**Chapter 12**

**Causation and Proportional Recovery**

ROB MERKIN and JENNY STEELE

**I. The Impact of *Fairchild***

The decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*,[[1]](#footnote-1) though on the face of it not concerned with apportionment at all,has ultimately led to the introduction into the English law of tort, and of insurance, of novel forms of proportional liability. The challenge for tort law was that rules on causation, as they then stood, precluded recovery in the absence of proof of a link between a given exposure to a harmful substance and consequent injury suffered at a much later date. In the case of mesothelioma, such proof was regarded as impossible where there was a chain of potential defendants. The challenge for insurance law was how policies were to respond to this gap. The practical outcome for both areas of law (tort, and insurance) has been the adoption of proportionality.[[2]](#footnote-2) It should be said at the outset that there was nothing new, in practice, about with a degree of proportionality in either tort, or insurance. Joint or cumulative tortfeasors are, through the Civil Liability (Contribution) Act 1978 (UK), ultimately required to bear a degree of liability broadly proportional to their respective contribution,[[3]](#footnote-3) whichever of them is the initial target of the victim’s action. Two or more insurers whose *concurrent* policies happen to overlap in respect of a single loss are, through the mechanism of contribution and following a successful claim against any of them, ultimately required to carry only a proportionate share of the loss,[[4]](#footnote-4) generally based upon a comparison of the amounts for which each insurer would independently have been liable to the assured.[[5]](#footnote-5) *Fairchild*, however, particularly as it has been later interpreted, takes the law into new territory.

We argue here that, given the problems with which *Fairchild* deals, some form of proportional liability solution was more or less inevitable, not only at the level of tort law, but – if the tort judgments on the incidence of liability were to be meaningful – also at the level of insurance. A majority of the House of Lords in *Barker v Corus*[[6]](#footnote-6)effectively retrenched on what was thought to be the outcome of *Fairchild*, by rejecting 100% tortfeasor liability in favour of proportionality based on – presumably, but this is yet to be articulated fully – time on risk and intensity of exposure. In addition, the decision has already had a transformative effect on the question of proportional liability in employers liability insurance, first in *Durham v BAI (The Trigger Litigation)[[7]](#footnote-7)* by causing the courts to construe such policies as responding to the year of exposure, rather than the year of injury; and then in *International Energy Group v Zurich Insurance plc UK* [[8]](#footnote-8),by allowing contribution between *consecutive* insurers on an entirely novel ‘time on risk’ rather than the established ‘independent liability’ basis.[[9]](#footnote-9) It is apparent that, had conventional contribution been applied, an insurer on risk for one year but nevertheless facing 100% liability for mesothelioma claims based on exposures in that year would have been required to contribute 50% to an insurer on risk for 20 years of exposure and similarly facing 100% liability.

We do not argue that, but for *Fairchild*, none of this would have happened. To the contrary, the argument developed in what follows is that the problem was latent and indeed would have arisen independently of *Fairchild.* Neither do we argue that proportionality is a better reflection of a particular defendant’s ‘share’ of responsibility. Rather, we see proportionality in the *Fairchild* scenario as indicating a set of rough and ready practical solutions to a range of practical difficulties which faced not only tort law, but also the underlying insurance arrangements. Our view is that, for both tort and insurance law, a solution resembling *Fairchild* in one form or another – in which proportional liability was effected either through the adaptation of tort law itself, or through the creation of full liability with contribution – was more or less necessary because the problems with which the decision deals are real problems and not confined to one particular social and political issue.[[10]](#footnote-10) Strong though the influence of the social context of industrial mesothelioma undoubtedly was, *Fairchild* is not to be dismissed as a one-off reaction to a particular social problem.

Given that *Fairchild* has taken us into new territory, the real question is exactly how far *Fairchild* is going to lead.Much ink has been spilt over the shock that *Fairchild* has created in the English law of tort, one that many advocate should be confined as closely as possible to the ‘enclave’ of mesothelioma, the fatal disease with which it dealt: this often builds on an argument that it is best seen as dealing with a particular social problem.[[11]](#footnote-11) Similarly, on the face of things, the principles laid down in the authorities on consequential insurance claims arising out of the *Fairchild* ruling are limited to that context. Earlier authority on the liability of insurers for exposure claims had reached the ‘date of injury’ solution for exposure injuries in the context of public liability insurance: *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd*.[[12]](#footnote-12) It is an open secret that the claim in *Bolton* was designed as a stalking horse for the many thousands of similarly-worded employers liability policies, and the extension of *Bolton* to such policies would have removed virtually all insurance liability, given that cover would then have existed only for injuries suffered in the policy year by *current* employees and not ex-employees. The outcome in *Durham* was a major shock to the small number of insurers who faced long-tail liability under employers liability policies in force up to 40 years earlier. It is to be stressed that *Fairchild* was concerned only with employers liability, and Lord Mance, on the opening of the arguments in *Durham,* expressed some relief that the Supreme Court was not being called upon to consider the correctness of *Bolton*.

It is apparent that the ultimate effect of *Fairchild*has been to adopt an approach under which rough proportionality was substituted for established principles of causation where proof of nexus between the negligence of any one among a group of potential defendants, and injuries later suffered, was an impossibility.[[13]](#footnote-13) That then followed through to insurance claims. Could *Fairchild*become the default outcome in other situations where it is not possible to identify the responsible tortfeasor in a group of tortfeasors? More importantly, could *Fairchild*become the default solution to impossibility of proof where there is only one potential tortfeasor but there are other potential causes of the loss? In either case, what are the parameters of this? Pushing things further still, could insurance and reinsurance[[14]](#footnote-14) claims abandon causation as presently understood and replace it with proportionality, and, if so, in which circumstances?[[15]](#footnote-15) We expand on these points as the chapter proceeds. In the following section, Section II, we defend *Fairchild*, and illustrate that a solution like it would have been needed at the insurance level quite independently of its precedential influence. In Section III, we explore the potential for *Fairchild*’s influence to expand, showing the way to a range of solutions to the problems we have just indicated.

**II. In Defence of *Fairchild***

A. Introduction

The right of a claimant who has suffered loss to recover damages from a defendant for a tortious act traditionally rests upon causation in the form of the ‘but for’ test. The basic ‘but for’ test is easily stated: if the conduct of the defendant is left out of account, would the claimant have suffered loss? The claimant must prove that ‘but for’ causation is established on the balance of probabilities. Refinements of the ‘but for’ test have been proposed, which nevertheless continue to rest on identification of whether the defendant’s conduct was a ‘necessary’ factor.[[16]](#footnote-16) In a case where two or more defendants potentially face liability for their respective acts or omissions, causation determines whether each of them is responsible; and if the loss is a result of the acts of a defendant and external forces, causation determines if there is any recoverability at all.

In applying causation rules to concurrent causes, three quite different scenarios have to be distinguished. These can be explained by examples inspired by the comments of Baroness Hale in *Barker*.[[17]](#footnote-17) The first involves independent concurrent causes: D1 and D2 simultaneously shoot C. The second involves indeterminate concurrent causes: D1 and D2 simultaneously shoot C, but only one of the guns is loaded, and it is not possible to show which gun it was. The third involves interdependent concurrent causes not amounting to a joint enterprise: D1, pursuing his own purposes, injures C, enabling D2 to make a simultaneous fatal shot which, without the intervention of D1, would have missed its target. The issues raised by each are quite different. Independent concurrent causes throw into doubt the efficacy of the ‘but for’ test, because each of the defendants can justifiably say that, if his own conduct is disregarded, C would still have been shot by the other and the result would have been the same. Indeterminate concurrent causes are essentially a question of proof, in that it is impossible to say which of the defendants caused the loss. Putting the matter in terms of standard of proof, neither D1 nor D2 can be said on the balance of probabilities to have been more likely than the other to have caused C’s loss. Interdependent concurrent causes give rise to an allocation issue, in that there would have been no loss (in our example, no fatality) without the acts of both D1 and D2. Both pass the ‘but for’ test, and both attract liability. In English tort law, this remains full liability. However, through contribution proceedings, a liable defendant is able to seek the court’s quantification of the appropriate liability of each defendant, producing a proportional outcome.[[18]](#footnote-18)

It would seem, therefore, that traditional causation principles, combined with contribution, give a satisfactory solution only in the case of interdependent concurrent causes, although even there the task of apportioning responsibility is probably little more than a combination of best guess based on common sense. If mathematical criteria are applied at all, they are generally applied to elusive facts. Indeed the broad-brush nature of the exercise is in no sense disguised or avoided by the legislation.[[19]](#footnote-19) The broad-brush character of this assessment is similar to the nature of the decision required of courts determining questions of contributory negligence in its proportionate form. One of the present authors has argued elsewhere that this proportionate form of contributory negligence (comparative negligence, as it is known in some jurisdictions) does not lend itself to the precise logic attributed to proportionate liability by some of its proponents.[[20]](#footnote-20) Where contribution legislation is concerned, the rough and ready nature of the assessment is still more evident, and it is plain that relevant considerations go far beyond the relative causal responsibility of the parties (with which contributory negligence deals) to embrace non-causative factors such as the fact that one party holds un-disgorged profits resulting from the wrong,[[21]](#footnote-21) or even the manner in which a party conducts proceedings.[[22]](#footnote-22) But, at least there is a mechanism. The question to be posed is whether a proportional approach of some sort can resolve the difficulties in the other scenarios.

It is, to say the least, counter-intuitive that if both D1 and D2 have fired shots at C then they should both be able to walk away free of liability essentially because they can blame each other for the consequences. Without liability, there can be no contribution. Applying extended proportional liability, either D1 and D2 are each to be regarded as 50% to blame for the purposes of a claim on behalf of C, or alternatively D1 and D2 are each to be regarded as 100% to blame and the allocation takes effect between them in separate subsequent proceedings under the Civil Liability (Contribution) Act 1978. As with interdependent concurrent causes, the latter offers a proportional result, while removing the cost of additional proceedings and the risk of non-payment for the claimant. Proportional liability is conceptually more attractive where both D1 and D2 have fired loaded guns, because although it cannot really be said that each has caused half the loss, at least the result produces broad equity between them. However, if there is one loaded and one unloaded gun, so that the problem is one of indeterminacy, then under proportionality (of one form or the other) one or other of the defendants is going to be held 50% responsible for a loss in which he had no part.[[23]](#footnote-23)

B. Exposure Injuries

The range of possibilities becomes clearer if we transpose the scenario from exposure to bullets to exposure to harmful substances, thus also changing the time frame. C is negligently exposed to a carcinogen by D1 in year 1 and by D2 in year 2. C discovers in year 30 that he has suffered personal injury. The results of the medical evidence may be that: (1) each of the exposures by D1 and D2 would independently have caused the injury; or (2) one or other of the exposures has caused the injury, but it is not possible to ascertain which; or (3) the exposures had a cumulative effect and together gave rise to the injury. In case (3), if the injury is a divisible one, liability can clearly be apportioned by the law of tort.[[24]](#footnote-24) In the case of an indivisible injury resulting from cumulative causes, there is some authority that each exposure making a material contribution is capable of giving rise to liability in full, but the fit between this conclusion, and principles of causation, is far from obvious, and the authority in question appears to involve a departure from ‘but for’ causation.[[25]](#footnote-25) To the extent that more than one such exposure is tortious, one would expect contribution to operate. In case (1) it would seem that D1 has to carry the can, as D2 has merely exposed to risk a person who has already suffered the relevant outcome. Case (2) is the difficult one, and this is of course the problem arising specifically from exposure to asbestos. The difficulty exists because, in respect of asbestos, medical evidence: (i) cannot ascertain which of the potentially many thousands of exposures over a lengthy period led to injury 30 or so years later; and (ii) whilst it no longer supports the ‘single strand’ theory,[[26]](#footnote-26) it continues to hold that some exposures will be causative, and others not,[[27]](#footnote-27) rather than illness being the result of a cumulative effect from all exposures.[[28]](#footnote-28) In short, we are faced with the equivalent of D1 and D2 each firing guns at C but only one of the guns being loaded. There are four possible responses.

First, the traditional tortious ‘but for’ test of causation may be applied. C has to show on the balance of probabilities that the injuries were caused either by D1 or by D2. On our scenario he cannot do either, and so C bears his own financial loss (other than to the extent that, in the unlikely event, he has first party insurance) and D1 and D2 escape liability. It may be that there is evidence that one or other of the defendants is more likely to have caused the injury, by reason of intensity or duration of exposure, so that the balance of probabilities test is satisfied in respect of that defendant. Lord Phillips considered this kind of point in *Sienkiewicz v Greif*,[[29]](#footnote-29) questioning why, if such issues could be used to define what proportion of risk was contributed by a particular defendant, they could not also be used to determine who was liable on balance of probabilities. He and the other members of the UK Supreme Court rejected this kind of reliance on epidemiological evidence, proposing that it was not sufficiently probative.[[30]](#footnote-30)

Secondly, the law may adopt an artificial allocation of responsibility. Australian state workers’ compensation legislation, based upon the English Workmen’s Compensation Acts 1897 and 1906, arbitrarily lumps the entire liability on D2 as the last employer in the chain.

Thirdly, the law may take a robust approach to compensation, scrap proof of causation as a requirement for the imposition of liability and treat every tortious act by D1 or D2 capable of giving rise to the injury as having actually done so. This is the approach adopted by section 3 of the English Compensation Act 2006, although only in respect of mesothelioma claims. There is apportionment between D1 and D2, but in indemnity or contribution proceedings as provided for by the 2006 Act and not at the point of claim by C.

Fourthly, a less robust approach, but also adopting the abandonment of proof of causation, is proportionality. This proved to be the common law solution to the problem in *Barker v Corus*,[[31]](#footnote-31) following what had earlier been perceived as an initial flirtation with the third solution in *Fairchild v Glenhaven Funeral Services*. The House of Lords in *Fairchild* did not make any finding that the liability of each defendant should be restricted to a ‘share’ of damages, and indeed was not invited by the parties to consider apportionment – a fact that was mentioned by Lord Bingham.[[32]](#footnote-32) In the absence of any such discussion, it was concluded by most, not unreasonably, that liability was in full. Presumably, settlement of the claims would have proceeded on this basis, and mesothelioma is, after all, an indivisible disease. It seems likely that the defendants were unwilling to urge the court to accept the notion of proportional liability, since liability insurers were at the same time defending claims in the pleural plaques litigation, their defence resting firmly on the position that causation of a risk of injury is not causation of injury. In the end, it turned out that the insurers could have it both ways: *Fairchild* could be interpreted as a proportional solution, while pleural plaques which merely act as a marker for the risk of serious injury could not themselves amount to an injury.[[33]](#footnote-33) English law was not ready to edge closer to recovery for ‘loss of chance’ in this form, but was ready to adopt proportional liability in the circumstances of *Fairchild*.

Certainly, it appeared from *Fairchild* that the liability of each defendant was for causation of mesothelioma, given the impossibility of proving which exposures were fatal, and which were not. The subsequent decision of the House of Lords in *Barker v Corus* took a further controversial step because, although it restricted the impact of *Fairchild* on defendants (an outcome which in practical terms was reversed in mesothelioma cases by the Compensation Act 2006),[[34]](#footnote-34) in terms of legal principle it struck out afresh. *Barker* could be read as either (a) the first English decision to endorse proportionate liability for an indivisible disease, or (b) the first English decision awarding damages for exposure to risk, rather than for causation of injury. Nothing in the Compensation Act 2006 alters the impact of *Barker* on common law principles, so this choice of interpretation remains significant.

In *Durham v BAI (Trigger Litigation)*,[[35]](#footnote-35)the Supreme Court made clear that liability in both *Fairchild* and *Barker* is liability for the fatal mesothelioma incurred, and not for exposure to risk. Interpretation (b) therefore was ruled out. While it might have been thought that this implied the correctness of Lord Rodger’s dissenting opinion in *Barker* (supporting liability in full on the part of each tortfeasor), the possibility of proportional recovery was not in issue in *Durham v BAI*, since s 3 of the Compensation Act 2006 applied, and the question therefore did not arise. Subsequently however, in *International Energy Group v Zurich Insurance Plc UK*, interpretation (a) was adopted: under *Barker*, each exposure is a tortious act, and the tort (it was clearly determined in *Trigger*) is complete when injury is sustained; however, each tortfeasor is liable only for a proportion of the loss, reflecting the extent to which his own misconduct might be thought to have contributed to it. This will reflect the degree to which the defendant contributed to the *risk* of development of mesothelioma. If we were to assume consistency of intensity of exposure over the relevant period (unrealistic though this may be in many instances), each tortfeasor faces liability for his own proportion of the total exposure period. But many other variables may be in play.

What is notable is that the common law here has sought to produce, between claimant and defendant, a result which appears to be akin to the one achieved in the Civil Liability (Contribution) Act 1978 between tortfeasors. However, the latter statutory approach is openly based on broad-brushed principles of equity as we have seen, evidently allowing for impressionistic judgment and allowing for consideration of factors that are not causative where appropriate. Like the contributory negligence legislation, it makes no spurious claim to exactness.[[36]](#footnote-36) The common law, on the other hand, tends to operate through – or at least with – appeals to principle. The embrace of proportionate liability in *Barker*, as confirmed by *IEG*, is likely a somewhat different beast from the Civil Liability (Contribution) Act 1978; and, to the extent that it operates beyond the disease of mesothelioma, or outside the operation of the Compensation Act,[[37]](#footnote-37) it certainly has different implications for claimants.

Returning to our exposure problem and its possible solutions, we can see that only the first response deprives C of compensation altogether. All the others allow C to recover, but, leaving aside the case of divisible injury,[[38]](#footnote-38) each of them does so at the cost of the traditional need to establish ‘but for’ causation. So, traditional causation rules must take a bow if it is thought appropriate for C to be compensated. Of course, what is being abandoned would appear to be merely the need to *prove* causation, since this is considered impossible. The solutions would not apply to a defendant who could be proven not to be a cause. But in the face of impossibility of proof, selecting the relevant approach necessarily involves appeal to something other than causation.

Leaving aside the specific public policy issues arising from asbestos and mesothelioma – and the existence of a special statutory scheme in the UK for compensation in such cases[[39]](#footnote-39) demonstrates that wider considerations are at play in this context – the question is whether the sacrifice of causal principles is warranted. It may be that each of the underpinning purposes of tort – deterrence, punishment, compensation, risk-spreading – point towards the victim’s right to recover: victims typically do not have any or adequate first party insurance; few can bear the financial burdens of what may be inflicted on them; and state support is unlikely to be adequate, even in the most enlightened of nations. Alternatively, a fairness-based approach may be adopted: each party who breaches their duty leading to exposure to risk also contributes to the impossibility of proving causation, and it is better that these wrongdoers bear the cost of this impossibility. Though this may appear principled, it is nevertheless a novel principle for tort law to adopt. It reaches for a pragmatic solution on principled (fairness) grounds. Tort scholars have been mixed in their response, but there have been distinguished and loud condemnatory voices ranged against the *Fairchild* and *Barker* line of cases. Yes, compensation has been achieved, but at too high a price to established legal principle. The argument runs that *Fairchild* is an anomaly and should not be extended any further.[[40]](#footnote-40) Nevertheless, *Fairchild* has been extended to occupational lung cancer resulting (on balance of probabilities) from exposure to asbestos.[[41]](#footnote-41) The Court of Appeal stated that *Fairchild* would apply wherever its preconditions were present. As Lord Dyson put it,

I can see no reason not to apply the *Fairchild* exception to the facts of the present case. There can be no objection in principle to extending it to situations which are not materially different from Fairchild’s case. Indeed, principle requires that in a situation which is truly analogous to that considered in that case, the Fairchild exception should be applied. Otherwise, the law in this area would be inconsistent and incoherent.

The search is on therefore for a principled interpretation of *Fairchild*, which would not treat it as a narrow response to a particular problem – although certain of the preconditions of *Fairchild* spelt out by the Court of Appeal in *Heneghan* (such as the insistence that the rival causes involve a ‘single agent’), may be resistant in the end to principled explanation. This search for principle is not however the key focus of this chapter. We adopt the alternative view that *Fairchild* is a pragmatic response to inevitable issues. Whether on the principled approach, or on our more pragmatic, problem-driven approach, *Fairchild* would tend to resist containment. The implications for its extent, however, would be different.

In our view, the pragmatic arguments for compensation are overwhelming. Not adopting a solution of some sort to the problems posed to claimants would be almost unthinkable. At the level of tort law and of insurance law, this may be addressed by considering the broad purposes of the law. There are differences, but the two deeply influence one another.[[42]](#footnote-42) Securing compensation for those harmed by breaches of duty in a fair and efficient manner is an aspiration of the law of tort and liability insurance together. In insurance law, based as it is in contracting, we may add the necessity of reflecting commercial sense. On this premise, we move from a debate about causation to a debate about apportionment and allocation. But we will return, as appropriate, to the arguments of fairness and principle which are hinted at by Lord Dyson, when we consider the likely limits to the application of *Fairchild*.

What is apparent from the above scenarios is that, assuming that neither D1 nor D2 is insolvent or does not have insurance, all recovery responses for C lead to an ultimate proportional sharing by D1 and D2. The second, artificial response leaves the loss entirely in the hands of D2, although D2 may well have a contribution claim against D1. The fourth response applies proportionality at the point of recovery by C, although, under this scenario, C may have to bear a proportion of the loss himself if there are self-inflicted exposures, or exposures from atmospheric conditions. The third response contemplates an initial 100% payment by whichever of D1 and D2 is called upon to pay, but tempered by a contribution claim against the other. One theoretical problem arises from the third response where there have been exposures from other sources. It is far from clear who bears the loss for such exposures ie, whether it is borne entirely by the paying defendant or whether that defendant can recover some proportion from others liable to contribute.[[43]](#footnote-43) We refer to this point below.

It cannot be questioned that *Fairchild* has highlighted a range of problems that were not contemplated when it was decided, and at time of writing those problems have yet to be fully resolved. But does that mean that *Fairchild* was either responsible for those problems, or wrongly decided? We take the view that there cannot be a proper analysis if tort issues are isolated from the underpinning insurance arrangements. If attention is focused not on tort law, which may be considered the ‘gatekeeper’ to compensation, but rather on how tort losses inflicted by multiple defendants are actually to be paid for, a series of entirely different and potentially more complex legal questions are exposed. Those issues are not just raised under liability policies providing indemnity for claims in tort, but are replicated in first party insurance. A further contention that we make is that insurance law in general has a lot to learn from *Fairchild*, and that there is a good case to align tort law and insurance law in a regime which includes elements of proportional liability in response to otherwise intractable problems. These problems are otherwise inclined to create problems of unfairness, with a particularly heavy impact on claimants. In short, causation has been unable to adapt to produce acceptable results in the situations under consideration.

C. Putting *Fairchild* to the Test: Life without *Fairchild*

Without *Fairchild*, a victim of exposure in the conditions of uncertainty to which the decision applies by two or more defendants would have no tort claim, so, to that extent, the case is of crucial importance. However, it is our contention that in other respects the decision in *Fairchild* has contributed relatively little to the complexities of paying for mesothelioma claims and that such complexities arise wholly independently of *Fairchild.* To illustrate the point, let it be supposed that C has been exposed to asbestos by D1 alone for a period of 20 years and that there has been no self-exposure or atmospheric exposure. C would easily be able to satisfy a court that, on the balance of probabilities, his disease was caused by negligent exposure, and there is no need to engage *Fairchild*. At that point, tort law, manning the gate to compensation, can lift the barrier and relax in the knowledge that nobody has played fast and loose with sacred causation principles. C’s claim against D1 does not need to identify any individual exposure in the 20-year period as giving rise to his injuries, and C’s claim cannot be time-barred unless he delays for more than three years after the discoverability of his injuries. It matters not whether liability is based upon an established tort per individual exposure or whether it flows from a course of conduct.

What, then, of D1’s employers’ liability insurance, which has been compulsory in the UK since 1 January 1972? The initial question is necessarily whether those policies actually respond to mesothelioma claims. In *Durham v BAI Run-Off, The Trigger Litigation* the Supreme Court held that policies issued both in the pre-compulsory period and thereafter are to be construed as responding to exposure, rather than to injury. The latter finding would have, in all but exceptional cases, rendered the insurance devoid of value: injury-based policies apply to injuries inflicted upon a current employee, and mesothelioma injury – kicking in 30-40 years or so after exposure – is more likely to affect employees who have moved on to other employment, or who have retired. The Supreme Court’s finding of exposure cover filled the ‘black hole’. So we are off first base, and at this point in the reasoning we remain in a *Fairchild*-free zone. But for no longer; once there is more than one insurer involved,[[44]](#footnote-44) proportionality and allocation necessarily raise their heads. It is to be remembered that the scenario with which we are concerned is one where single exposures do not contribute equally to injury: where that is the case, it may be possible to prove – by evidence or at least inference – a uniform regularity of exposure, so that each can be regarded as contributing to the loss at identifiable times. The problem is the one previously captured starkly in terms of the ‘single strand’, and now more generally present in the scientific – or at least legal – consensus that not all fibres are involved in the causation of mesothelioma.

Let us assume that for a 20-year period of exposure, D1 was insured by U1 for the first 15 years and U2 for the final 5 years. Can D1 recover from one or other of his insurers? There is a range of possible responses, reflecting those discussed earlier in respect to tortious liability. Outcome (a): D1 cannot, on the balance of probabilities, identify the year in which the killing exposure took place, because every year has an equal chance, and so can recover nothing. Outcome (b): D1 can show that, because U1 was on risk for 75% of the period, on the balance of probabilities the killing exposure took place during U1’s time on risk. It follows that U1 must bear the entire loss without contribution from U2, because, on the balance of probabilities, the damage did not occur during U2’s five years on risk. That does not of course mean that D1 has identified which of the fifteen years is the relevant years, just that it is more likely than not to have been one of them. Outcome (c): the loss is to be allocated 75:25 as between U1 and U2.

The difficulty with Outcome (c) is that there is no insurance authority for it. To the contrary, apportionment of loss does not form a part of English insurance law, other than in the limited context of policies subject to average under which the assured is deemed to be his own insurer for the proportion of underinsurance: the result is that losses are divided between assured and insurer in their respective proportions.[[45]](#footnote-45)

The final possibility is Outcome (d): each exposure is to be regarded as giving rise to a tort in its own right, so that liability can be pinned onto any exposure in any year. On that basis, each of U1 and U2 is liable for 100%, but because there is concurrent liability then there is a right of contribution in the paying insurer from the non-paying insurer. At that point, as we noted in Section I above, a further complication arises, because the right of contribution is generally determined on an independent liability basis, ie, on the basis that the liability of each insurer is ascertained and the loss is allocated accordingly.[[46]](#footnote-46) Adopting outcome (d) in an unmodified form means that U1 and U2 are each liable for 100%, so that whichever pays can claim 50% back from the other despite the disparity in time on risk.

The point here being made is that, even where *Fairchild* has no part to play in pinning tort liability on D1, the allocation issue becomes live, albeit at one remove. Since we are now in the realms of insurance, we should ask which of the four outcomes produces the solution making the most commercial sense? Outcome (a) is plainly nonsensical, given that D1 has paid premiums for 20 years. Outcome (b) has two drawbacks. First, the insurer with the shorter period of cover is relieved of liability, even if the difference is a matter of minutes. Secondly, varying the facts and assuming that U1 and U2 are on risk for ten years each means that it is impossible to satisfy the burden of proof in respect of either and there is no recovery. Outcome (c) has the benefit of rough and ready justice and probably reflects the outcome that conforms with the risks undertaken by U1 and U2, but it has no legal basis. Outcome (d) achieves much the same as (c), with the additional benefit for D1 that the paying insurer bears the risk of the other’s insolvency but with the downside that it is necessary to tinker with the rules on contribution between insurers to ensure that the loss is divided proportionately to time on risk and not equally.

We know how the Supreme Court actually dealt with this very problem, as the facts of *IEG v Zurich* are in essence those set out above*.* The minority of three opted for (c) and the majority of four opted for (d), but with the modification that it was necessary to vary the contribution principle to a proportional rather than independent liability approach, so that whoever paid was entitled to contribution based on time on risk.

The majority view in *IEG* was clearly based on the principle that, *Fairchild* having been decided for better or worse, it was necessary to extend *Fairchild* to the underlying insurance to maintain consistency. The minority view was that *Fairchild* was to be disregarded at the insurance stage and that proportionality was the appropriate solution. However, if we assume that *Barker* and *Fairchild* had not been decided and that the allocation problem had arisen only at the insurance stage, there is a powerful argument that the outcome in *IEG* would have been the same. With no *Fairchild*, the principle upon which the majority judgment proceeded is cut away, but that does not mean that it would not be reached by some other route. It is to be noted that nobody in *IEG* argued for (a) or (b). However, there is authority in favour of (a). In *Kelly v Norwich Union Fire Insurance Ltd*[[47]](#footnote-47)Mr Kelly insured his bungalow with Norwich Union under a 12-month policy incepting on 29 October 1977. The relevant cover was for ‘[l]oss or damage to the buildings caused by any of the insured perils’ and the insurers were to pay ‘in respect of events occurring during the period of insurance.’ The policy was renewed on the anniversary date for a further year on terms for all material purposes identical, and renewals continued until 28 October 1981. As a consequence of effects of the long, hot summer of 1976 on the subsoil, before the 1977 policy incepted there was a break in the mains water pipe leading to the bungalow, leading to an escape of water into the underlying soil and repairs were effected. A further break occurred at the repaired point in 1978. By April 1981 cracks appeared in the bungalow’s walls, and a claim was made against Norwich Union. Further investigation showed that there had been a further escape of water in 1980 and that the water had caused the soil to ‘heave’. The result, therefore, was that the two possible causes of water causing heave were the pre-policy escape in 1977 and the post-policy escape in 1980. Each side appointed experts, and it proved impossible for either of them to apportion the relative contribution of the two causes. For that reason, the claim was not pressed, on the basis that Norwich Union should be liable for a proportional part of the loss, and the judge noted that:

In appropriate circumstances I would have thought it right to adopt such an approach, although I have been referred to no English case where this has been done. Indeed, I was never invited by counsel for Mr. Kelly so to apportion, and there has been no argument about it.

Instead, Mr Kelly had to argue that both bursts were covered by the insurance. On that he failed. The insurance by its terms covered events and not damage, so it was necessary to show that the events giving rise to the damage occurred during the currency of the policy. However, because he could not show which of the events gave rise to the damage – one before the insurance incepted and one after the insurance incepted – the claim had to fail.

*Kelly* can of course be distinguished as applying to a property policy, rather than a liability policy, but there seems nothing of substance in that point. In *Kelly* and *IEG* the policies covered exposure rather than damage. The lesson from *Kelly* is that, if there are two exposures, each of which is capable of causing the loss but it is not possible to show which of them actually did so, then there is no recovery. Apportionment is precluded for the very reason that there is no relevant evidence.

Had the facts of *IEG* come before the Supreme Court in a *Fairchild*-free world, *Kelly* would surely have featured in the arguments. There is no way of knowing whether *Kelly* would have survived, but it is a reasonable guess that the absurdity of outcome (a) and the arbitrary nature of outcome (b) would have led the Court to ditch *Kelly* and to alight on either (c) or (d). In the mesothelioma context, outcome (d) secures full payment for D1 and throws upon the paying insurer the risk of insolvencies of potential contributors. Outcome (c) secures as much payment for D1 as is available from those insurers who are solvent. Outcome (c) has at first sight an important advantage over (d), in that it removes to a limited extent a reinsurance problem. Under outcome (c), the paying insurer need look to his reinsurers only for his own proportion of liabilities, whereas under outcome (d) the paying insurer may well have to claim from his reinsurers both its own liabilities and those of any other insurer irrecoverable by reason of that insurer’s insolvency. But even that potential advantage is only partly of assistance. Every year of insurance will be reinsured, and there will almost certainly be some variation in the identities of participating reinsurers at each renewal. The paying insurer will therefore be required to show that the loss falls into a given reinsurance year. As we know, that is impossible. The issues in *IEG* thus arise at the reinsurance level, if anything in a more acute form, and potential contribution recoveries are just one further complexity.

It is perhaps too far-fetched to suggest that Outcome (d), the solution adopted in *Fairchild*, isclose to inevitable. However, it is at the very least one of two – and in our view the only two – plausible alternatives.

**III. In Support of Fairchild: Causation in the Insurance Context**

A. The Doctrine of Proximate Cause in Insurance Law

We have already established that, although the insurance cases arising in the wake of *Fairchild* have required novel solutions, these solutions might have been seized upon as a matter of common sense, irrespective of any felt need to replicate *Fairchild* at the insurance level. The alternative solutions would not have commended themselves. But how far could the influence of this extend?

Established insurance law principles require the assured to prove on the balance of probabilities that the loss was proximately caused by an insured peril occurring in the period of cover. Absence of any evidence means that the claim will be lost even though there was undoubtedly insurance coverage from one or other source in every eventuality. In the following paragraphs, we first outline the derivation of these principles and illustrate their effect. We then consider whether *Fairchild*, at least its example,does or should pose a challenge to these established principles. Is the absence of evidence the same as the impossibility of proof?

Causation principles in insurance law were relatively late to develop. Until the growth of other forms of insurance in the 1850’s, the courts were concerned almost exclusively with marine disputes, and the overwhelming bulk of the decided cases between 1756 and 1815 – the formative period of the law under Lords Mansfield and Ellenborough – were concerned with wartime conditions. Enemy warships and armed merchant vessels (privateers) derived a good living from seizing British merchant vessels and selling both vessel and cargo following condemnation by a prize court. Virtually all of the principles of law subsequently codified in the Marine Insurance Act 1906 were developed in seizure cases. The Lloyd’s SG Policy, formally adopted in 1779 but based on wordings in use for the previous 150 years,[[48]](#footnote-48) generally insured war and marine risks alike, and relevant exceptions related not to the cause of loss, but rather to the amount recoverable. However, war conditions led to increasing use of the ‘FCS Warranty’, an exclusion stating that the subject matter was ‘warranted free of capture and seizure’.[[49]](#footnote-49) This first appeared in the reported cases in 1743,[[50]](#footnote-50) was pressed into greater use during the American War of Independence and became commonplace in the Napoleonic period. The FCS Warranty was the most important source of causation disputes.

Causation questions were resolved on an ‘immediate’ or ‘direct’ basis. That was generally taken to point to the last thing to happen to the subject matter, unless there was a clean break between events. Thus a vessel driven aground by bad weather and then confiscated by the enemy was lost by the latter cause,[[51]](#footnote-51) and a vessel taken by the enemy and then lost by sea perils en route to an enemy port was regarded as the victim of a sea peril rather than capture.[[52]](#footnote-52) It was only where the loss was complete at the time of enemy intervention that sea perils were to be regarded as the ‘proximate cause’.[[53]](#footnote-53) These and similar cases were reconsidered by the House of Lords in the landmark ruling *Leyland Shipping Co</i>* v <i>*Norwich Union Fire Insurance Society</i>*,[[54]](#footnote-54) where a vessel holed by a torpedo limped into Le Havre, only to be ordered out lest she sank in a coming storm. She was lost at sea in the storm. Their Lordships rejected the earlier case law pointing at the storm, and, in holding that the proximate cause of the loss was the torpedo rather than sea perils, each of the Law Lords used various terms to confirm the concept that the proximate cause was the effective, rather than the last, cause.

*Leyland Shipping* was taken a step further in *Rhesa Shipping v Edmunds, The Popi M*.[[55]](#footnote-55)In that case a fishing vessel disappeared without explanation off the coast of Scotland. Competing contentions were put forward: that of the insurers was unseaworthiness; that of the assured was the possibility of the nets having been snared by a Russian submarine. Neither could be proven, and at first instance Bingham J found for the assured on the basis of ‘the least unlikely’ cause. The House of Lords rejected that concept and instead confirmed that the assured bears the burden of proving that the loss was proximately caused by an insured peril. It was argued in *The Popi M* that, where competing causes of loss were put forward, it was appropriate to apply the Sherlock Holmes dictum that ‘once you eliminate the impossible, whatever remains, no matter how improbable, must be the truth.’[[56]](#footnote-56) That suggestion was viewed with deep suspicion, although not entirely ruled out in *The Popi M*, but it is now clear from later cases that the choice between two competing suggestions is not binary and that there is always a third possibility, namely that nothing has been proved to the standard of the balance of probabilities.[[57]](#footnote-57)

B. Proving the Time of Loss: Reassessing *Kelly*

In *Kelly v Norwich Union,* as we have seen, Mr Kelly was plainly the victim of an insured peril, and suffered consequent damage, in the life of the insurance. What stopped him recovering was the possibility that the same peril occurring at an earlier point was also the potential cause of the damage. Minor changes to the facts demonstrate the weakness in the reasoning. Let it be supposed that in year 1 Mr Kelly was insured by IA, and there was an underground leak arising from an insured peril. In year 2 Mr Kelly was insured by IB and there was another underground leak arising from an insured peril. In year 3 Mr Kelly discovered damage. It does not matter for our purposes whether the insurer in year 3 is IA, IB or non-existent: there cannot be a claim in year 3 because there is no insured peril in year 3, only damage. So Mr Kelly’s claim has to be brought against IA and IB, and each claim inevitably fails because IA and IB can both point their respective fingers at each other and Mr Kelly can prove nothing either way. A related problem has arisen in the aftermath of the consecutive earthquakes in Christchurch in September 2010, February 2011 and June 2011, causing cumulative damage and frequently ultimate total loss. Many policyholders have been faced with the scenario of a change of insurers between the earthquakes, and there have been disputes as to the allocation of damage and repair costs to successive events. The issue has not been as acute as that in *Kelly* and indeed *Fairchild*, because it has proved possible to apply science to allow the assured to jump the balance of probabilities hurdle, although there has been interesting analysis of the credibility of modelling used as evidence for the purpose.[[58]](#footnote-58)

But assume that the insurer in both year 1 and year 2 was IA? Can IA escape liability by arguing that unless someone in Mr Kelly’s position can place his claim in either year 1 or year 2 there is no liability? From Mr Kelly’s point of view that outcome is bizarre: he was insured for a two year period, and insured perils occurred in the two-year period, but he recovers nothing. From IA’s point of view, the position is potentially somewhat different. Policy terms may have changed between the two years: a long hot summer before the year 1 insurance incepted has given rise to a mass of claims in year 1, and IA decides that with effect from year 2 the deductible for heave or subsidence damage should be raised from £100 to £1000. Additionally, in the light of the long hot summer, reinsurers decide to exclude heave and subsidence damage from the renewed casualty treaty issued to IA in respect of claims for perils occurring in year 2. So the year of coverage matters both to Mr Kelly and to IA, albeit in different degrees. Whose problem should this be? We suggest that it is contrary to sense to deprive Mr Kelly of all cover, that some proportional solution is called for and that, as far as he is concerned, the loss can be treated as occurring equally in each year: it is then a matter of taste as to whether he has to bear the full amount of each deductible or perhaps only half of each deductible, but that is a relatively trivial matter in the scale of things. As far as IA’s outward claim against reinsurers is concerned, that follows IA’s liability to Mr Kelly, so that IA cannot arbitrarily place the loss in year 1 and the reinsurers cannot insist that it is treated as a year 2 loss and consequently not reinsured.

An issue of this type arose in *MMI v Sea Insurance,*[[59]](#footnote-59)where the Court of Appeal was satisfied on the balance of probabilities that a series of thefts at a dockyard over a period of 18 months, straddling three policy periods, had occurred with uniform regularity and could be allocated proportionately to each period of insurance. It is of interest to note that a single insurer was on risk for the entire period, and the question was how the losses were to be allocated to the three successive years of reinsurance coverage: there is nothing in the report to indicate an issue between assured and insurers whereby the assured was put to proof of loss per year, as demanded by *Kelly*. However, it is hardly satisfactory to say that just because the point is not always taken in practice then there is no problem.

The proportional approach that we have suggested could resolve the *Kelly* problem owes a great deal to the example of *Fairchild*, and arises from a similar problem in a different context. We know the general cause of the damage suffered, but do not know which policy period it fell within, nor can we know. Essentially, each potential claim (against IA in period 1 or against IA in period 2) is, under *Fairchild*, now capable of being successful (though precisely what this means needs further articulation). If it is right that *Fairchild* provides a workable solution to the *Kelly* problem, then, at risk of letting the tail wag the dog, it must surely be appropriate to apply the same analysis to the scenario in which IA is on risk in year 1 and IB is on risk in year two. The number of cases is likely to be very small, as there will generally be enough evidence for the court to reach a conclusion on the balance of probabilities, but, where that is not the case, then the loss could perfectly easily be split. The *Fairchild* analysis, as adopted by the majority ruling in *IEG,* would allow Mr Kelly to sue either IA or IB for the full amount, leaving the paying insurer to recover what it can by way of contribution. The minority ruling in *IEG* would require Mr Kelly to claim half from each insurer. Given the current, tight prudential regulation of insurers, which of the approaches is adopted is probably of no great significance, at least other than for the reinsurers involved. *Fairchild* seems to us to point to either of two perfectly good solutions. Far from condemning the decision, this suggests that it is worthy of wider application.

C. Proving the Cause of Loss

We have thus far argued, in the context of *Kelly*, that an application of apportionment under an approach resembling *Fairchild* is appropriate where a claim is defeated because the time of the loss cannot be pinned down, even though there was insurance in place whenever the loss occurred. We would go further and suggest that apportionment may be appropriate where there is undoubtedly insurance in place but the cause of loss, and thus the appropriate insurer, cannot be identified.This however takes our discussion into new territory. In *Heneghan* as we have seen, the Court of Appeal ruled that *Fairchild* should apply in any case where its preconditions were fulfilled, to avoid incoherence in the law. The case was clearly and closely concerned with difficulties of evidence and proof in relation to industrial disease, and the preconditions of *Fairchild* as stated by the Court of Appeal included the (problematic) ‘single agent’ criterion. In *Heneghan* itself, it was treated as established on the balance of probabilities that the deceased’s cancer was caused by exposure to asbestos. There were other potential causes (the deceased was a smoker), but the exposure to asbestos more than ‘doubled the risk’ that cancer would develop. The insurance cases we consider next cannot fit the single agent criterion. They are cases concerning unexplained losses, where sufficient evidence is impossible. Our argument is that the problems raised are equivalent to those problems with which *Fairchild* dealt; and that, far from confining the *Fairchild* approach to its enclave, it should be expanded as providing a more rational solution to the issues raised. This is not surprising. Outside the insurance field, in the law of tort, notions of ‘proximate cause’ were developed in all their gory complexity in order to deal with the injustice of the complete defence of contributory negligence. The reformed, proportional form of contributory negligence was devised precisely in order to supercede all of this. Can common law now achieve similar results to deal with continued problems in the application of the doctrine of proximate cause in insurance, in the particular context of impossibility of proof?

*The Popi M* and subsequent cases deny recovery for unexplained loss, on the basis that no contention can be proved or disproved. There may or may not be insurance coverage, but it cannot be demonstrated either way. In those circumstances there cannot be a claim, and the *Fairchild* principle has not been extended so far. *Fairchild* itself dealt with a case where it has been proved that there is a loss for which someone is responsible, but irresolvable doubt as to who that person might be; and the extensions of this to deal with cases where there are alternative, non-tortious causes have insisted on the ‘single agent’ criterion. However, we suggest that *The Popi M* does come into conflict with the spirit of *Fairchild*, raising very similar problems to the ones it was designed to ameliorate,where it is clear that one or other policy does respond to the loss.[[60]](#footnote-60) Consider Malaysian Airlines flight MH370, which disappeared on 8 March 2014. Four years on, there is still no clear evidence as to why it was lost. Let us suppose – not unreasonably – that the aircraft’s liability to passengers was insured by separate insurers against respectively aviation risks and terrorism risks. One or other of the insurers is plainly liable, but there is no way of knowing whether the cause of the loss was mechanical fault, or hostile action. This scenario differs from that in *The Popi M*,in that here there is insurance coverage whatever the cause of the loss but the insurer cannot be identified, whereas in *The Popi M* there may or may not be insurance coverage: nobody knows. Applying *The Popi M* to MH370, the assured will fail because the assured cannot establish a proximate cause on the balance of probabilities against either insurer.[[61]](#footnote-61) Even if we alter the scenario in a minor fashion by assuming a single insurer covering all losses, the problem does not disappear if the insurer has separate reinsurances for aviation and terrorism: the insurer pays, but which of the reinsurers can be called upon for indemnification? The law points to no recovery, but this does not seem to be a logical outcome when there was plainly cover in place. In such a case, *The Popi M* can be distinguished, using *Fairchild* as the means to distinguish the problems for solution. In the tort context, if scientific evidence cannot establish which of two defendants is liable, *Fairchild* requires them to apportion the loss. Arguably, *Fairchild* may be applied by analogy where it is not clear which insurance policy should respond either where the alternative causes are themselves insured (all potential causes ought to give rise to liability, but are prevented by the existence of an alternative cause); or, by extension, to the cases where there is an alternative uninsured cause, provided it can be shown that, on the balance of probabilities, the loss arose from one of the insured causes.[[62]](#footnote-62) The latter will be inherently difficult in the absence of evidence, but the former should hold good, resembling the problems of over-determination on which some of the reasoning in *Fairchild* was based. This reflects our problem-based approach to *Fairchild*: that it showed a pragmatic route to dealing with an inherent problem which is not confined to mesothelioma, nor even to industrial disease, and can point the way to suitable solutions for a range of similar issues.

D. Concurrent, Interdependent Causes of Loss

Where there are two or more possible causes of loss, the general approach of the courts is to strive to identify one or other of the causes as the proximate cause. However, that is not always possible, and where one of the causes is insured but the other excluded the position is governed by the ruling of the Court of Appeal in *Wayne Tank v Employers Liability Association*.[[63]](#footnote-63) Here, the assured installed equipment for storing and conveying liquid wax used in the manufacture of the modelling clay ‘plasticine’. A major fire occurred at the premises, and, in successful proceedings brought against the assured by the owners, two separate forms of negligence were identified: using dangerous materials; and leaving the equipment unattended but in operation before it had been tested. The assured sought indemnification under a liability policy that excluded ‘damage caused by the nature or condition of any goods … sold or supplied by or on behalf of the assured’. The Court of Appeal concluded that the proximate cause of the loss was the nature of the goods so that the exclusion operated, but ruled obiter that, had it not been possible to split the two causes, there would have been judgment for the insurers. The rationale for giving priority to the exclusion is far from obvious. The decision turned on contract interpretation, Lord Denning being of the view that, if the underwriters ‘have stipulated for freedom, the only way of giving effect to it is by exempting them altogether’.[[64]](#footnote-64) Lord Denning added that the generality of an insuring clause should give way to the specificity of an exclusion, a comment that is far from convincing and indeed frequently an inaccurate representation of how policies are drafted.

The proposition put forward in *Wayne Tank* has received general acceptance in England[[65]](#footnote-65) and other common law jurisdictions. A recent decision in Australia is *Sheehan v Lloyd’s Underwriters*,[[66]](#footnote-66)where the Federal Court was faced with fatal damage to an engine of the assured’s motor vessel. Within minutes of leaving berth, the engine suffered a loss of oil pressure, but the assured – who had neglected to read the manual and thus was unaware of the significance of the various alarms flashing and sounding – wrongly thought that it would be safe to return to berth at the automatically reduced speed. The policy covered ‘accident’ but excluded ‘faulty design …’ Allsop J held that the assured’s conduct constituted an accident, but that the claim was defeated because proximate cause of the loss was faulty design in the form of defective oil seals. Allsop J ruled in the alternative that, had the two causes been interdependent and concurrent, the outcome would have been the same.

*Wayne Tank* has also been recently reaffirmed in New Zealand. In *AMI Insurance Ltd v Legg*[[67]](#footnote-67) the assured operated both a farming business and a landscaping business from his lifestyle block. The assured’s liability policy extended to farming but excluded ‘legal liability arising out of or in connection with any retail shop.’ The assured burned rubbish from both businesses on a single heap. The fire was thought to have been extinguished, but flared up as a result of weather conditions and caused substantial damage to neighbouring property. The Court of Appeal held that the insurers were not responsible for the loss, by reference to the evidence and to the precise terms of the coverage clause. The Court of Appeal nevertheless added that, had the point arisen, *Wayne Tank* would have been applied: it had been recognised in earlier New Zealand authorities[[68]](#footnote-68) and to reject the principle as a matter of the construction of the words used would be to take contra proferentem beyond its acceptable limits.

E. Critique of the Concurrent Causes Rule

*Wayne Tank* bites in two different situations. The first is where the assured has a single policy: the assured must initially bring himself within the insuring clause on the balance of probabilities, and if that can be done then it is open to the insurers to demonstrate the operation of an exclusion on the balance of probabilities. It has not been suggested in the cases that if the assured gets home on the first point then that automatically defeats any possible reliance on an exclusion,[[69]](#footnote-69) nor has it been suggested that there is a 50% prospect that the assured is covered and should therefore have a claim for 50% of the proceeds.

The second situation in which *Wayne Tank* has an impact, bringing us closer to *Fairchild*, is where the assured has two or more policies potentially covering the loss. Many business activities take out insurance covering specific risks on a mutually exclusive basis. By way of illustration: a supplier of products will carry product liability insurance and public liability insurance (generally as separate sections of the same policy); an integrated construction company will carry professional indemnity insurance for the design stage and construction insurance for the building stage; and a shipowner will carry marine risks insurance and separate war risks insurance. Each form of insurance will exclude the other, so – assuming no gaps in coverage or overlaps – the assumption is that one or other of the policies will respond to any loss. If there is evidence as to what has occurred,[[70]](#footnote-70) and the claim has elements that trigger both the insuring clause and the exclusion, there will be no recovery by virtue of the exclusions even though the assured can prove that each policy responds to the loss. Here we have a similarly absurd solution to the one featuring two hunters, with which *Fairchild* initially grappled. Here, each insurer can point to the existence of the other, and the assured bears the consequences.

*Wayne Tank* has not gone entirely unchallenged. In *Derksen v 539938 Ontario Ltd*[[71]](#footnote-71) the assured had mutually exclusive employers liability and motor insurance policies. An employee was injured in a work-related motor accident, with the result that the employers liability insurer denied liability by reference to the exclusion. Plainly a claim under the motor policy would have met with the same response. The assured was held by the Supreme Court of Canada to be entitled to an indemnity under the employers liability policy, and *Wayne Tank* was rejected. *Derkson* was seized upon by Nation J at first instance in the *Legg* case, *New Zealand Fire Service Commission v Legg*,[[72]](#footnote-72) the judge stating that ‘the *Wayne Tank* principle should not be extended to apply to a situation where liability has been caused by an event or circumstances which the insurer agreed to cover but there is some connection with circumstances, not causative of the insured’s loss, which the insurer argues should exclude its liability.’ *Legg* was itself a case in which there was separate insurance for non-farming activities but separate defences were raised to the claim, and it is clear that Nation J thought that an assured who had two policies apparently providing comprehensive coverage should be able to recover from at least one of the insurers. As we have seen, the Court of Appeal thought otherwise.[[73]](#footnote-73)

Authority against *Wayne Tank* is presently slender, and the authority of the case has recently been reaffirmed by the UK Supreme Court. In *Atlasnavios-Navegacao Lda v Navigators Insurance Co Ltd*[[74]](#footnote-74) the assured’s vessel was seized by Venezuelan customs authorities following the discovery of a quantity of cocaine strapped to the underside of her hull. The policy afforded coverage for malicious acts, but excluded loss caused by infringement of customs or trading regulations. The Court of Appeal held that the loss had been concurrently caused by these perils, and that *Wayne Tank* precluded recovery. The Supreme Court upheld the appeal on the alternative ground that there was no malicious act and the only peril was infringement of customs or trading regulations, so the concurrent cause point did not arise, but Lord Mance – speaking for the entire Court – noted that any doubts as to *Wayne Tank* did not in the present case ‘have traction in relation to the present careful exclusion of the peril of loss arising from detainment by reason of infringement of customs regulations from cover.’[[75]](#footnote-75) It is nevertheless our suggestion that the example of *Fairchild* shows the way to avoiding the absurd conclusion that each effective policy can successfully exclude the other.

F. Concurrent, Independent Causes of Loss

One, final scenario merits brief mention. *Wayne Tank* is concerned with the situation where two events, one insured and one excluded, have contributed to the loss. It may also be possible that two events operating at the same time were independently capable of causing the loss. The position here is somewhat different, because if the assured is able to prove that the loss was proximately caused by an insured peril operating, the insurer’s only defence can be that, had the claim been brought on the basis of the other insured peril, there would have been no cover. The distinction between the two situations was noted by Hamblen J in Orient-Express Hotels Ltd v Assicurazioni General SpA,[[76]](#footnote-76) a case arising out of the New Orleans hurricane in 2007, where a hotel suffered loss of business by reason of damage to its building and also by reason of administrative action which effectively shut down entire parts of the city until general repairs had been effected. The decision, largely in favour of the insurers, turned upon the express wording of the policy, but Hamblen J noted that none of the decided cases applying *Wayne Tank* had involved independent concurrent causes.

The same point had earlier been made, in more detail, by Kiefel J in *McCarthy v St Paul International Insurance Co Ltd*.[[77]](#footnote-77) Her Honour noted that the outcome rested upon the proper construction of the policy, and that the question was whether the parties had agreed that there would be no cover if the loss was caused by the excluded peril, or if the loss was *solely* caused by the excluded peril. Plainly Her Honour’s sympathies were in favour of the latter. The same distinction, without the need for any decision, was drawn in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd[[78]](#footnote-78)* and *Limit (No.3) Ltd v ACE Insurance Ltd*.[[79]](#footnote-79) Most recently, in *The Cultural Foundation v Beazley Furlonge Ltd*,[[80]](#footnote-80) Simon Henshaw QC, sitting as a High Court Judge, commented that *Wayne Tank* and the other English cases were not concerned with the situation in which the loss arose from two causes operating independently, although the comments were obiter and the point was not developed.

**IV. Conclusion**

Here, we have taken a problem-based approach to *Fairchild*, suggesting that its pragmatic solution – which is rooted ultimately in proportionality – is not something to be feared, but to be appreciated. Attempts to confine *Fairchild* have turned on concerns about its disruptive effect on legal principle, and its potential unfairness to certain categories of defendant (particularly those making a minimal contribution to the risk of injury). The latter has been dealt with, in *Barker v Corus*, by bringing a degree of proportionality into the law of tort, rather than leaving it to contribution proceedings. The former can be largely avoided by regarding *Fairchild* not as stating revised principles so much as practical solutions to particular, but generalisable, problems of evidence and proof. A start was made in those insurance decisions which were made necessary by *Fairchild* liability – most notably the *Trigger Litigation* and *IEG –* but we have argued that these are not the only cases in which a *Fairchild*-style solution would benefit the law. Indeed without the close connection to *Fairchild*, we suggest these cases would most likely have been decided in the same way.

The proportionality of *Fairchild* as it is now applied and understood is based ultimately on compromise, just as the proportionate form of contributory negligence (which rescued the law of tort from convoluted notions attached to proximate cause, and claimants from the effect of a harsh ‘all or nothing’ rule) is also based on compromise.[[81]](#footnote-81) It avoids placing the burden of impossibility on claimants alone. The initial, full liability version of *Fairchild* passed that burden entirely to the class of defendants, a result now confined (by statute) to mesothelioma. But the resulting position spelled out in *Barker* is a robust and broad-brush solution, not to be confused with a principled statement that the share of exposure to risk is a measure of true responsibility. In the problems with which we have dealt, it is proof that is lacking, and in the absence of proof, a proportional solution cannot claim to precision. The further risk, that one defendant or another will prove to be insolvent, is now carried by claimants outside the area governed by section 3 of the Compensation Act. In the insurance context, as we have argued, this is a lesser risk.

We have therefore interpreted *Fairchild* as a pragmatic solution. It does not ‘peg back’ liability on the basis of some appropriate share of global responsibility for an outcome, as *Heneghan* shows, but apportions the burden of impossibility of proof. A similar solution is mandated at the insurance level in circumstances which are analogous in appropriate ways, in order similarly to avoid absurdity. This is not necessarily motivated by a need to replicate ‘principles’ derived from *Fairchild*: it is the existence of similar problems which suggests the appropriateness of similar solutions. We have had some years to appreciate the difficulties thrown up by *Fairchild*, and to begin to deal with them. Our argument is that we should now learn from *Fairchild*, rather than attempting to treat it as confined to a special enclave of its own.

As a concluding comment we would note that, in the UK, ‘all-or-nothing’ responses are gradually falling out of favour in contract law in general and insurance law in particular. Although the sharing of liability and the adoption of proportional remedies are different in nature, they have in common the overriding objective that losses should not necessarily lie where they fall where there is the possibility of a more nuanced approach. The majority of the Supreme Court in *Patel v Mirza*[[82]](#footnote-82) rejected the previous, formalistic approach to the enforcement of illegal contracts and replaced it with proportionality criteria in this broader sense. It was recognised by a majority of the Supreme Court in *Versloot Dredging BV v HDI Industrie Versicherung AG*[[83]](#footnote-83)that allowing an insurer to refuse to pay a genuine claim by reason of false statements made in the negotiation process was a disproportionate response to fraud. Finally, the Insurance Act 2015, following the lead of the non-marine regime in Australia in the Insurance Contracts Act 1984, has eschewed the all-or-nothing approach of avoidance to non-disclosure and misrepresentation and instead has adopted proportional remedies based upon what the insurer would have done, had there been a fair presentation. None of this could have been predicted five years ago, and our suggestion of an extension into the world of causation is far from a heresy.

1. [2002] UKHL 22; [2003] 1 AC 32. [↑](#footnote-ref-1)
2. A bizarre fact of academic life in the common law world is the virtual dearth of scholars researching into both tort and insurance. The issues that arise are frequently common to both, particularly in the spheres of causation and loss, but the solution reached in one rarely refers to the other. By way of example, both tort and insurance agree that an event causing unrepaired damage is for liability purposes to be left out of account if, by the time of the trial, there has been a supervening subsuming loss, but the bumpy journeys to that conclusion in tort (*Jobling v Associated Dairies* [1982] AC 794, effectively undermining *Baker v Willoughby* [1970] AC 467) and in insurance (*QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447, effectively undermining *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 117) have been endured quite independently. [↑](#footnote-ref-2)
3. A variety of factors is relevant in making the decision on quantum of contribution. In arriving at proportional solutions, the criteria applied in different contexts may vary considerably. [↑](#footnote-ref-3)
4. Marine Insurance Act 1906 (UK), ss 32 and 80, codifying the common law on marine insurance and subsequently adopted in the non-marine context. The same sections appear in the legislation of virtually all common law jurisdictions. [↑](#footnote-ref-4)
5. There are various measures of apportionment in this situation, notably ‘maximum liability,’ which focuses on the sum insured by each policy, and ‘independent liability’ which focuses on the liability of each insurer for the amount of the specific claim. In most cases both formulae give rise to a 50:50 outcome. It will be assumed for the purposes only of what follows, that independent liability is the correct analysis. [↑](#footnote-ref-5)
6. [2006] UKHL 20; [2006] 2 AC 572. [↑](#footnote-ref-6)
7. [2012] UKSC 14; [2012] 1 WLR 867. [↑](#footnote-ref-7)
8. [2015] UKSC 33; [2016] AC 509. [↑](#footnote-ref-8)
9. A suggestion put forward by the present authors in R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013), 378 and adopted by Lord Mance in *IEG* (n 8) [63]. [↑](#footnote-ref-9)
10. Note the wide range of comparative common law and civilian solutions canvassed in Lord Bingham’s opinion in *Fairchild* itself (n1) [23]-[32], concluding that if ‘a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question’. [↑](#footnote-ref-10)
11. This, ultimately, seems to have been the view of Lord Hoffmann: had the House of Lords rejected liability in *Fairchild*, Parliament would have created a bespoke solution for mesothelioma claims, so that the experiment was unnecessary: L Hoffmann, ‘*Fairchild* in Retrospect’ (2012) 39 *The Advocates Quarterly* 257-71. Lord Hoffmann, however, did not adopt the view that *Fairchild* went wrong in meddling with orthodox causation doctrine, since his view of causation is that the law can properly adapt the notion to its own ends. [↑](#footnote-ref-11)
12. [2006] EWCA Civ 50; [2006] 1 WLR 1492. [↑](#footnote-ref-12)
13. It may be presented, of course, as a new route to establishing causation, in a limited range of circumstances; but the proportional nature of *Fairchild* liability after *Barker* (n 6)has made this hard to rationalise with coherence, particularly given that the route of arguing that what is caused is *risk* rather than injury – apparently espoused by Lord Hoffmann in *Barker* – has been closed off by the Supreme Court’s decision in *Durham v BAI (Trigger Litigation)* [2012] UKSC 14; [2012] 1 WLR 867, in which the issue was crucial. Lord Dyson’s comments in *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86, [2016] 1 WLR 2036, citing Lord Hoffmann’s approach in order to justify proportional rather than full liability on the part of defendants,are to this extent problematic. [↑](#footnote-ref-13)
14. The market decided to resolve the question whether *IEG* (n 8)is to be applied at the reinsurance level, ie whether an insurer liable under *IEG* principles is entitled to ‘spike’ claims into the most favourable year of reinsurance cover, in arbitration under the cover of confidentiality. Flaux LJ was appointed as judge-arbitrator for the purpose. His confidential award was issued in April 2017 but, by virtue of a successful application to the Court of Appeal for permission to appeal on points of law under section 69 of the Arbitration Act 1996, in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2018] EWCA Civ 991, his conclusions but not yet his reasoning have become public. Flaux LJ concluded that *IEG* should apply, that spiking was permissible and that an insurer with an entitlement to spike was not under any contractual or general law duty of utmost good faith to spread claims proportionately. The Court of Appeal, granting permission to appeal, ruled that these conclusions satisfied the appeal threshold test of being ‘open to serious doubt’. [↑](#footnote-ref-14)
15. Note also the decision in *The Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm), where the court considered the possibility that a loss fell within each of two consecutive years of insurance cover and held it to be arguable that the assured would, based on *IEG* (n 8), have the right to choose the appropriate year of cover. The point arose in the context of ‘claims made’ liability insurance, where cover is triggered by the notification to the insurer of circumstances that may give rise to a claim against the assured, or the making of a claim against the assured. Most policies provide that a notification of circumstances prevents notification in a later year, but in the absence of such a clause the possibility of two different notifications can arise. [↑](#footnote-ref-15)
16. An influential variation in academic debate is the ‘NESS’ test, which considers whether the defendant’s breach was a ‘necessary element in a sufficient set’ of factors, or a necessary element of a set of conditions jointly sufficient for the result: see initially HLA Hart and T Honoré, *Causation in the Law*, and more recently R Wright, ‘Causation in Tort Law’ (1985) 73 *Cal L Rev* 1735. [↑](#footnote-ref-16)
17. *Barker* (n 6) [30]. [↑](#footnote-ref-17)
18. Civil Liability (Contribution) Act 1978 (UK). This allows a liable party to recover contribution from any other person who is liable in respect of ‘the same damage’. [↑](#footnote-ref-18)
19. The amount of contribution recoverable ‘shall be such as may be found by the court to be just and equitable having regard to that person’s responsibility for the damage’ (Civil Liability (Contribution) Act 1978 (UK) s 2(1)). [↑](#footnote-ref-19)
20. K Barker and J Steele, ‘Drifting Towards Proportional Liability: Ethics and Pragmatics’ (2015) 74 *CLJ* 49-77. [↑](#footnote-ref-20)
21. *Dubai Aluminium v Salaam* [2003] 2 AC 366 (HL). [↑](#footnote-ref-21)
22. *Re-Source America v Platt Site Services* [2004] EWCA Civ 665. [↑](#footnote-ref-22)
23. It has been suggested that this may be justified on the basis that all defendants have, through their breaches, contributed to the impossibility of proof with which the claimant is faced: S Steel. ‘On When Fairchild Applies’ (2015) 131 *LQR* 363. [↑](#footnote-ref-23)
24. *Holtby v Brigham and Cowan* [2000] 3 All ER 423 (asbestosis); *Thompson v Smiths Shiprepairers* [1984] QB 405 (progressive hearing loss). *Bonnington Castings v Wardlaw* [1956] AC 613, where a breach of duty made a ‘material contribution’ to development of a progressive disease, is now understood to be such a case, though no question of proportionality was raised in that case. [↑](#footnote-ref-24)
25. *Bailey v Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 WLR 1052 – a controversial decision: S Green, ‘Contributing to the Risk of Confusion? Causation in the Court of Appeal’ (2009) 125 *LQR* 44-48; S Bailey, ‘What is a Material Contribution?’ (2010) 30 *LS* 167. In *Williams v Bermuda Hospital Board* [2016] UKPC 4; [2016] AC 888, the Privy Council regarded *Bailey* as merely applying the traditional ‘but for’ test, as proposed by Foskett J at first instance, but this was not the view of the Court of Appeal deciding the case. [↑](#footnote-ref-25)
26. Lord Phillips described the theory as ‘discredited’ in *Sienkiewicz v Greif* [2011] UKSC 10; [2011] 2 AC 229, at [102]. The theory was rejected by the High Court of Australia in *Amaca Properties v Booth* [2011] HCA 53. [↑](#footnote-ref-26)
27. For example, it is understood that once a cell is cancerous, further exposures will have no causative effect: *Sienkiewicz* (n 26) [103]. [↑](#footnote-ref-27)
28. Compare comments from the same expert for claimants in *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) (occupational lung and bladder cancer, the ‘Phurnacite case’) and *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86; [2016] 1 WLR 2036 (lung cancer). The expert argued in *Jones* that, if he were to be asked the same question that had been asked in *Fairchild*, he would say that all exposures had probably contributed to the carcinogenic process. This, however, did not sway either Court. In *Heneghan*, the Court of Appeal applied a proportionate version of *Fairchild* to the development of a lung cancer after occupational exposure to asbestos. The claimant had argued for full liability based on a material contribution. The judge below, like the judge in *Jones*, the Court of Appeal argued, was right to reject the opinion of Dr Rudd that every period of exposure in fact contributed to the development of the deceased’s cancer:

    This was not a medical opinion. It was an opinion that an inference of causation could be drawn from the epidemiological evidence. But for the reasons stated in the Phurnacite case and by the judge in this case, it was wrong to draw this inference. The epidemiological evidence permitted the contribution to the risk of cancer attributable to an individual defendant to be quantified. But it went no further than that. [↑](#footnote-ref-28)
29. *Sienkiewicz* (n 26). [↑](#footnote-ref-29)
30. According to Lord Dyson (ibid [216]), a ‘claimant who seeks to prove his case on the balance of probability in reliance entirely on statistical evidence will inevitably fail, since he is able to do no more than prove on the balance of probability that the defendant probably injured him.’ The Justices were persuaded by S Gold, ‘Causation in Toxic Torts: Burdens of Proof, Standards of Causation, and Statistical Evidence’ (1986) 96 *Yale LJ* 376. [↑](#footnote-ref-30)
31. [2006] UKHL 20; [2006] 2 WLR 1027. [↑](#footnote-ref-31)
32. *Fairchild* (n 1)[34]. [↑](#footnote-ref-32)
33. *Rothwell v Chemical and Insulating Co Limited* [[2007] UKHL 39](http://www.bailii.org/uk/cases/UKHL/2007/39.html), [[2008] 1 AC 281](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2007/39.html). [↑](#footnote-ref-33)
34. Section 3. [↑](#footnote-ref-34)
35. [2012] UKSC 14; [2012] 1 WLR 1148. [↑](#footnote-ref-35)
36. Underlining this, see J Goudkamp and D Nolan, '[Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions](http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12202/abstract)' (2016) 79 *MLR* 575; and *Jackson v Murray* [2015] UKSC 5 [27]: ‘It is not possible for a court to arrive at an apportionment which is demonstrably correct’ (Lord Reed). [↑](#footnote-ref-36)
37. *IEG* itself was a mesothelioma case, but arose in Guernsey, to which the Compensation Act 2006 did not apply. [↑](#footnote-ref-37)
38. Apportionment of liability for divisible injury is an application of traditional causation principles, rather than a departure from them. [↑](#footnote-ref-38)
39. The Diffuse Mesothelioma Payment Scheme (DMPS) was launched in April 2014 and began taking applications from July 2014. It was set up to provide payments to sufferers of mesothelioma who were negligently exposed to asbestos at work but unable to pursue a civil claim because their former employer no longer exists and their former employer’s insurer cannot be traced. The insurance industry acknowledged their failure to keep adequate records and this was a factor in its agreement to fund the DMPS via a levy on active employers’ liability insurers. [↑](#footnote-ref-39)
40. Lord Brown expressed this view clearly in *Sienkiewicz* (n 26) [186]: ‘mesothelioma claims must now be considered from the defendant’s standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the ‘but for’ test of causation at its peril’. [↑](#footnote-ref-40)
41. *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86. [↑](#footnote-ref-41)
42. We have argued this point at length elsewhere, most comprehensively in Merkin and Steele (n 9). [↑](#footnote-ref-42)
43. The 2006 Act precludes a contribution claim against the victim for any period of self-exposure. [↑](#footnote-ref-43)
44. And even if there is only one insurer, what follows will arise where that insurer seeks to bring claims against the various reinsurers on risk during its period of exposure. [↑](#footnote-ref-44)
45. Marine Insurance Act 1906 (UK), s 81. [↑](#footnote-ref-45)
46. *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804. [↑](#footnote-ref-46)
47. [1989] 2 All ER 888. [↑](#footnote-ref-47)
48. It was not abandoned until 1983. [↑](#footnote-ref-48)
49. The risk to merchant vessels was that of capture, not destruction. There was no profit to be made from burning or sinking merchant vessels. [↑](#footnote-ref-49)
50. *Green v Brown* (1743) 2 Str 1199. [↑](#footnote-ref-50)
51. *Green v Elmslie* (1794) Peake 279; *Livie v Janson* (1807) [↑](#footnote-ref-51)
52. *Hagedorn v Whitmore* (1816) 1 Stark 157. [↑](#footnote-ref-52)
53. *Bondrett v Hentigg* (1816) Holt 149; *Hahn v Corbett* (1824) 2 Bing 205. Unlike the position in English tort law, insurance law continues to work with the terminology of ‘proximate cause’, despite significant developments in the principles applied. [↑](#footnote-ref-53)
54. [1918] AC 350 (HL). [↑](#footnote-ref-54)
55. [1983] 2 Lloyd’s Rep 235. [↑](#footnote-ref-55)
56. A quote that appears in *The Adventure of the Blanched Soldier* (1926). [↑](#footnote-ref-56)
57. *Nulty v Milton Keynes BC* [2013] EWCA Civ 15; *Ace European Group Ltd v Chartis Insurance UK Ltd* [2013] EWCA Civ 224; *Contact (Print And Packaging) Ltd v Travelers Insurance Co Ltd* [2018] EWHC 83 (TCC). [↑](#footnote-ref-57)
58. *Vero Insurance New Zealand Ltd v Morrison* [2015] NZCA 246, where it was held that a model based on earthquake intensity was unreliable and to be taken into account only if there was no better evidence. Intensity modelling was similarly regarded with scepticism in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, on the basis that it said nothing about repair costs following each event, and in *Sadat v Tower Insurance Ltd* [2017] NZHC 1550 such evidence was rejected entirely. [↑](#footnote-ref-58)
59. But contrast *Ted Baker Ltd v Axa Insurance* [2017] EWCA Civ 4097, where the policy imposed a £5000 per loss deductible in a scenario where there had been regular thefts over a five-year period. There was simply no evidence as to the size or frequency of losses to enable the Court to determine whether and how often thefts exceeded the deductible, with the outcome that the assured recovered nothing despite suffering losses of around £2 million in that period. [↑](#footnote-ref-59)
60. This may also be the case where it is shown on balance of probabilities that the loss was covered by one policy or another, and we return to this shortly. [↑](#footnote-ref-60)
61. It is understood that insurers did in fact pay for this loss, but the basis of the settlement is unknown. [↑](#footnote-ref-61)
62. We have here stated the *Heneghan* decision (n 41), in effect, without recourse to the ‘single agent’ notion. [↑](#footnote-ref-62)
63. [1974] QB 57. [↑](#footnote-ref-63)
64. If one cause is insured and the other uninsured but not excluded, then Lord Denning’s principle is inapplicable, in that the insurers have not stipulated for freedom, and there is full recovery because the insurers have been unable to prove the operation of an exclusion: *Global Process Systems Inc v Berhad, The Cendor Mopu* [2011] UKSC 5. [↑](#footnote-ref-64)
65. *Kuwait Airways Corp SAK v Kuwait Insurance Co SA* [1999] Lloyd’s Rep IR 803; *Midland Mainline Ltd v Commercial Union Assurance Co Ltd* [2004] Lloyd’s Rep IR 239; *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2006] Lloyd’s Rep IR 38; *UK Insurance v Farrow* [2016] EWHC 1090 (Comm). [↑](#footnote-ref-65)
66. [2017] FCA 1340. See also *Wiesac Pty Ltd v Insurance Australia Ltd* [2018] QSC 123. [↑](#footnote-ref-66)
67. [2017] NZCA 321. [↑](#footnote-ref-67)
68. *State Insurance Office Manager v Bettany* (1990) 6 ANZ Insurances Cases 76,818; *Countryside Finance Ltd v State Insurance Ltd*  [1993] 3 NZLR 745; *Body Corporate 326421 v Auckland Council* [2015] NZHC 862. [↑](#footnote-ref-68)
69. There is an exception in marine insurance, where it has been held that perils of the seas (insured) and inherent vice (excluded) are mutually exclusive, so that if the assured proves the former then the latter is automatically discounted: *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad, The Cendor Mopu* [2011] UKSC 5. [↑](#footnote-ref-69)
70. We have already discussed the position where there is no such evidence. [↑](#footnote-ref-70)
71. [2001] SCC 72. [↑](#footnote-ref-71)
72. [2016] NZHC 1492. [↑](#footnote-ref-72)
73. The first instance decision in *Legg* was, before the Court of Appeal’s reversal of it, questioned in *Sadat v Tower Insurance Ltd* [2017] NZHC 1550. [↑](#footnote-ref-73)
74. [2018] UKSC 26. [↑](#footnote-ref-74)
75. ibid [49]. [↑](#footnote-ref-75)
76. [2010] EWHC 1186 (Comm). [↑](#footnote-ref-76)
77. (2007) 14 ANZ Insurance Cases 61–725. [↑](#footnote-ref-77)
78. [2008] NSWCA 243. [↑](#footnote-ref-78)
79. [2009] NSWSC 51. [↑](#footnote-ref-79)
80. [2018] EWHC 1083 (Comm). [↑](#footnote-ref-80)
81. Barker and Steele (n 20). [↑](#footnote-ref-81)
82. [2016] UKSC 42, [2016] 3 WLR 399. [↑](#footnote-ref-82)
83. [2016] UKSC 45, [2017] AC 1. [↑](#footnote-ref-83)