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**The *Fairchild* case**

*TUC analysis of the  
Law Lords Judgment*

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## **Justice for asbestos victims - thanks to Roman slaves!**

Insurer attempts to evade their liabilities were stumped on 20 June 2002 when the House of Lords' judgment in the "*Fairchild* case" was published.

### **Background**

Arthur Fairchild, and two other unconnected victims were exposed to asbestos by more than one employer<sup>1</sup>, so when they developed the fatal cancer mesothelioma, they sued each employer for damages. The employers' insurers argued that mesothelioma can be caused by a single asbestos fibre, so it could not be held that *all* the employers who exposed the victims to asbestos had actually caused the disease. Without being able to prove which employer actually exposed the workers to the fibre or fibres that caused their mesothelioma, the insurers argued that no employer could be found liable for the compensation bill.

This has been called the "Murder on the Orient Express" case, after the Agatha Christie book where several people all stabbed the victim, but no one could be prosecuted because it could not be determined who had actually landed the fatal blow.

The High Court and the Court of Appeal (which heard the cases in December) agreed with the insurers, and hundreds of other cases were halted while the *Fairchild* appeal rumbled on to the House of Lords. Mesothelioma victims with careers involving more than one exposure to asbestos looked likely to be denied any compensation, and insurers looked likely to make a windfall profit.

### **Law Lords' ruling**

Afer some insurer chicanery, the Lords heard the final appeal in May, and delivered their judgment very quickly. To make sure that the judgment was given as swiftly as possible (in part because one of the victims, Edwin Matthews was still alive but gravely ill), they gave it orally, with written justification to follow. They allowed the victims' appeal, and later made it clear that each employer who had exposed the victim to asbestos was liable to pay the full compensation, rather than only being responsible for a proportion (known as apportionment). Insurers still refused to settle other cases, though, insisting that they needed to see the judgment in full.

And now it's out. A mammoth hundred page judgment with each Law Lord explaining their own reasoning for the unanimous decision. This briefing explores the reasons for the judgment, and the implications.

### **Principles**

The House of Lords is entitled effectively to make law on the basis of public policy requirements, in the context of the principles of natural justice, common sense and the common law of the land.

In this case, the Law Lords were clearly appalled at the prospect of upholding the Court of Appeal's judgment, leaving the victims of a particularly nasty fatal disease (there is no known cure for mesothelioma) uncompensated, and allowing employers who had clearly been negligent to escape paying the price. One Law Lord echoed trade union fears that if the Appeal Court judgment stood, unscrupulous employers could expose workers to asbestos and escape paying compensation to the ones who develop mesothelioma simply by employing people who someone else has exposed to asbestos!

The Law Lords decided that the purpose of common law compensation was to compensate victims. They dismissed insurer arguments that it would be unfair to

those employers who had not exposed the victims to the fibre/s which proved fatal because it would be a greater injustice to deny the victims, and because all the employers concerned had done something dangerous enough to have killed the victims. If an employer who had exposed their worker to asbestos had not actually killed them, that was because of chance, not because the employer had done nothing wrong.

The other main principle that the Lords worked by was that making a material contribution to the *risk* of someone developing mesothelioma was effectively the same as making a material contribution to the *development* of that mesothelioma, unless it could be proved that the risk had not eventuated. It would still be possible therefore for someone to contribute to the risk of someone developing a disease but not be held liable for compensating that person, if it could be shown that another party had not only contributed to the risk, but had actually directly caused the illness. (As an example, driving someone too fast contributes to the risk that they will die in a car accident. But it is only the person driving too fast on the occasion of the accident who would be liable for the compensation in such a case.)

### **Case law**

But the House of Lords also relied on decisions made in previous cases – the main ones being *McGhee*, from the early 1970s, and *Wilsher*, from the early 1980s.

In *McGhee*, the House of Lords found that an employer should be held liable for causing dermatitis if they did two separate things (in that case they exposed him to dust in some kilns, and then provided inadequate washing facilities so that he could not wash the dust off) either of which could have caused the dermatitis, even if the victim could not prove which one had caused the dermatitis or that both had.

In *Wilsher*, the House of Lords did not find a health authority liable for the disablement suffered by a patient who had been given too much oxygen, because

other things could have caused the disablement, none of which were under the authority's control. There was no proof that what the doctor had done had led to the injury, even if he should not have done it.

Effectively, the House of Lords considered the *Fairchild* case to be more like *McGhee* than *Wilsher*. There was no dispute that asbestos had caused the mesotheliomas, and no doubt that all the employers concerned had negligently exposed the victims to asbestos. Unlike in *Wilsher*, each employer in *Fairchild* had done the thing which had caused the mesothelioma. In *Wilsher*, the disablement may have resulted from some completely different cause.

Several other cases were cited, from around the world. And one authority cited was from a second century Roman legal text by Julian. It explains the issue perfectly. Julian was referring to the Lex Aquilia, which held that if someone killed your slave, they were liable to compensate you. Julian considered what would happen if several people all struck the slave and he died. If it was clear which blow was fatal, according to Julian, the wielder of that blow would be liable. But if there was no proof about which was the fatal blow, then all the attackers would be liable.

Paragraph 160 of the Lords' judgment states that: "I would take from these passages the clear implication that classical Roman jurists of the greatest distinction saw the need for the law to deal specially with the situation where it was impossible to ascertain the identity of the actual killer among a number of wrongdoers. If strict proof of causation were required, the plaintiff would be deprived of his remedy in damages for the death of his slave. In that situation, some jurists at least were prepared, exceptionally, to hold all of the wrongdoers liable and so afford a remedy to the owner whose slave had been killed. The exact scope of these decisions can, of course, no longer be ascertained and it is likely that different jurists held differing views: the sixth-century compilers of the Digest may well have altered the texts to some extent, if only by abbreviation, cutting out the cut and thrust of debate. Nor could the decisions, as recorded, furnish any guidance on the formulation of any equivalent rule today. The point remains, however, that all these centuries ago

considerations of policy plainly led to a departure from what the law would usually require by way of proof of causation.”

### **Implications**

The immediate result of the Fairchild judgment is clearly that where several employers have exposed a person negligently to asbestos, and that person has developed mesothelioma, then all the employers are liable to pay compensation.

Further, the Lords ruled out apportionment, where each employer was only responsible for a proportion of the damages. In part, this is because it would be impossible to apportion the damages. In cases of cumulative disease, it is possible to share out the damages in line with the amount of exposure each was responsible for. But in a case of mesothelioma where it is unclear which dose/s caused the cancer, this cannot be done. Thus in mesothelioma cases where several employers all negligently exposed the victim to asbestos, those employers are jointly and severally liable – it is up to them to sort out how to split the bill.

One final implication, however, is that in comparing *Wilsher* with *McGhee*, the Lords make it quite clear (paragraphs 67-71) that diseases with multi-factorial causes cannot be treated in the way Fairchild has been. If several employers expose someone to some but not all of the factors which cause the disease, they are not likely to be jointly liable. Only those where a causal connection can be proved between the risk factors and the disease would be liable.

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<sup>1</sup> In Mr Fairchild’s case, he was exposed by the owner/occupier of buildings he worked in.