



Mesothelioma – The Law Turns Full Circle

The past few years have witnessed a remarkable amount of litigation surrounding a number of issues relating to the liability of employers to pay compensation in respect of asbestos related mesothelioma, and how such compensation should be apportioned between employers / defendants.

Mesothelioma is the most serious of a number of diseases that can arise from exposure to asbestos dust. It is an aggressive form of cancer that affects the pleura, the thin membrane that surrounds the lungs and internal organs of the chest. Once diagnosed, the condition is essentially untreatable and is invariably fatal. Victims of mesothelioma experience distressingly high levels of pain and suffering with attendant distress to their families.

The disease presents a number of difficult issues in relation to compensation.

It has a very long ‘latency’ period, in that there may be a gap of up to 50 years between the victim being exposed to asbestos dust and development of the disease. It is thought that the first cell mutations in the pleura may start to take place some 10 years before the first proper symptoms of the disease become apparent and a diagnosis is made.

A single asbestos fibre may be capable of initiating the development of the disease, albeit many years after inhalation by the victim.

In cases where the claimant has been exposed to asbestos over a number of years and in periods of employment with a number of employers, it is impossible to determine during which particular employment he inhaled the particular fibre or fibres that subsequently caused the disease to arise.

In the now famous case of *Fairchild –v- Glenhaven Funeral Services Ltd [2002 UKHL]*, the claimant had worked for three different employers, all of whom admitted negligently exposing him to asbestos dust. He subsequently developed mesothelioma and brought a claim seeking damages as against all three employers in the High Court.



As the medical experts in that case could not state during which period of employment Mr Fairchild had inhaled the asbestos fibres that *caused* his illness to develop, his claim failed, a decision that was subsequently upheld by the Court of Appeal.

Amid great public concern and comment, the matter went before the House of Lords, who overturned the previous decisions and found in favour of Mr Fairchild.

In a judgement clearly based upon public policy rather than legal purity, the Lords ruled that in mesothelioma cases, where exposure had occurred in more than one period and with different employers, it was not necessary for a claimant to prove which of those exposures had caused his disease. He could sue one of the employers and recover his damages in full, leaving that employer to try and recover contributions from any other implicated employers. This is referred to as ‘joint and several’ liability.

The Lords decision, whilst welcomed in some quarters, appeared unjust -why should one employer be made to pay full damages in circumstances where others also had responsibility? It also transferred the burden of insolvent or uninsured employers from the claimant to the defendant. Their lordships made no ruling as to how such claims should be apportioned between defendants, or how ‘void’ periods (periods of employment with a defunct / insolvent / uninsured company) should be considered.

The matter was to raise it head once again in the case of *Barker –v- Corus UK Plc [2006 UKHL]*.

In that case, the Courts were asked to decide how mesothelioma damages should be apportioned or reduced to account for the fact that the claimant had not only been exposed to asbestos whilst working for the defendants, but had also been exposed to substantial quantities of asbestos dust during a period of 7 years as a self-employed plasterer.

The defendants had argued for damages to be apportioned as between themselves and the claimant to reflect the relative periods of exposure.



Both the High Court and Court of Appeal rejected this approach, relying on the Fairchild ruling, but reducing the claimant's damages by 20% on the basis of contributory negligence. Both parties appealed, and the matter came before the House of Lords in March 2006, by which time two other cases of similar fact had been conjoined to the appeal.

The Lords decided that an employer was only liable to pay such proportion of mesothelioma damages as reflected the extent to which that employer's breach of duty had contributed to the risk of the claimant contracting mesothelioma.

The effect of the decision was to return to the position whereby an employer would only be responsible for his 'share' of the claim (based upon time/intensity of exposure).

Following immediate condemnation from claimant organisations, claimant's lawyers, trade unions and members of parliament alike, The Government intervened and a new clause was inserted into the then Compensation Bill. This became the **Compensation Act [2006]** on receiving royal assent on 25 July 2006.

By section 3 of the Act, a mesothelioma claimant may once again bring a claim against only one of his previous employers and recover 100% of his damages from that employer alone. The act preserves the right of that employer to thereafter seek contribution from other exposing employers or to allege contributory negligence on the claimant's part.

This legislation has thus brought matters full circle to the position as it was immediately following the Lord's ruling in *Fairchild*.

Once more Insurers and claims handlers will face claimants solicitors targeting solvent or insured companies and organisations in order to secure full compensation. Therefore careful expeditious expert handling of meritorious claims is required. To assist in achieving this Garwyn has been working with the insurance industry as part of the Industrial Disease Claims Working Party on a proposed mesothelioma protocol that will provide timely resolution of claims for claimants and their families whilst seeking to control spiralling litigation costs.



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