UK
disease compensation under threat

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INTRODUCTION

For more than 25 years, courts in the United Kingdom had compensated victims of mesothelioma, a cancer that usually attacks the lining of the lung and causes death within 18 months of symptoms starting. Most British claims are brought against employers. It did not matter whether victims had been exposed to asbestos by one employer or by many employers. Victims were able to sue one or more employers, and anyone was liable for the entire damages. The increased cost of these claims prompted employers' liability (EL) insurers to mount an ingenious defence that would defeat every claim where the victim had more than one source of exposure. This covers nearly all claims.

FAIRCHILD, FOX AND MATTHEWS

The case of *Fairchild*[1] was lost in the High Court by Mrs Judith Fairchild in February 2001. Another judge followed this judgment in a case by Mrs Doreen Fox[2] several weeks later, but a third judge found both employers were responsible in a case brought by Mr Edwin Matthews[3] in July 2001, concluding that any employer who increased the risk of the disease in fact caused the disease. This was the approach that had been adopted in settlements over the previous 25 years. The Court of Appeal found for the employers in consolidated appeals in December 2001.[4] The House of Lords restored the rights of mesothelioma victims in May 2002.[5] As a result of this decision, hundreds of mesothelioma and asbestos cancer cases, which had been halted for a year or more, were able to go ahead. Thousands of future victims have had their entitlement to compensation preserved.

The Association of British Insurers estimated the true cost of the judgment to the insurance industry at £200 million a year. These cases have redoubled the insurance industry's efforts to avoid the cost of occupational disease.

The Rulings

The three cases[6] were about the meaning of 'cause' in the context of compensation for asbestos-induced cancer.

Although the victims had been negligently exposed to asbestos by two or more former employers, the cases were originally lost by the victims because the judge said:

'...there is no scientific means of ascertaining from which source of exposure came the single asbestos fibre, or if it be the case, the fibres, responsible for the malignant transformation of the pleural cell. It follows the exposure causing the disease could be at either of the named premises or in combination - and none are more likely than the other.'[7]

The Court of Appeal upheld this approach on 11 December 2001.[8] It said that mesothelioma 'is a single indivisible disease ... and a claimant cannot establish on the balance of probabilities when it was he inhaled the asbestos fibre, or fibres, which caused a mesothelial cell in his pleura to become malignant.'[9]

Law Lords Bingham, Nicholls, Hoffman, Hutton and Rodger disagreed.[10] They said that the breach of duty by each defendant materially increasing the risk of the onset of mesothelioma in Mr Fox, Mr Fairchild and Mr Matthews involved a substantial contribution to the disease suffered by them, 'therefore each defendant is liable in full for a claimant's damages, although a defendant can seek contribution against another employer for causing the disease'.[11] Put another way, 'by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants are taken in law to have proved that the defendants materially contributed to their illness'.[12]

Lord Bingham said, 'there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. ...such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law.' Lord Nicholls said, 'Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands.'[13] Lord Hoffmann said:

'To say, for example, that the cause ▶

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of Mr Matthews' cancer was his significant exposure to asbestos during two employments over a period of eight years, without being able to identify the day upon which he inhaled the fatal fibre, is a meaningful causal statement ... as between the employer in breach of duty and the employee who has lost his life in consequence of a period of exposure to risk to which that employer has contributed, I think it would be both inconsistent with the policy of the law imposing the duty and morally wrong for your Lordships to impose causal requirements which exclude liability.'[14]

The Law Lords attached weight to the approach that would be taken overseas, and particularly in European jurisdictions. Lord Bingham said:

'...in a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries), there must be some uniformity of outcome, whatever the diversity of approach in reaching that outcome'.[15]

To this end, they considered authorities or practice from Australia[16], Canada, United States, Germany, Holland, France, Ireland, Greece and other countries.[17]

The Manoeuvres

The Law Lords hearing was originally listed on 22 April 2002. During the second week in April, the Association of British Insurers (ABI) floated a scheme as an alternative to litigation. Compensation for mesothelioma was to be paid on a proportionate time-exposed basis, which would significantly reduce the size of awards. While the burden of proof would remain on claimants, it was not said who would assess compensation.

The insurers also offered to settle the three cases at full value so that there would be no appeal to the Law Lords, and the effective law, as set out by the Court of Appeal, would remain favourable to the insurers. Our client, Mrs Doreen Fox, rejected the offer because she knew her late husband would not have wanted her to be used to block compensation for hundreds, and in the future, thousands of other mesothelioma victims.

At the same time as this was happening, the insurers took an unsigned petition to the House of Lords on April 17 stating, 'The present appeals will be settled by the payment of damages and costs.' This was not true. Apparently, they told the court 'that all three appeals had been settled.' As a result, the hearing date was lost.

A short hearing took place on 22 April to discuss what should happen next. Sir Sydney Kentridge QC, the victims' barrister, told the court 'the whole object of these so-called offers and this so-called scheme is to ensure that the Court of Appeal decision remains intact.' He said this had been a 'sordid attempt to manipulate the judicial process.'[18] The cases were eventually heard on 7, 8, and 9 May 2002. On 16 May, Lord Bingham announced that our clients had won.

The Ramifications

By early July 2002, the Association of British Insurers was in talks with the Treasury, the Financial Services Authority, the Health and Safety Executive, the Confederation of British Industry, the unions, and others, about possible solutions to the insurance industry's difficulties with employers' liability policies.

John Parker, Head of General Insurance at the ABI, said, 'We put the view that the current employers' liability (EL) system is not sustainable.' Royal & Sun Alliance said, 'the current (employers' liability insurance) regime was set up to deal with workplace accidents - like slips, trips and falls - not long-tail industrial diseases ... We would want to see the exclusion of industrial disease from any future legislation.'

On 8 August it was reported in the *Guardian* newspaper that the ABI today had warned the government it must reform employers liability insurance wholesale or risk the collapse of the system.

By 14 August, the *Financial Times* newspaper reported thousands of small companies were trading illegally or faced closure because they could not pay soaring insurance premiums or obtain cover. The Federation of Small Businesses was calling on the government to use part of its revenue from insurance premium taxes to set up an insurer of employers' liability. This would act as insurer of 'last resort' for companies that no one else would insure. It suggested that the compulsory element of employers' liability insurance should be restricted to event-based work problems, that is, accidents but not disease.

CONCLUSION

The law of causation, in relation to occupational disease, has been clarified by the House of Lords decision. In Britain, there are 1700 victims of mesothelioma a year, most of whom have been exposed to more than one source of asbestos exposure. That number is still growing. These people would not have been compensated but for the Law Lords' decision to equate 'increase in risk' with 'cause' in this context. There was support for this approach to causation in several Australian cases[19], but not within the *ratio* of those cases. The House of Lords decision represents a helpful clarification for Australian mesothelioma victims.

Most British claims are brought against employers. There is likely to be further legal argument about whether damages for mesothelioma can be apportioned between employers, or whether an employer who increases the risk of the disease is liable for all the damage that follows. Insurers are arguing this point despite the fact that their own counsel told the Law Lords, 'we accept that this is an all or nothing case. It is not an apportionment case.'[20]

This case triggered a concerted effort by insurers in Britain to avoid the cost of occupational disease. They argue that occupational diseases ought to be treated differently from occupational accidents. It is suggested that occupational disease is simply not insurable commercially. A merging of the pri-

vate employers' liability insurance system and the public industrial injuries disablement benefit scheme has been floated. A recent publication by insurers asks 'how much compensation is society willing to pay?...There are no easy answers, but we need to plan for change now, otherwise the current system will break down.'[21]

The writer points out that employers' liability insurance was sold as a 'loss leader' when it became compulsory in 1972. A depressed stock market has now prompted many insurers to inflate their premiums to cover investment losses. It is submitted that losses in investment business are behind the insurance industry's claims that employers' liability insurance for occupational disease is no longer sustainable. The number of workplace disease claims in Britain actually fell by 40 per cent in 2001-2002. Legal costs would be reduced significantly if insurers did not so often resist valid cases. If insurers had taken a bigger role in making sure employers adhered to the law, there would be little or no occupational disease. PL

ENDNOTES:

1 Judith Fairchild (Suing as Administratrix and widow of Arthur Eric Fairchild deceased) v (1) Glenhaven Funeral Services;(2) Waddingtons plc; (3) Leeds City Council. QBD (Curtis J) 1/2/2001.

2 Doreen Fox (Widow and Administratrix of the Estate of Thomas Fox, deceased) v Spousal (Midlands). Liverpool Country Court (HH Judge Mackay) 27/3/2001 Ltd, LTL 7/1/2002.

3 Edwin Matthews v (1)Associated Portland Cement Manufacturers [1978] Ltd; (2) British Uralite plc [2001] QBD Manchester District Registry (Mitting J) 11/7/2001, LTL 19/10/2001.

4 [2001] EWCA Civ 1881. CA (Brooke LJ, Latham LJ, Kay LJ) 11/12/2001.

5 Lords Bingham, Nichols, Hoffman, Hutton and Rodger) 20/6/2002 [2002] 3 All ER 305.

6 ibid.

7 *Fairchild* n 1 at 3.

8 [2001] EWCA Civ 1881. CA (Brooke LJ, Latham LJ, Kay LJ) 11/12/2001.

9 ibid n 8 Summary p3 and paras 102-108.

10 [2002] 3 All ER 305.

11 Lord Hutton at 361h.

12 Lord Rodger at 383c.

13 at 335a.

14 at 336b-341f.

15 at 334c.

16 The writer would like to thank Mr A G Gardiman of Turner Freeman and Mr J Rush QC for their help with the Australian case law.

17 at 326-334.

18 House of Lords hearing transcript, 22 April 2002.

19 *Chappel v Hart* [1998] 195 CLR per McHugh J; *Naxakis v Western General Hospital* [1999] 197 CLR per Gaudron J and Callinan J.

20 House of Lords transcript 8th May 2002, page 78, lines 2-3.

21 Association of British Insurers 'Workplace Compensation, the case for reform and a vision for the future' September 2002.