

Reinsurance

Barker v Corus – The UK Asbestos Story Continues

by

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Commentary

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[Editor's Note: Mr. Robinson is a senior associate with Freshfields Bruckhaus Deringer's Financial Institutions Dispute Group in London. Copyright 2006, Toby Robinson. Replies to this commentary are welcome.]

Introduction

The recent House of Lords decision in *Barker v Corus* [2006] UKHL 20 limited substantially the ability of mesothelioma victims to recover damages for injuries caused by exposure to asbestos dust. Mesothelioma kills around 1,800 people every year in Britain, with the average pay-out being approximately £150,000.

The decision led to an immediate backlash from MPs, trade unions, claimants' support groups and victims alike. On 13 June, Tony Blair told the GMB general union conference: "I regret [the *Barker* decision]. . . . If we can change it we will. I hope to announce something on this in a couple of weeks." On 20 June, the Lord Chancellor announced that he would be introducing an amendment to the Compensation Bill to provide that in such cases an employer will be jointly and severally liable enabling a claimant to recover full compensation from any relevant employer. It would then be up to that employer to seek contribution from other negligent employers.

This article discusses the legal and practical implications for insurers of the proposed legislation by reference to both *Barker* and the earlier House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

Fairchild v Glenhaven

The *Fairchild* decision enabled a worker who had contracted mesothelioma after being wrongfully exposed to asbestos dust at different times by more than one employer to sue any of his former employers notwithstanding that he could not prove on the balance of probabilities which exposure had caused the disease. Each employer had materially contributed to the risk of the claimant contracting the disease.

As Baroness Hale of Richmond put it: "For the first time in our legal history, persons are made liable for damage even though they may not have caused it all." Lord Bingham concluded that ". . . 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".

As a result of *Fairchild*, insurers were potentially liable for large claims in circumstances where their insureds were not actually responsible for the damage. Furthermore, given that mesothelioma is a condition that is usually latent for around 30 or 40 years, the chance of recovering a contribution from other defendants/their insurers was materially reduced, either because of the inherent difficulties in tracking them down or because of the increased likelihood that they/their insurers had become insolvent.

Barker

In *Barker*, the claimant had been exposed to asbestos by two separate employers and, in addition, had been exposed to asbestos for a period of time when he was

self-employed. The House of Lords decided two issues which were left unresolved by *Fairchild*: the limits of the Fairchild exception; and the extent of the defendant's liability.

The Scope Of The Fairchild Exception

It was held that for the Fairchild exception to apply, it was irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. Furthermore, the exception applied only where exposure to a single injurious agent had caused the risk of the disease that the victim had eventually contracted. The exception would not therefore apply to a claimant who suffers from lung cancer and where it cannot be determined if that was caused by asbestos or smoking.

Apportionment

The majority held that under the Fairchild exception a defendant is treated as having created a material risk that the injury would occur and is not deemed to have actually caused that injury. This was crucial given the general rule that where two or more defendants are found to have caused indivisible damage, either defendant can be sued for the full amount. This analysis of *Fairchild* enabled the Lords to decide that if each employer's contribution to the damage suffered was to increase the risk of the damage occurring (as opposed to actually causing the damage), then each employer should only be liable for the degree of risk for which that defendant was responsible.

According to Lord Hoffman, the *Fairchild* exception was created because the alternative of leaving the claimant with no remedy was thought to be unfair: "But does fairness require that he should recover in full from any defendant liable under the exception? . . . In my opinion, the attribution of liability according to the relative degree of contribution. . . .

would smooth the roughness of the justice which a rule of joint and several liability creates. . . . The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you *may* have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm."

Implications For Insurers

Fairchild represented a significant relaxation in the requirements for causation in relation to claims brought by mesothelioma victims where there was more than one potential defendant. However, in providing that an employer should be liable for all of the damage in circumstances where it was by no means clear that he had caused it, the Lords arguably went too far. *Barker* went some way towards redressing the balance.

The proposed legislation effectively reverses *Barker* and reinstates the position in *Fairchild* whereby an employer/his insurer(s) can be sued for the full amount. Insurers will now be forced to pursue subrogated proceedings against other negligent employers/their insurers where they can be traced, leading to potentially protracted litigation. Insurers might also face recovery issues in relation to their outwards reinsurance depending on the terms of their reinsurance cover.

Conclusion

The government's proposed legislation, whilst undoubtedly welcomed by the victims of this terrible disease, has the potential to wreak havoc in the insurance industry and destroys the balance of justice that resulted from *Barker*. ■

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