

UK SUPREME COURT UNANIMOUS IN DISMISSING APPEALS



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On 9 March 2011, the Supreme Court of the United Kingdom delivered its judgment in the conjoined appeals of *Sienkiewicz (Administratrix of Mrs Enid Costello) v Greif (UK) Ltd* and *Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10. It dismissed the appeals of the first appellant manufacturing company (G) and the second appellant local authority (K) which appealed against decisions concerning the appropriate rule of causation in mesothelioma cases involving a single defendant. In both cases the exposure had been found to be small and the appellants were the sole known sources of occupational exposure of the respondents (S and W) in each case.

The Law Lords affirmed previous judgments relating to asbestos-related injury, applying *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 and *Barker v Corus UK Ltd* [2006] 2 A.C. 572, and in each case held the appellant (defendant) was responsible for exposing the claimant, S and W, to sufficient amounts of asbestos dust to create a material

increase in risk and was therefore liable. The claimants (respondents) were therefore entitled to compensation. The Court has therefore again shown sympathy for mesothelioma sufferers and their families in cases where, despite clearly suffering from the disease, the claimants are unable to prove that the defendant negligently caused their mesothelioma, using the normal “but for” test of causation.

This case will prove useful in further understanding of issues of causation arising, not just from mesothelioma claims, but employer’s liability for industrial disease generally. The Law Lords in this case, most notably Lord Phillips, who gives a comprehensive opening to the case, have presented a concise and useful guide to the history and development of the common law in this area. As readers of the judgment will note, the House of Lords, now the Supreme Court, have consistently turned a sympathetic eye to claimants who have suffered seriously, often fatally, at the hands of defendant employers, but who fall short of being able to prove causation



on the balance of probabilities, i.e. showing that but for the defendant's (or defendants') negligence they would not have suffered injury.

This is true not only in the cases of *Fairchild* and *Barker* mentioned above, but also in the cases of *McGhee v National Coal Board* [1973] 1 WLR 1 and *Wilsher v Essex Area Health Authority* [1988] AC 1074, on which this judgment and the *Fairchild* judgment are based. It is worth mentioning at this stage, that due to the uncertainty as to the biological cause and development of the disease, knowledge about mesothelioma was based partly on medical science and also on statistical analysis of disease (epidemiology). In the *McGhee* case, the claimant was a brick kiln worker who was successful in his claim for damages for dermatitis caused by brick dust where his employer had not provided shower facilities at his workplace to wash off the dust before he cycled home. He succeeded, despite not being able to prove with epidemiological evidence a definite causal link between the dermatitis and the washing facilities. It was enough for the claimant to show that the failure of the defendant to provide washing facilities had "*materially*

increased" the risk that he would contract dermatitis.

In the highly-publicised case of *Fairchild*, the claimants, who had contracted mesothelioma through the inhalation of asbestos dust, had been exposed to asbestos throughout their working lives, from more than one employer in each case. It was impossible for the claimants to prove, on the balance of probabilities, which period of exposure from which employer had actually caused the disease. The House of Lords held that in cases involving mesothelioma, for public policy reasons, claimants should be able to recover compensation from the defendants, jointly and severally, without having to satisfy the usual "but for" test of causation for any one of the defendants. This became known as the *Fairchild* exception.

In *Barker v Corus* the House of Lords went further. They held that since the basis of the liability was materially increasing the risk of developing mesothelioma, each employer was only liable to the extent of that increased risk. Therefore, although mesothelioma is an indivisible disease, the liability was divided in proportion to the contribution to the

increased risk. This was almost immediately reversed by Parliament's controversial section 3 of the Compensation Act 2006.

One of the distinguishing features that the Law Lords had to deal with in this latest judgment (*Sienkiewicz*) was that both claimants (Karen Sienkiewicz on behalf of Enid Costello, and Barré Willmore on behalf of Dianne Willmore) were claiming compensation from just *one* defendant each. In the case of Mrs Willmore, the level of exposure at the school she had attended in the 1970's was low. Similarly, in *Sienkiewicz*, the low levels of asbestos dust Mrs Costello was exposed to while she walked around a factory floor compared to the levels in the general environment in Ellesmere Port increased the risk of her contracting mesothelioma by just 18%. The defendants, therefore, sought to distinguish the case from *Fairchild* because, *inter alia*, the *Fairchild* case dealt with *multiple* exposure through *multiple* defendants. They argued, therefore, that the *Fairchild* exception that a claimant needed only to demonstrate that the defendant "*materially increased*" the risk of mesothelioma should not apply in these

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circumstances because only a single defendant's actions were in issue, and also that any exposure which did not at least double the background risk was not "material" exposure within the meaning of *Fairchild* and the Compensation Act.

Another argument put forward by the defendants was that the claimants should be required to prove, on the balance of probabilities, that the defendant alone caused the mesothelioma, through the bringing of statistical evidence to that effect. Even if the Court found that the *Fairchild* exception did apply to these claimants, the defendants argued that they should still not succeed in their claims because their exposure to asbestos dust was not "material", i.e. it had not more than doubled the risk of contracting mesothelioma.

The Supreme Court did in fact apply the *Fairchild* exception to the general laws of causation to this case of "single exposure". In addition, it was held that what counted as a "material increase in risk" did not mean "a doubling of risk" and was something that should be measured on a case-by-case basis, having regard to the sufferer's life history of exposure. In this case, the levels of exposure were small and so the threshold of material risk was low. Accordingly a claimant will be compensated for developing mesothelioma even where occupational exposure is low (as long as it is not *de minimis*) and even where the exposure is less than exposure from the claimant's environment.

Whilst this case gives comfort to mesothelioma victims and their families that the rules established in *Fairchild* continue to apply in claims

where one party, or multiple parties committing the same wrong, caused the disease, their Lordships appeared reluctant to extend the normal "but for" test of causation into other types of employer-liability litigation. They do not wish to open the floodgates or create an environment of uncertainty. The question of the Justices tampering with the common law causation rule clearly troubled Lord Brown who notes, "*mesothelioma claims are in a category all their own. [...] The unfortunate fact is, however, that the courts are faced with comparable rocks of uncertainty in a wide variety of other situations too and that to circumvent these rocks on a routine basis - let alone if to do so would open the way, as here, to compensation on a full liability basis - would turn our law upside down and dramatically increase the scope for what hitherto have been rejected as purely speculative compensation claims*".

Finally, regarding the Compensation Act and its relevance in this matter, the Justices agreed that it should not be used by a claimant to assist in proving what amounted to "material contribution to injury". It had been brought in solely to reverse the decision in *Barker v Corus*.

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