Rights of British mesothelioma victims restored

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The following article was submitted to the World Socialist Web Site *by Anthony Coombs, of John Pickering & Partners, who acted for Doreen Fox and Edwin Matthews, two of the three appellants in the historic House of Lords legal decision of May 16, 2002, which restores the rights of most asbestos cancer victims to be compensated through the court system.*

In December 2001, The Court of Appeal had decided in these cases that where a mesothelioma sufferer had worked with asbestos for two or more employers, he or his widow would not recover damages, because it could not be proved in which employment the fatal fibre or fibres that might have triggered the cancer had been inhaled.

In January 2002, the House of Lords gave permission to appeal to Mr Matthews and Mrs Fox, and later to another appellant, Mrs Fairchild. A hearing date was fixed on 22 April 2002.

In April 2002, shortly before the hearing, the Association of British Insurers (ABI) approached the Association of Personal Injury Lawyers (APIL) and the Trades Union Congress (TUC), with a draft scheme for all mesothelioma victims. This provided for compensation on a proportionate or time-exposed basis. It would have resulted in much lower compensation payments than had been given to victims prior to the Court of Appeal decision. The victims would still have to prove compensation in the normal way. It was proposed that compensation would be "discounted appropriate to reflect early payment, simplified procedure, and the elimination/reduction of legal risk." The scheme further provided for fixed or otherwise limited costs. It was not said who would assess proof, damages or costs. APIL took soundings from a specialist group already formed, and told the ABI that it would not recommend the scheme to its members.

With the Appeal before the Law Lords still fixed on 22 April, insurers then made offers in full settlement of their claims to the three victims. Each offer was conditional upon all three offers being accepted. The insurers also stipulated that if the House of Lords ordered that the Appeals should continue in spite of the offers being accepted, then the offers were immediately withdrawn. The terms of the offers had to be kept confidential. The appellants were given approximately 24 hours to decide. One of our clients, Mrs Doreen Fox, rejected the offer. Although she was offered £115,000, a large amount of money for a widow living on benefits, she knew that the result of the offers being accepted would be the continuation of the law as laid down by the Court of Appeal. This would mean that the majority of asbestos cancer victims in the future would not be compensated at all, unless the scheme proposed by the ABI was introduced. The other two appellants had similar reservations about accepting the offers made to them in these circumstances.

At the same time, or shortly before offering compensation, solicitors newly instructed by the ABI filed an unsigned Petition at the Judicial Office of the House of Lords. It said, "the present appeals will be settled by the payment of damages and costs. There will be no dispute left for decision by the House." This Petition asked that the three appeals should be "withdrawn by consent, or directions given."

The court staff were told that there was no possibility that the Appeals would proceed. Based on that information, the House of Lords withdrew the Appeals from the list on 22 April, and brought forward another case to be heard. We, as the lawyers for the appellants, knew nothing about this, and only found out after the Appeals had been removed from the list. We protested through counsel, but it was unfortunately too late to restore the full hearing. It was arranged that a short hearing would take place on 22 April to discuss what had happened, and decide whether the appeals could proceed.

It became clear to us that the intentions of the insurers, coordinated by the ABI, were (1) to prevent the House of Lords from hearing the Appeals at all; (2) to retain the benefit of the Court of Appeal decision for all future cases; (3) to force through a scheme for mesothelioma victims against the background of the Court of Appeal decision remaining good law, providing for proportionate or time-exposed liability, further discounts on damages, and fixed or limited costs. There was a substantial risk that this strategy would succeed, because the ABI had succeeded in removing the Appeals from the list for hearing on 22 April.

A hearing took place on the morning of 22 April. Sir Sydney Kentridge QC represented the appellants. Sir Sydney is a living legend and part of legal history. He was one of Nelson Mandela's defence team in 1961 and represented the family in the Steve Biko inquest, later moving to practice in London.

Sir Sydney told their Lordships about the misleading assurance given to the Court that all three cases would be settled. At the time this assurance was given, offers had not been accepted. In at least one case, no offer had been made. He called this "a sordid attempt to manipulate the judicial process." Their Lordships seemed to accept this description. Lord Bingham, who chaired the panel, observed: "All their Lordships well understand why you wish to

express the dismay that you feel at the terrible events that you have just described. I think that you can take it that we all share that sense of dismay." Lord Hoffmann said; "It is one thing to tell the House that an offer is being made which will render the substance moot, and to ask the House in its discretion to dismiss the hearing. It is another thing to tell the House that the Appeal has been settled."

Lord Brennan QC, for the ABI, submitted that the three appeals, whether or not the offers were accepted, could not proceed. He relied upon a case of Sun Life Assurance Co of Canada v Jervis (1944) 1 All ER 469, in which it was decided that it would not be a proper exercise of the authority of the House of Lords hearing appeals of a purely academic nature which would not affect the respondent (in this case the insurers) in any way. He also relied on a later case Ainsbury v Millington (1987) 1 All ER 930 in which Lord Bridge said that this limit on discretion would not apply to proceedings instituted specifically as a test case (and contended that these three appeals were not test cases). He argued that although their Lordships had discretion to hear a public law case even if there was no practical effect on the individual parties, these asbestos cancer cases were private law cases, in which the insurers' offer of full damages and costs meant that there was nothing in reality left to be decided. The ABI submitted that the House of Lords had no discretion to hear these three appeals.

The Law Lords disagreed. Although their Lordships did not give reasons for their decision to allow the three appeals to proceed in spite of the offers in settlement, Lord Bingham stated: "Their Lordships regard the course of events over the last few days as highly regrettable. We are however in no doubt at all that the appeal hearings should proceed." We speculate that it must have been important that Mrs Fox had rejected the offer made to her, that the cases were test cases in any true sense of the words, and that they raised an important matter of law that the public interest demanded should be clarified.

But had it not been for the courage and principle of Mrs Doreen Fox in rejecting the money offered to her, there must have been a serious risk that these Appeals would not have proceeded, and that the Court of Appeal decision would have remained intact. The entitlement of hundreds of current asbestos cancer victims to compensation, and thousands of future victims, would have been ended. Mrs Fox cannot be praised too highly for her courage and principled decision.

The hearing was re-listed with expedition by their Lordships on 7th May. The panel consisted of Lord Bingham, Lord Nicholls, Lord Hoffmann, Lord Hutton, and Lord Rodger.

Sir Sydney Kentridge, again for the appellants, submitted that the cases were closely comparable to McGhee v National Coal Board 1973 1 WLR 1, and that justice required that the Appeals be allowed. The Respondents relied upon Lord Bridge's formulation in the case of Wilsher v Essex Health Authority 1988 AC 1074, to the effect that the McGhee decision "laid down no new principle of law." They argued that McGhee had to be explained in terms of a material contribution to a cumulative condition and did not apply to an indivisible condition such as mesothelioma. Neither side suggested time-exposed or proportionate liability. The Respondents' counsel described the cases as "all or nothing."

Within hours of the hearing ending, their Lordships announced that a decision would be given on 16 May 2002, and reasons would be given at a later date. As of writing, we do not have the reasons.

The decision given on 16 May was that the five Law Lords upheld the victims' appeals unanimously, and the Court of Appeal decision was set aside. It is necessary to speculate that their Lordships considered that in industrial disease cases in which the agent (here asbestos) causing the injury was known, but the precise mechanism of how it causes the injury is not understood, then the epidemiological and medical approach of treating a material increase in risk as a material contribution to cause, is the correct one. The evidence in these cases was that anyone who had worked with asbestos and experienced substantial exposure had their risk of contracting the disease increased by up to one thousand times.

Apart from the English and Scottish authorities, we had researched American, Australian and Canadian authorities. In this respect, we owe much to our Australian colleagues, Turner Freeman & Co., who had been at the forefront of earlier asbestos disease causation battles in the Australian courts.

Their Lordships called in addition for European authorities. We obtained the impression that they would regard it as undesirable if the law applicable to a British factory was, for example, different from the law applicable to a factory in Holland. European codes of authority, on the whole, supported the principle of finding two or more wrongdoers liable to compensate a victim in a situation in which either or any of them might have caused the injury, and therefore supported the "material increase in risk" approach to causation.

Estimates of the cost of this decision to the insurance industry have varied widely. The ABI estimate of up to £200m a year payable in total mesothelioma compensation claims is probably correct.

Several hundred cases have been halted for more than a year. Many people will have died during this time. This is the most regrettable part of this history. We hope that it will now be possible to settle most of these claims.