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Proportionate liability in mesothelioma claims

By a strong majority, the House of Lords (4-1) has held that defendants in mesothelioma claims are only severally liable for their respective contribution to the risk of damage, but not jointly liable for the whole damage.

Lord Hoffmann gave the leading majority view (agreed to in separate speeches by Lords Scott and Walker, and Baroness Hale); Lord Rodger dissented.

barker v Corus (UK) Plc

[2006] UKHL 20 (3 May 2006) (with concurrent other appeals)

Significance

The decision creates new legal ground by now recognising that, in the class of cases involving diseases such as mesothelioma, proportionate liability is applicable to tortious defendants, rather than joint and several liability.

Thus a defendant is only liable for that proportion of the risk it created, not for the risks created by others (whether another defendant or other party).

The policy basis stated in support of this included one of fairness where, although the disease (mesothelioma) is indivisible damage, the risk is divisible, and liability should be limited as proportionate to the risk one has created.

It was not disputed that mesothelioma was indivisible damage.

Discussion

In a prior decision, *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22; [2003] 1 AC 32, the House of Lords held that a defendant was liable for mesothelioma if it materially increased the risk of injury. Some debate occurred as to what *Fairchild* precisely decided. The majority recognised *Fairchild* as creating an exception to the normal causation requirements. That is, that case established that a defendant is liable if it materially contributed to the risk of an injury (mesothelioma), even though it could not be actually proven that the defendant's act or omission caused the injury.

Fairchild created this causation exception to address the perceived injustice of a plaintiff exposed to asbestos by successive defendants, but who (on normal causation requirements) could not actually prove which exposure caused mesothelioma (as science could not provide a definitive answer). Thus:

- Lord Hoffmann noted *Fairchild* imposed liability because a defendant's conduct *may* have caused the harm [40] and that case created a narrow exception to the causation requirements of single agent cases [64]
- Lord Scott described *Fairchild* as imposing liability not because a breach of duty *had* caused mesothelioma, but that the breach materially contributed to the *risk* of contracting the eventual disease [53].

The defendants had argued that, because *Fairchild* broke new ground in altering a causation test to favour plaintiffs, a corresponding response was required to limit the boundaries of that by recognising that a negligent defendant should only be liable for its portion of creating a risk of injury.

The majority favoured that approach as the better development of the law. Lord Hoffmann said [at 43]:

In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. 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.

Baroness Hale noted that there was no magic in indivisibility of harm. If the harm were indivisible, she argued that material contribution to risk could be divided [126]. The issue was one of policy and she found it fair that a defendant's contribution to liability in a *Fairchild* type case (materially increasing the risk of harm) is in proportion to the contribution it made to the risk of harm occurring [127].

Lord Rodger, in a stern dissent, suggested that the majority were rewriting *Fairchild* and 'spontaneously embarking' upon an adventure to redefine the nature of damages suffered by victims [86]. He saw the real reason for altering apportionment as based upon solvent defendants being concerned about insolvent defendants.

Lord Rodger would maintain the usual rule of liability *in solidum* for a material contribution to an indivisible injury.

Impact

The House of Lords has thus recognised exceptional requirements in respect of causation and liability for single toxic agent type cases involving indivisible damage (e.g. asbestos fibre causing mesothelioma).

The Dust Diseases Tribunal of New South Wales has traditionally held defendants jointly and severally liable for mesothelioma. It is not strictly bound by the House of Lords, but will no doubt view this decision as an authoritative one. Australian courts may, however, adopt an approach that, absent (and until) any similar decision by the High Court of Australia, they would follow the current common law application of joint and several liability.

AGS proposes to have discussions with counsel on whether this House of Lords decision paves the way for possibly arguing for proportionate liability in our courts for these classes of asbestos cases.

Text of the decision is available at:

<http://www.bailii.org/uk/cases/UKHL/2006/20.html>

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