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Judgment: Approved by the court for handing down (subject to editorial corrections)

Case No: 00/TLQ/1284

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2001

Before:
THE HON MR JUSTICE CURTIS

JUDITH FAIRCHILD
(Suing on her own behalf and on behalf of the Estate of and Dependants of ARTHUR ERIC FAIRCHILD, Deceased.
Claimant
and
GLENHAVEN FUNERAL SERVICES LIMITED T/A G.H DOVENER & SON **First Defendants**
and
WADDINGTONS PLC **Second Defendants**
and
THE LEEDS CITY COUNCIL **Third Defendants**

Mr A Hogarth (instructed by O.H Parsons,London for the Claimant)
Mr Stephen Stewart QC (instructed by Halliwell Landau for the 2nd Defendant)
Mr Michael Taylor (instructed by Leeds City Council for 3rd Defendant)

JUDGMENT

Mr Justice Curtis:

This is a reserved Judgement in three PARTS .

Part 1. CAUSATION

8Part 2.. THE OCCUPIERS LIABILITY ACT CLAIM AGAINST THE THIRD DEFENDANT

Part 3. QUANTUM

PART 1

[CHAPTER 1] BACKGROUND

The deceased Arthur Fairchild's date of birth was 18th October 1935.

His work record included:-

1.A. working as a joiner for **G.H. DOVENER** making lined packing cases for ovens.

1 B. working as a joiner for the same firm on outside maintenance jobs for **LEEDS CITY COUNCIL** and in particular a major renovation job at **MEANWOOD SWIMMING BATHS** in about 1962.

2. working as a concrete floor maker for **BISONS FLOORS** 1962 to 1964

3.(A) working for **B. SLACK & SONS of LEEDS**, general builders, as a roof repairer, particularly on the roof of **PROCTOR & GAMBLE's** factory at LEEDS in 1964 to 1968.

- (B) working for the same firm as a joiner at **WADDINGTON's** building at **PATRICK GREEN** LEEDS which was 'gutted' and converted into a factory. This was in or before 1968, since he left SLACK's employ in that year. The main job lasted 6 to 8 months, and thereafter the deceased made periodic maintenance visits to the Factory now established.

4. working for two road-making Companies 1968 to 1970

5. working for **BISONS FLOORS** 1970 to 1996

In 1995 the deceased began to exhibit symptoms of mesothelioma which were diagnosed for certain in 1996. On 18th September 1996 he died from that disease (Agreed Fact No. 1)

His widow brings this Action for damages under the *Law Reform and Fatal Accidents Acts* against the occupiers of the two buildings at which any meaningful exposure to asbestos is said to have occurred viz MEANWOOD SWIMMING BATHS (Job 1B) and the WADDINGTON building (Job 3B). It is not suggested there was any exposure at all to asbestos in Jobs 2, 4 or 6.

Both the deceased's then employers on those jobs have long since ceased to trade and have not figured in this action.

[CHAPTER 2]. ESSENCE OF THE CLAIMANTS CASE.

The Claimant's case is that the deceased was exposed to substantial quantities of asbestos fibres at the BATHS and WADDINGTON's building. In each case major works of renovation or adaption were carried out: the deceased was present at each by reason of his employment, and this exposure was created by workmen employed by other contractors on the same site.

It is not disputed that the second and third defendants were the occupiers of the relevant premises and that in the case of the second defendants, the later part of the exposure to which the deceased was subjected involved a breach by those defendants of their statutory duties as occupiers of a factory. Otherwise the claims against both are under ***the Occupiers Liability Act 1957***

It is further agreed that the deceased was on both jobs exposed to substantial quantities of "lagging-derived asbestos containing debris and dust". No type of asbestos is identifiable.

[CHAPTER 3] THE MEDICAL EVIDENCE

All three of the distinguished Physicians concerned in this case are in agreement upon the medical issues. Their opinions are incorporated in a written document dated 15th January 2001 which in turn incorporates but also enlarges on a previous similar document dated 10th January 2001. Doctors **RUDD** and **MOORE-GILLON** gave some oral evidence to me.

I summarise the main points

1. the cause of death is agreed [see Chapter 1]

2. the exposure to asbestos occurred during the Deceased's employments.

3. there is no scientific means of ascertaining from which source of exposure came the single asbestos fibre, or if it be the case, the fibres, responsible for the malignant transformation of the pleural cell.

It follows the exposure causing the disease could be at either of the named premises or in combination - and none are more likely than the other.

4. The mechanics of the disease are not within medical knowledge at the present day

It is received medical opinion that mesothelioma is in 90% of cases caused by exposure to asbestos and that it arises when one cell in the pleura is damaged. The mechanism is supposed to be on these lines: that due to one or maybe more fibres "hitting" the "cell," or exciting a reaction in other cells thereby releasing chemical

"mediators," the cell turns malignant. The malignancy could equally be caused by a combination of the direct or indirect processes described.

5. the number of fibres inhaled is immaterial. It is not known whether a single or multiple fibres trigger the onset of malignancy - each situation is as likely as the other.

6. the only relevance of the number of fibres is in connexion with the RISK of contracting the disease since it is possible that the more fibres which are inhaled, the greater are the chances that one will succeed in initiating the fatal mutation.

7. Mesothelioma is an all-or nothing disease: it is thus different from asbestosis or pneumoconiosis which are cumulative diseases.

8. it is medical belief, and no more, that the development of malignancy is a multi stage process involving a sequence of perhaps 6 to 7 genetic changes which together result in a normal cell becoming a malignant cell. Asbestos may act at one or more of these stages: there is no evidence such action at one stage is more or less likely than action at more than one stage nor whether such actions are by one fibre or more than one.

It is clear beyond peradventure in any judgment that in the light of the opinions of these most highly qualified medical men, it simply cannot be said in this case:-

[1] whether a single fibre of asbestos is more or less likely to have caused the disease

[ii] whether more than one fibre is more or less likely to have caused the disease

[iii] even if multiple fibres are responsible, it cannot be shown that it is more likely than not those fibres came from more than one source.

[iv] no Court could find on the facts of this case that the deceased's fatal disease was caused cumulatively by the exposure's at Defendant Three and Defendants Two named premises

[CHAPTER 4] LAW

If matters stood 'free' at this stage, I would unhesitatingly hold, though reluctantly, that the claimant is unable to establish on the balance of probabilities that the breaches of duty by either defendant were a cause or a material contribution to the deceased mesothelioma. I find the factual position to be as follows:

(1) There is no question of a cumulative effect flowing from breach(es) of duty by Defendant Two or Defendant Three. Thus the situation in ***HOLTBY & BRIGHAM & COWAN (HULL) LTD 2000 3AER 421*** is different.

(2) It would be wrong to find that both the second and third contributed to the disease - it is equally probable only one did.

(3) It cannot be decided:-

(a) when a fibre "hit" the cell which later became malignant or triggered the bodily reaction called release of chemical mediators so in particular I cannot say that an earlier "hit" was more likely to have initiated the disease

(b) whether it was one fibre or more than one that was/were the initiator of the disease.

(c) whether there was any material difference between the level of exposures alleged to be the responsibility of each Defendant.

- THE CLAIMANT's SUBMISSIONS ON LAW.

Mr HOGARTH made erudite and interesting submissions. His argument on causation is set out in his Opening Summary. In essence he submits to me that a line of four cases is "identical" to the present case and require me to find for the claimant.

He formulated his first submission, on ***BONNINGTON CASTINGS v WARDLAW [1956 AC 613*** as follows "a defendant may be liable to pay damages for the consequences of his non negligent acts if those acts have the effect of exposing a claimant to the same cause of potential injury as his negligent acts".

This submission in my view is wrong: ***BONNINGTON*** made it clear and ***WILSHER v ESSEX HEALTH AUTHORITY [1988 AC 1074]*** in my view affirmed it, in saying that a defendant is only liable if the claimant can prove that his negligent acts did in fact cause, or materially contribute to his injury, not merely to the risk of injury.

He formulated his second submission by referring to the first of the above-described four cases namely ***McGHEE v NCB 1973 1 WLR (HL)*** thus:-

"A defendant will be liable to a claimant for the whole of the damage he has suffered if his negligent act has materially increased the risk that he will suffer an injury, even in circumstances in which the preponderence of probability is that it was the Defendants' non-negligent acts which caused the Claimant's injury, provided the risk was created by the same physical cause or "agent"

Counsel strongly relied on **Mustill LJ's** formulation, in the majority decision in the Court of Appeal in ***WILSHER (1987 QB 730 at 771)*** of the ratio of McGHEE's case - a dermatitis case with two negligent acts in succession allegedly causing the damage (distinguish the instant case)

Mustill LJ said:

"the principle applied by the House of Lords seems to me to amount to this. If it is an established fact that conduct of a particular kind creates a risk that injury will be caused to another or increases an existing risk that injury will ensue, and if the two parties stand in such a relationship that one party owes a duty not to conduct himself in that way, and if one party does conduct himself in that way and if the other party does suffer injury of the kind to which the the injury related then the first party is taken to have caused the injury by his breach of duty even though the existence and extent of the contribution made by the breach cannot be ascertained"

As we shall see later, these words figured large in the subsequent case on which the claimant most strongly relies namely ***BRYCE v SWAN HUNTER PLC [1987 2 Lloyds List Reports 426]***, a decision of **Phillips J.** and a road traffic case in the Court of Appeal, ***FITZGERALD v LANE [1987 1 QB 791]*** This last case was cited in Argument in ***WILSHER*** in the House of Lords but not referred to by the House in their speeches.

In my judgment, the House

(1) rejected the above analysis of ***McGHEE*** and

(2) made it clear that ***BONNINGTON*** was still good law namely that the burden of proving causation rested on the plaintiff. See page 1088 at (A) where the true ratio is discovered and page 1090(C) where the House held that ***McGHEE*** laid down no new principle of law whatever: the majority of the House ***McGHEE*** had concluded that it was a legitimate inference of fact that the defendants negligence had materially contributed to the pursuer's injury and approved the Vice-Chancellor's dissenting judgment below which began

"to apply the principle in McGhee v NCB.. to the present case would constitute an extension of that principle"

I am bound by the House of Lords decision: that I agree with it is immaterial. The claimant's argument cannot survive it, and I therefore reject the argument.

Counsel for the claimant's third submission is in these terms

"All defendants will be held liable to a claimant for the whole of his damages when it is impossible to establish whether it was his act or another's act which caused the damage, provided that the damage which occurred is within the type of risk which he creates. One Canadian and one American case are cited in support. In my view the proposition is untenable in English and Welsh Law.

Counsel's fourth submission reads

"Propositions 1,2 and 3 remain true even when the evidence establishes that the same other party may have caused the damage, even if it is more likely than not that the other person did in fact cause the damage. Proposition 6 is to much the same effect

FITZGERALD v LANE [1987 1 QB791] is cited. This was a road traffic case where the plaintiff pedestrian was hit by the first defendants's car, struck the windscreen of it, was thrown into the road, and struck by the second defendants car. The trial Judge rejected the first of the four causes advanced for the plaintiffs tetraplegia namely the collision with the first defendants car but held there was an equal probability of the three subsequent above described impacts doing so (page 805(C). The decision by the Court of Appeal and **Mustill LJ's** formulation of the "McGhee principle" ***WILSHER*** was crucial to the Court's

judgment (See page 807 to 808F) and **Evelegh's LJ's** reasoning at 810 (E) to (H)

It is true the case was not expressly over-ruled in ***WILSHER*** by the House of Lords. My frank view is that the principles contained in it were implicitly over-ruled. I content myself with saying it is a decision upon its own facts, should be so confined and is distinguishable from the facts of this case sufficiently for me to say it is a unsafe precedent for me to follow in the instant case. It is noteworthy that in ***FITZGERALD*** the probable causes acted cumulatively as in pneumosoniosis, whereas in the instant case the claimant cannot show the disease was caused other than by a single "hit" (fibre)

BRYCE's case is relied as in support of the proposition cited and it is the closest of all the cases to the facts of the present case. But it is persuasive authority only. More importantly was the decision, made before the restatement of the law in ***WILSHER*** by the House of Lords but after the Court of Appeal decision, correct?

I am grateful to Mr Stewart QC (Counsel for the Second Defendant) for his step by step analysis of **PHILIPPS J's** approach to the case. I have re-read the case and **WILSHER**, and in summary I find myself in agreement with Mr Stewart's analysis. It follows that the Judge's finding at page 442 that the plaintiff could successfully invoke the "principle in McGhee" as then understood cannot assist this claimant.

The respects in which the analysis particularly convinced me are:-

(1) the Learned Judge must be taken to have misdirected himself at page 439 when dealing with the law, in holding that ***McGHEE's*** ratio was that "where a disease has been caused by a mechanism which is unclear, one can properly infer that a breach of duty which increased the risk of the disease thereby contributed to its cause"

In my view he must be taken to have elevated a factual situation, and proper inferences from it, into a legal principle.

It cannot be right that such an inference can be drawn against the evidence in the case, which it would have to be in the instant case to get the claimant home (See the agreed Medical findings)

(ii) the reliance placed in the judgment in **Lord SIMON's** speech in ***McGHEE*** ***(page 8 B-D)*** omits the preceding and qualifying passage which reads **"BONNINGTON and NICHOLSON v ATLAS STEEL FOUNDRY 1957 1WLR613** establish....that where an injury is caused by two or more factors operating cumulatively, one (or more) is a breach of duty and one (or more) is not so in such a way that it is impossible to ascertain the proportion in which the factors were effective in introducing the injury or which factor was decisive, the law does not require a...plaintiff to prove the impossible but holds that he is entitled to damages for the injury if he proves on the balance of probabilities that the breach or breaches...contributed substantially to causing the injury. If such factors so operate cumulatively it is in my judgment immaterial whether they do so "concurrently or successively."

In the instant case no question of cumulative breach arises.

Similarly the reliance on **Lord Salmon's** speech omits reference to an earlier critical passage at page 11 F-G where he stressed the pursuers duty to prove causal connexion between his injury and the defender's negligence and pointed out it was not necessary to prove that it was the only cause. He went on

"a factor by itself may not be sufficient to cause injury but if with other factors it materially contributed to causing injury it is clearly a cause of the injury...in the circumstances of this present case it seem to me unrealistic and contrary to common sense to hold that the negligence which materially increased the risk of injury did not materially contribute to causing the injury"."

To me this reads like a finding on the facts of the case only.

(iii) the Judge's conclusion after these quotations and the recital of **MUSTILL LJ's** judgment (quoted above) was as follows

"I find however that the plaintiff can successively invoke the principle in *McGHEE* as identified by the Court of Appeal in ***WILSHER*** . Whether the defendants' breaches of duty merely added to the number of possible initiators of mesothelioma within the lungs of Mr Bryce or whether they also produced a cumulative effect on the reduction of his body's defence mechanism, they increased the risk of his developing mesothelioma. He developed mesothelioma. Each of the defendants [there were three] must accordingly be taken to have caused the mesothelioma by its breach of duty"

In the light of ***WILSHER*** , my view is that the above reasoning is flawed, that **BRYCE** is not to be followed, and most certainly does not afford a definitive guide to the resolution of the issues of causation arising in this case.

For the record, I have read *NICHOLSON v ATLAS STEEL 1957 1 WLR613* which I do not think requires separate analysis and I have not overlooked the criticism of **Lord**

Wilberforce's speech in *McGHEE* quoted by the trial judge in *BRYCE,* made in the *WILSHER* case. That speech cannot be treated as authoritive.

There must be judgment for both defendants in the issues of causation for the same reasons.

I must now deal with the Third Defendants position under the *OCCUPIERS LIABILITY ACT 1957* and the one other issue, that of general damages which remains unagreed.

PART II

OCCUPIERS LIABILITY ACT CLAIM v THIRD DEFENDANT

I propose to state my findings and then deal summarily with this part of the case in view of my decisions on causation.

Leeds City Council were the occupiers of the Meanwood Swimming Baths and hired the then employers of the deceased, *G.H. DOVENER & SON,* along with other contractors to carry out in 1962, the "complete renovation" of the Baths (deceased's affidavit Y.B.119). The work included stripping of the boilers and pipework. His work as a joiner did not always take him near the stripping out but there was a great deal of dust: it was his "biggest" site and "the most dusty". He was by 1962 an experienced workman. As the documents of the day have all been destroyed the evidence of the standing of **G.H. DOVENER** is sparse. It was clearly a family business owned by a Leeds City Councillor. They employed the deceased for 12 years before and two years after his National Service. They held a number of municipal contracts. I am not prepared to find 52that they were other than a reputable firm, and the same goes for the other

subcontractors in other trades including those in charge of the de-lagging work in particular. I have no help from the experts about the nature of the work and how many and if so what trades would have been engaged in this venture but in view of the size of the operation it seems to me, and I so find, that the City Council were entitled to engage a multiplicity of trades and entrust them with work inside their professional competence. We do not know what joinery work the deceased was engaged upon nor its relation to the de-lagging work. But it seems common sense to me that the primary duty for ensuring the deceased's safety from asbestos dust created, lay with his employers by keeping him away from it, or providing breathing equipment or taking reasonable steps to see the employers of the "de-laggers" minimized so far as was reasonably practicable the profileration of dust near their own personnel Likewise that there was nothing by way of an esoteric or special situation created by a perfectly normal site renovation such as could be seen up and down the country on innumerable sites at that time.I have considered ***MAKEPEACE v EVANS BROS [Unreported: 23 May 2000 NF 1999/0425/A2*** and the allegations pleaded at paragraph 7 of the Re Amended S/C against Defendant Three. They all relate in my view to matters which the Council could and did reasonably leave to the contractors they regarded as competent and "in charge". There is nothing sufficient to show they should have 'policed' them in some or any particular way. Mr Hogarth in a last ditch submission suggested that there was an evidential burden on these defendants to show that the "defect" in the premises arising from the activities upon them was caused by independent contractors. Though in appropriate cases such a burden

may arise as in the case urged by him as a binding precedent namely ***CHRISTMAS v BLUE LINE et al [1961 1LL Rep 94]*** I do not regard it as a universal rule See ***SOUTER v BARCAL DESIGN et al [1989 CA Transcript]*** and certainly not applicable in this case. It is obviously a fair inference here without more that Local Authority like the Third Defendants would use such contractors to carry out the necessary work. In any event as the Third Defendants were added at the last minute when the opportunity of investigation and finding any documents were long since lost, it would be inequitable to adopt such an approach.

I have considered the dicta in ***FERGUSON v WALSH [1987 1WLR1555]***especially those at **LORD GOFF** at page 1564 quoted in ***MAKEPEACE.***

I am unable to find there were any special circumstances calling upon the occupiers to take action above the norm. In this connexion, I respectfully adopt the tests posed by **EADY J.** in ***BABCOCK INTERNATIONAL LTD v NATIONAL GRID PLC [Unreported 15th June 2000 QB Case No.1999 B No.567 p6, at paragraphs 18 and 19]***

"In any event one would come back to the fundamental question of what "reasonable care" (and I would add the common duty of care which was law in 1962 but not when the **BABCOCK** case arose) in this context means. It seems to me that here what was required was simply to instruct competent and skilled companies to carry out the necessary steps for the construction of the power station, including the installation of boilers and the associated equipment as well

as the lagging of the pipes in accordance with current standards. I need to apply the test consistently with that of **Lord DENNING** [in ***ROLES v NATHAN 1WLR1117,1123]*** but adapted to the present facts as follows 'Could the...occupier of the power stations under construction reasonably expect the various specialist firms to take care of their staff so far as the risks associated with the lagging of power station boilers were concerned"

Counsel have further debated whether the occupiers either knew or ought to have known of the hazards of asbestos and the creation of asbestos dust by work of repair or renovation.

I am indebted to **His Honour Judge BUSH in *DYSON v FIELD ex Ors of LAWRENCE TWOHEY [on Appeal to the Court of Appeal*** for an exposé of the relevant literature on the topic which also figures in **Phillips J's** judgment in BRYCE and in the Report of Mr DEARY Consultant Engineer page 158 to 173 of the Bundle. He concludes "in my view" (and it is a well qualified man in this branch of work speaking - See page 176) "during the material period there was sufficient authoritive literature in the public domain for the Defendants [i.e. the First and Third Defendants] to have realised that workmen who were being exposed to asbestos dust in this manner in which the Deceased was likely, being exposed (sic) to such dust, were being put at risk to their health".

I accept that evidence, and find accordingly. There is no material, direct or by inference, upon which to make a finding that the Third Defendants actually knew of that risk and I decline to do so.

It follows that there must be judgment for the Third defendants upon the issue of liability under ***The Occupiers Liability Act 1957.***

For the record Mr CLARK the only expert to give oral evidence before me gave as his off the cuff opinion in it that the Third Defendant were in breach of an unspecified Regulation but presumably Regulation 82 of the ***BUILDING (SAFETY HEALTH & WELFARE) REGULATIONS 1948***. No such allegation was pleaded. The matter has not been explored in any way in the Expert's Report nor in his evidence. I decline in those circumstances to make any finding on this part of his evidence.

PART 3 QUANTUM

The deceased was 60 at the date of his untimely death.

It is difficult to imagine a more drawn-out or painful way in which to die. The deceased bore it all with fortitude. He was on massive doses of morphine as he approached his end. I am sure his affidavit is truthful about the course of his illness - having to give work in February 1996 after the onset of symptoms no later than May 1995. He knew from February 1996 he was dying. Operations to mitigate his physical suffering took place (e.g. May 1996) but he also suffered mental distress. [Dr RUDD's agreed REPORT 28.7.2000]

By the end his right lung was "obliterated by tumour": the tumour had invaded the chest wall, diaphragm and pericardium" (See Post Mortem Report).

Counsel have referred me to eleven High Court Awards 1990 to 1999 and the 5th Edition of the JSB Guidelines on General Damages.

In this particular case, the appropriate General Damages are £50,000 . Were I able to find for the Claimant, that would be the sum I would have awarded her.