



9 March 2011

## PRESS SUMMARY

**Sienkiewicz (Administratrix of the Estate of Enid Costello) (Respondent) v Greif (UK) Limited (Appellant)**

**Knowsley Metropolitan Borough Council (Appellant) v Willmore (Respondent)**

**[2011] UKSC 10**

***On appeal from the Court of Appeal [2009] EWCA Civ 1159 and [2009] EWCA Civ 1211***

**JUSTICES:** Lord Phillips (President), Lord Rodger, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Dyson

### BACKGROUND TO THE APPEALS

A special rule has been developed for cases brought by persons who contract mesothelioma after being wrongly exposed to asbestos, known as the *Fairchild* exception after the decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. This provides that defendants whose breaches of their duty of care ‘materially increase the risk’ of mesothelioma are jointly and severally liable for the damage suffered if mesothelioma does in fact develop. The rule relaxes the usual requirement that a claimant must show that it is more likely than not that the harm he has suffered has been caused by the defendant’s breach, in order to reflect the fact that medical science cannot presently determine which asbestos fibre or fibres has caused the mesothelioma to develop, often decades later. The issue in these two appeals was whether this special rule applies in cases where only one defendant is proved to have exposed the victims to asbestos, but where the victims were also at risk of developing the disease from environmental exposure to asbestos in the general atmosphere.

Mrs Karen Sienkiewicz is the daughter and administratrix of the estate of the late Mrs Enid Costello, who died of mesothelioma on 21 January 2006 at the age of 74. Mrs Costello had worked in an office at factory premises manufacturing steel drums for employers who were found to have wrongly exposed her to asbestos, although the level of that exposure was ‘very light’. This was calculated by the trial judge to have increased her total level of exposure, over the general environmental exposure, by 18%.

Mr Barre Willmore is the husband and administrator of the estate of the late Dianne Willmore who died of mesothelioma on 15 October 2009 aged 49. She was found to have been exposed to asbestos at her secondary school.

In Mrs Costello’s case, the judge held that the *Fairchild* exception did not apply and that she had failed to establish that her occupational exposure to asbestos was the likely cause of her disease. This decision was reversed by the Court of Appeal, which entered judgment on liability with damages to be assessed. The judge in Mrs Willmore’s case applied the *Fairchild* exception and awarded her damages of £240,000. The Court of Appeal upheld his decision.

The defendants in each case appealed to the Supreme Court, arguing that the *Fairchild* exception should have been held to be inapplicable when proceedings are directed against one defendant. They submitted that, in such cases, liability could only be established if a claimant could prove on the balance of probability that the mesothelioma was caused by the defendant’s exposure ie that such exposure had at least doubled the risk of the victim developing mesothelioma.

## JUDGMENT

The Supreme Court unanimously dismisses the appeals. It holds that the *Fairchild* exception applies to cases of mesothelioma involving a single defendant and that there is no requirement for a claimant to show that the defendant's breach of duty doubled the risk of developing the disease.

The main judgment is given by Lord Phillips, with each of the other justices adding shorter judgments concurring in the result. Numbers in square brackets below are to paragraphs in the judgment.

## REASONS FOR THE JUDGMENT

- Knowledge about mesothelioma is based in part on medical science and in part on statistical analysis or epidemiology. It is summarised at [19] and in the annex after [112]. Much remains still to be discovered. The courts may revert to the conventional causation test if advances in medical science in relation to this disease make such a step appropriate [70][142][208].
- The decision in *Fairchild* was made in the context of claims against multiple employers who had each been found to be in breach of duty. It left open the question of whether the principle applied where other possible sources of injury were similar but lawful acts of someone else or a natural occurrence. In the subsequent case of *Barker v Corus* [2006] UKHL 20 the House of Lords answered this question by refining the exception so as to render each employer liable only for the proportion of damages which represented his contribution to the risk. Parliament then intervened to overturn this apportionment of damages, by providing in section 3 of the Compensation Act 2006 that where a person was liable under the common law in tort to a victim who had contracted mesothelioma, that liability was for the whole of the damage caused by the disease, jointly and severally with any other responsible person. Parliament has therefore legislated to impose draconian consequences on an employer or his insurers who has been responsible for only a small proportion of the overall exposure of a claimant to asbestos and the court had to have regard to this when considering the issues in these appeals [58][131][167][185].
- The *Fairchild* exception did apply to single defendant cases [103][113]. The 'doubles the risk' test for causation was therefore only potentially relevant in connection with the question of what constituted a material increase of risk. There was no justification for adopting the test as a benchmark for this. Whether exposure was too insignificant to be taken into account, having regard to the overall exposure, was a matter for the judge on the facts of the particular case [107-108].
- Epidemiological evidence alone is not a satisfactory basis for making findings of causation. The exercise of comparing the statistical relationship between exposure and the incidence of the disease with the experience of the individual victim is particularly problematic in mesothelioma cases because of the very long latency of the disease [97-102][163][172]
- Accordingly the appeals must be dismissed. Even though the judge in Mrs Costello's case did not expressly consider whether the exposure in her case materially increased the risk, if he had thought it insignificant he would have said so [109]. In Mrs Willmore's case, the challenges to the judge's findings of fact also failed. The court considered that they had been very generous to Mrs Willmore but that it was not justified in taking the exceptional step of disturbing them [166]

## NOTE

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgements are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)