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An *Annus Horribilis* for UK Asbestos Victims

There has been a significant change in the court's approach to causation in asbestos related personal injury litigation in the UK with potentially devastating consequences to plaintiffs.

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Plaintiffs in UK asbestos related personal injury litigation have been dealt several devastating blows during the last 18 months or so. A number of well known defendant companies and defendant insurers have filed for administration or liquidation, the most recent of which has been T & N Ltd (formerly Turner & Newall) whose US parent company, Federal Mogul, filed for chapter 11 bankruptcy in the US on 1 October 2001 with the consequence that all its European companies were forced to file for administration.

Perhaps the cruellest blow to plaintiffs was the Court of Appeal's decision in *Fairchild v Glenhaven Funeral Services Ltd, Waddingtons Plc and Leeds City Council* on 11 December 2001. Judith Fairchild's husband, Arthur, died in September 1996 from the asbestos related cancer, mesothelioma. Proceedings against the first defendant, Glenhaven Funeral Services, were in fact discontinued, but the claim proceeded against Waddingtons Plc and Leeds City council as the occupiers of premises where Arthur Fairchild had the most significant exposure to asbestos.

It was admitted by both Waddingtons Plc and Leeds City Council that Arthur Fairchild was exposed to substantial quantities of lagging-derived asbestos containing dust and debris. The agreed evidence was that the exposures with both defendants (Waddingtons Plc and Leeds City Council) were equal. The case was heard at first instance by Mr Justice Curtis in the High Court and judgement was handed down on 1 February 2001.

The three distinguished respiratory physicians retained as experts (two for the claimant and one for the defendants) were in agreement on the medical issues. It was agreed that there was no scientific means of ascertaining from which source of exposure (i.e. from which defendant) came the asbestos fibre(s) responsible for the malignant transformation of the pleural cell. It was agreed that mesothelioma was an 'all or nothing disease' and therefore different from asbestosis or pneumoconiosis which are cumulative diseases. It was agreed that it could not be said (1) whether a single fibre of asbestos was more or less likely to have caused the disease; or (2) whether more than one fibre was more or less likely to have caused the disease; or (3) even if multiple fibres were responsible, it could not be shown that it was more likely than not that those fibres came from more than one source; or (4) the court could not find on the facts of the case that the deceased's fatal disease was caused cumulatively by the exposures at both defendants' premises.

Mr Justice Curtis therefore decided that it would be wrong to find that both Waddingtons Plc and Leeds City Council contributed to the disease when it was equally probable that only one did. Therefore, the claimant could not prove which defendant had caused her husband's fatal condition and the claim failed.

Another issue in the case was whether Leeds City Council owed Arthur Fairchild a duty of care under the *Occupiers' Liability Act 1957*. Mr Justice Curtis found, in the circumstances of Arthur Fairchild's work, that they did not.

Judith Fairchild appealed to the Court of Appeal. The Court of Appeal heard the appeal in November 2001, together with five other cases where similar issues arose, and judgement was handed down by the court of Appeal on 11 December 2001.

To the horror of the claimant's lawyers, the Court of Appeal agreed with Mr Justice Curtis that causation could not be proved and therefore the claim must fail. Lord Justice Brooke gave the judgement of the court.

The claimant's position was that in a case where the physical cause of the disease was known, where the precise causal mechanism of the disease was not known and where substantial exposure to that causative agent was proved, the claimant, in accordance with the decision in *McGhee v National Coal Board*[1], will be taken to have discharged the onus of proof. The claimant argued that, to the extent that there remained an evidential gap which, through lack of scientific or medical knowledge, could not be bridged, the court could and should infer the existence of that bridge. The claimant's position in law was dependent upon the correct interpretation of Lord Reid's speech in *McGhee*.

"...the claimant could not prove which defendant had caused her husband's fatal condition and the claim failed."

The defendant's position was that having regard to the proper understanding of the decisions of *Bonnington Castings Ltd v Wardlaw*[2], *Nicholson v Atlas Steel Foundry and Engineering Company Ltd*[3], *Gardiner v Motherwell Machinery and Scrap Company Ltd*[4], *McGhee*, and *Wilsher v Essex Area Health Authority*[5], ▶

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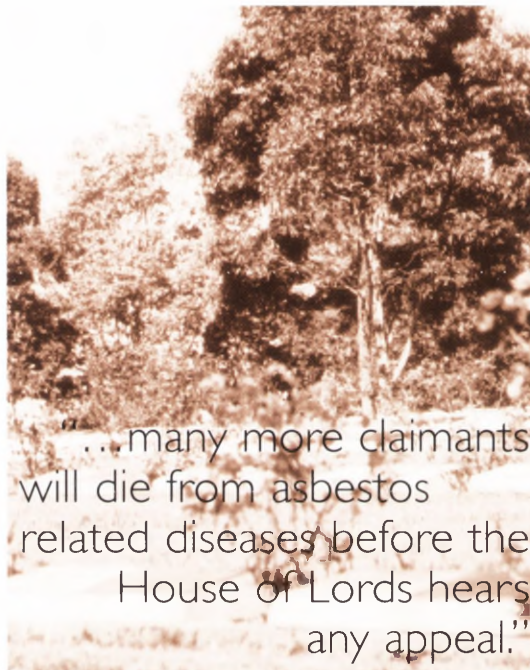
the claimant could not succeed without a change in the law on causation. The defendants argued that the claimant could not identify the source of the 'guilty' fibre or fibres and therefore the claimant could not identify the tortfeasor. The defendants argued that the court could not legitimately infer causation against any of the defendants since the agreed medical evidence ruled out any form of cumulative process.

In addition to the above cases, the Court of Appeal was also referred to a number of Commonwealth cases including the Australian cases of *Wintle v Connaust (Vic) Pty Ltd*[6] and *Wallaby Grip (BAE) Pty Ltd v Macleay Area Health Service*.[7]

The Court of Appeal found that the law as it stands did *not* allow a claimant to prove causation simply by showing that a defendant had exposed him or her to a *risk of injury* from which they should have been protected. The claimant must be able to prove, on the balance of probabilities, that the period of employment had a *direct* causative relationship with the inception of the disease.

The Court of Appeal was not prepared to accept the claimant's argument that because mesothelioma is an indivisible injury, once one tortfeasor is brought before the court, it will be notionally liable, on the balance of probabilities, for the whole of the claimant's injury. The Court of Appeal found this to be a 'leap over the evidential gap which not only defied logic but was also susceptible to unjust results by imposing liability for the whole of an insidious disease on an employer with whom the claimant was employed for a relatively short time.'



The Court of Appeal refused leave to appeal to the House of Lords, but Judith Fairchild's lawyers have now lodged a petition with the House of Lords for permission to appeal. It can only be hoped that the House of Lords will allow the petition and hear the appeal as the Court of Appeal's decision flies in the face of common sense and represents a U-turn in the way in which mesothelioma cases have been settled in the past on the basis of *Bryce v Swan Hunter Group Plc*[8]. It also leaves an illogical inconsistency between the treatment of cumulative or divisible diseases such as asbestosis, and indivisible diseases like mesothelioma. If Arthur Fairchild had contracted asbestosis in similar circumstances, then he might have succeeded and recovered damages in full. Lord Justice Brooke (in the Court of Appeal) indicated that the cases which they heard on appeal 'may have revealed a major injustice crying out to be righted, either by statute or by an agreed insurance industry scheme'. If the House of Lords hears the appeal but is not prepared to overrule the Court of Appeal on grounds of public policy, the only way forward may be to produce evidence in another case which shows that part of the causative mechanism in mesothelioma *is* cumulative.

As things presently stand, proceedings have been stayed in cases which are on all fours with Fairchild, i.e. where

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there are two 50/50 exposers. It remains open to debate whether a claimant can prove causation where there are two periods of exposure but one majority exposer, e.g. in an 80/20 two-defendant exposure case. *Fairchild* has also caused uncertainty in single exposure cases where the claimant has been exposed over (say) a 20-year period and the defendant accepts negligent exposure in the later 10-year period, but argues that the exposure in the first 10-year period was non-negligent. Does *Fairchild* prevent a claimant from proving causation in this situation? Worse still, some defendants are arguing that, as it is impossible to state of any claimant that he or she may not have had some background environmental exposure to asbestos, it is equally possible to state that the fatal fibres were not responsible.

It also remains to be seen whether defendants will seek to argue *Fairchild* in benign pleural disease cases where it is unclear whether pleural plaques and pleural thickening are to be regarded as divisible injuries (like asbestosis) or indivisible injuries (like mesothelioma). However, one of the other cases heard by the Court of Appeal at the same time as *Fairchild* concerned a claimant, Robert Pendleton, whose exposure to asbestos had resulted in the development of bilateral calcified pleural plaques. There was no dispute about liability and it was agreed that liability for the agreed general damages should be apportioned in various percentages between the four defendants, allowance being made for the periods when Robert Pendleton was exposed to asbestos during the course of employment with other employers who were not parties to the claim. An agreed order for provisional damages was made to cover the risk that Robert Pendleton might, at some point in the future, contract asbestosis or diffuse pleural thickening.

However, the defendants disputed that they should also cover the risk of Robert Pendleton contracting mesothelioma. The defendants argued that if *Fairchild* had been correctly decided by Mr Justice Curtis then Robert Pendleton could never establish, in law, a cause of action or liability in respect of mesothelioma should he contract this disease in the future. However, the Court of Appeal found that Robert Pendleton had satisfied the statutory criteria for an order for provisional damages and that if he was unfortunate enough to develop mesothelioma in the future, then that would be the time to argue which, if any, of the defendants were liable as a matter of legal causation, and that issue would be decided on the basis of the state of medical science at that time, considered in the light of the law's requirements as to causation at that time, and accordingly, mesothelioma was allowed as a return condition of the provisional damage order.

There has been a major public outcry at the *Fairchild* decision and there has been much campaigning by victim support groups and claimants' lawyers in the UK. APIL, the Association of Personal Injury Lawyers, has co-ordinated a 'Fairchild Practitioners Group' to assist in lobbying the government. However, how many more claimants will die from asbestos related diseases before the House of Lords hears any appeal or the government changes the law by statute in correcting what even the Court of Appeal refers to as 'a major injustice crying out to be righted' remains to be seen. PL

PostScript: We have now learned that the House of Lords has granted permission to appeal in *Fairchild*. The House of Lords will hear the appeals on 22 and 23 April 2002.

Footnotes:

1 (1973) 1 WLR 1.
2 (1956) AC 613.
3 (1957) 1 WLR 613.
4 (1961) 1 WLR 1424.
5 (1988) 1 AC 1074.
6 (1989) VR 951.
7 (CA 40620/97).
8 (1988) 1 AER 659.

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