpose of identifying general principle, to the House of Lords decision in *Alcock v. Chief Constable of South Yorkshire Police*[94] where such 'control mechanisms' were applied to claims in respect of psychiatric illness resulting from shock made by relatives of victims

[90] He considered, *inter alia*, *Byrne v. Great Southern and Western Railway Co. of Ireland*, Irish Court of Appeal, unreported, February 1884; *Bell v. Great Northern Railway Co. of Ireland* (1890) 26 L.R. Ir. 428 Ex.Div.); *Mullally v. Bus Éireann* [1992] I.L.R.M. 722 (H.C.).
[91] [1982] 2 All E.R. 298 (H.L.).
[92] [1982] 2 All E.R. 298 at 302 (H.L.).
[93] (1984) 155 C.L.R. 549 (H.C.A.).
[94] [1992] 1 A.C. 310 (H.L.).

who witnessed the Hillsborough football disaster. The Lords held that it was necessary for the plaintiff to show sufficient proximity of the relationship between the plaintiff and the defendant, though this was not limited by reference to particular relationships, and propinquity in time and space to the accident or its immediate aftermath. Geoghegan J. was impressed with a set of five principles relating to such cases identified by Lord Ackner, in particular his finding that 'shock' "has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system".[95] This statement caused him to conclude that:

> There is no doubt that in a 'fear of disease' case particularly when the disease is most unlikely to occur, psychiatric illness caused in such circumstances cannot be said to have arisen suddenly.[96]

Next, Geoghegan J. refers to the House of Lords decision in *Page v. Smith*[97] which, though it held that once it was established that the defendant was under a duty of care to avoid causing personal injury to the plaintiff, it did not matter whether the injury in fact sustained was physical, psychiatric or both, he distinguishes completely, saying that:

> There is a world of difference between direct injury resulting from a motor accident in which the plaintiff was involved on the one hand and a condition of anxiety emerging from information being gained as to the possible effects of negligent exposure over a long period of time to asbestos on the other.[98]

However, he quotes with approval one passage from the speech of Lord Lloyd:

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[95] *Alcock v. Chief Constable of South Yorkshire Police* [1991] 1 A.C. 310 at 401 (H.L.(E.)) *per* Lord Ackner.
[96] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 36 of the unreported judgment.
[97] [1996] A.C. 155 (H.L.).
[98] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 39 of the unreported judgment.

> Are there any disadvantages in taking the simple approach adopted by Otton J.? It may be said that it would open the door too wide, and encourage bogus claims. As for opening the door, this is a very important consideration in claims by secondary victims. It is for this reason that the courts have as a matter of policy rightly insisted on a number of control mechanisms. Otherwise, a negligent defendant might find himself being made liable to all the world. Thus in the case of secondary victims foreseeability of injury by shock is not enough.[99]

The final nervous shock case to which Geoghegan J. alludes is that of *White v. Chief Constable of South Yorkshire Police*[100] which, having distinguished *Page v. Smith*, he considers to be of limited usefulness. However, he does consider of relevance the general policy considerations set out by Lord Steyn who states that "the contours of tort law are profoundly affected by distinctions between different kinds of damage or harm"[101] and further that "in cases of pure psychiatric harm there is potentially a wide class of plaintiffs involved".[102]

Therefore, while finding that the above nervous shock cases have little direct bearing on this case, Goeghegan J. cites them in support of his conclusion that some kind of mechanisms are necessary to control the potential number of claims that may be made arising out of negligent exposure to asbestos. He concedes, however, that they do not afford much assistance as to the kind of control which should be applied. In relation to this issue, he turns to the few available 'fear of disease' cases. In the 1997 Illinois Appellate Court case of *Majca v. Beekil*[103] which concerned a claim by an employee of a

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[99] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 40 of the unreported judgment.
[100] [1999] 2 A.C. 455 (H.L.).
[101] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 44 of the unreported judgment.
[102] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 44 of the unreported judgment.
[103] (1997) 682 N.E. 2D 253 (C.A.).

medical practice and her husband for their fear of having contracted HIV, after she received a cut from a discarded scalpel in the garbage, against the physician in charge of the practice who had since died of AIDS. On the basis that the fear and distress must reach a degree of severity that justifies tort compensation, the Court held that their fear was not compensatable as they did not learn that the physician had AIDS until eight months after the woman's cut, at which time she had undergone two tests showing her to be HIV negative. In other words, a fear that is foreseeable, perhaps due to widespread misconceptions about the disease, may not be compensatable if the feared contingency is too unlikely. According to the Appellate Court:

> Where hysterical fear of a disease if sufficiently widespread, and popular knowledge concerning its aetiology is limited, a plaintiff may foreseeably experience severe emotional distress without medically verifiable evidence of a substantially increased risk of contracting the disease … recovery for fear of disease should not extend to such foreseeable fears … such broad recovery rewards ignorance about the disease and its causes.[104]

Significantly, he quotes at length from the judgment of Baxter J. in the Supreme Court of California in *Potter v. Firestone Tyre and Rubber Company*[105] who lists a number of public policy reasons for restricting liability in 'fear of disease' cases, including the likely scarcity and high expense of insurance, undue conservatism in the testing of new drugs and products, a possible inability to ensure adequate compensation for the victims who actually develop the disease, the difficulty of definition of a predictable threshold for recovery, and the inadequacy of monetary damages and the difficulty of measuring damages having regard to the intangible nature of the loss. At this point, Geoghegan J. mentions further policy considerations, including the danger of fraudulent claims and

[104] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 40 of the unreported judgment.
[105] (1993) 25 Cal. Reptr. 2d 550 (C.A.).

problems of proof. In *Temple-Inland Forest Products Corporation v. Reeves Carter*[106] itself a 'fear of asbestos disease' case, the Supreme Court of Texas gives voice to similar policy concerns, Hecht J. stating that:

> The difficulty in predicting whether exposure will cause any disease … makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether … Also claims for exposure could proliferate because in our society … 'contacts, even extensive contacts with serious carcinogens are common.'[107]

Geoghegan J. points out that the British courts have voiced similar concerns in 'fear of disease' cases. In *CJD Group B v. MRC*[108] which concerned children suffering from dwarfism who took part in clinical trials of a drug designed to improve their prospects of adulthood and were inadvertently exposed to a potentially lethal dose of the CJD agent, Morland J. stated:

> I am persuaded that the Group B plaintiffs should not be treated as primary victims. I accept that … if they were, the ramifications would be incalculable. If they were primary victims so would be those exposed to asbestos or radiation … The potentiality of a huge number of claims in similar situations would arise making insurance difficult or impossible. It could involve all manner of products and a huge range of potential tortfeasors. It could inhibit the producers, prescribers and suppliers of a product from warning the public of the danger of a product.[109]

He also refers to the decision of the High Court of Northern Ireland in *Bittles v. Harland and Wolffe p.l.c.*[110] where the plaintiff

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[106] (1998) 993 S.W.R. 2D (S.C.).
[107] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 53 of the unreported judgment.
[108] [2000] Lloyds Rep. Med. 161 (Q.B.D.).
[109] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at pp. 54-55 of the unreported judgment.
[110] [2000] N.I.J.B. 209.

exposed to asbestos was awarded damages for severe clinical depression, though he distinguishes that case on the ground that the plaintiff developed asymptomatic pleural plaques allowing the trial judge to find that the depressive condition "was significantly aggravated by the diagnosis of an asbestos related illness".
Therefore, on the basis of the general public policy considerations articulated in the above 'nervous shock' cases and, more particularly, the specific policy reasons set out in the above 'fear of disease' cases, Geoghegan J. concluded:

> In my view it would be unreasonable to impose a duty of care on employers … to take precautions not merely that their employees will not contract disease but that they will not contract so serious a fear of contracting a disease however irrational that they develop a psychiatric overlay. The court should not permit compensation for irrationality in that way.[111]

V. CONCLUSION

It would appear therefore that, faced with the unique challenges presented by asbestos claims in general, and mesothelioma claims in particular, the Irish and British courts have taken a very flexible and creative approach. They have proceeded to liberalise several of the traditional tests for tortious liability on the basis of policy considerations while, at the same time, limiting the scope of such liability, again on policy grounds. It seems that the traditional threshold for establishing the foreseeability of damage has been lowered by taking account of a broad class of damage or injury rather than the particular damage or injury suffered. Also, in *Fletcher*, the Supreme Court appears to have extended the relevance of the concept of foreseeability to the existence and breach of a duty of care as well as to the actual damage suffered. Similarly, the traditional 'but for' test for establishing causation has been relaxed, at least in relation to mesothelioma victims negligently exposed to

[111] *Fletcher v. The Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 59 of the unreported judgment.

asbestos by more than one tortfeasor, though whether this exception to the general rule can be restricted to such serious cases remains to be seen. Considerations of justice and injustice have played a major role in each of these developments. Practical public policy considerations were also to the fore in the Supreme Court's recent decision setting the boundaries of liability for psychiatric illness caused by anxiety over exposure to asbestos.

While such judicial creativity and the adoption of such a 'common-sense' approach is to be welcomed, especially in light of the potential for injustice presented by the cases considered above, these precedents may have significant implications for the future development of tort law generally and one would hope that a coherent and consistent line of reasoning might emerge that will allow victims, industry and insurers to understand their rights and duties and to act accordingly. One is reminded of the warning issued by Lord Hoffman in *Hunter and Others v. London Docklands Development Corp*.[112] where the House of Lords overturned the Court of Appeal's earlier decision to recognise non-proprietary rights in nuisance.[113] His Lordship took the view that, despite:

> … the need for the law to adapt to modern social conditions … the development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap.[114]

[112] [1997] 2 All E.R. 426 (H.L.).
[113] *Khorasandjian v. Bush* [1993] Q.B. 717 (C.A.).
[114] [1997] 2 All E.R. 426 at 452 (H.L.).