



Informing Progress - Shaping the Future

FOIL Update 15th May 2025



Johnstone v Fawcett Garage (Newbury) Limited EWCA Civ Case Note: A Detailed Analysis of Causation in Mesothelioma Claims

Introduction

The Court of Appeal's decision in *Johnstone v Fawcett Garage (Newbury) Limited* EWCA Civ provides a significant and instructive analysis of causation in mesothelioma claims, particularly in the context of low-level and indirect asbestos exposure. This case note examines the facts, the reasoning of the trial judge, the grounds of appeal, and the implications for practitioners involved in asbestos litigation.

Factual Background

The deceased, Mrs Elaine Johnstone, was employed as an office worker by Fawcett Garage (Newbury) Limited between 1982 and 1989. The office was situated across a yard from the garage workshop. During her employment, mechanics in the workshop regularly used a compressed air-line to clean asbestos dust from brake shoes and clutch plates. Mrs Johnstone's widower, Mr Alexander Johnstone, brought a claim under the Fatal Accidents Act 1976, alleging that these practices exposed his wife to asbestos fibres, materially increasing her risk of developing mesothelioma.

The defendant admitted that compressed airlines were used in the workshop and that this practice was negligent. However, it denied that Mrs Johnstone's exposure was sufficient to constitute a material increase in risk.

The Decision at First Instance

His Honour Judge Simon, sitting as a High Court Judge, found that Mrs Johnstone had indeed been exposed to asbestos as a result of the defendant's practices. However, he concluded that the

exposure was so low that it did not amount to a material increase in risk. The judge's approach comprised three principal stages:

Assessment of Workshop Exposure (Raymond Russell's Exposure):

The judge first considered the exposure of a mechanic, Raymond Russell, who worked in the workshop and directly used the compressed airline. The exposure levels for Mr Russell were calculated based on historical occupational hygiene data and expert evidence.

Assessment of Mrs Johnstone's Exposure:

The judge then assessed Mrs Johnstone's exposure relative to Mr Russell's, taking into account factors such as the distance between the workshop and the office, the frequency with which the office doors and windows were open, prevailing wind direction, and the likelihood of asbestos fibres migrating from the workshop to the office environment.

Materiality of Increased Risk:

Ultimately, the judge accepted the evidence of the defendant's expert, Mr Stear, over that of the claimant's expert, Mr Chambers. Mr Stear's calculations suggested that Mrs Johnstone's cumulative exposure was no more than 0.1% above the background risk of mesothelioma in the general population. The judge concluded that this did not amount to a material increase in risk as required by the authorities, most notably *Fairchild v Glenhaven Funeral Services Ltd* UKHL 22.

The Appeal

The claimant advanced five grounds of appeal:

1. Misunderstanding of Professor Norrie's Evidence:

It was contended that the judge misunderstood the evidence of Professor Norrie, particularly regarding the calculation of background risk.

2. Misunderstanding of Background Risk:

The appellant argued that the judge misunderstood the nature of the background risk of mesothelioma in the general population, and thus misapplied the test for material increase in risk.

3. Methodological Error – Method 2 v Method 1:

The appellant submitted that the judge ought to have adopted a simpler methodology (referred to as Method 1) for calculating increased risk, rather than the more complex approach (Method 2) preferred by the defendant's expert.

4. Failure to Provide Adequate Reasons:

It was argued that the judge failed to provide sufficient reasons for rejecting Method 1 and for his overall approach to the expert evidence.

5. Failure to Draw Adverse Inference:

The appellant contended that the judge erred in not drawing an adverse inference against the defendant for failing to retain or produce historical air monitoring records.

The respondent, by way of a Respondent's Notice, also relied on an alternative methodology (Method 3) to support the judge's conclusion.

The Court of Appeal's Judgment

The Court of Appeal dismissed the appeal in its entirety. The Court reaffirmed the trial judge's approach to the assessment of causation and the evaluation of expert evidence. Key points from the judgment include:

- Deference to the Trial Judge:

The Court of Appeal emphasised the deference owed to the trial judge's findings of fact and assessment of expert evidence, particularly in technically complex cases such as asbestos litigation.

- Material Increase in Risk:

The Court reiterated that the claimant must prove, on the balance of probabilities, that the defendant's breach of duty materially increased the risk of the claimant contracting mesothelioma, as established in *Fairchild* and subsequent authorities.

- Expert Evidence:

The Court found no error in the judge's preference for Mr Stear's evidence, which was reasoned and consistent with the factual matrix. The judge was entitled to reject Mr Chambers' higher exposure estimates as unsupported by the evidence.

- Background Risk and Methodology:

The Court held that the judge had not misunderstood the concept of background risk, nor had he erred in his methodological approach. The calculation of increased risk was a matter for expert evidence, and the judge's reasoning was adequately explained.

- Adverse Inference:

The Court declined to interfere with the judge's decision not to draw an adverse inference from the absence of historical air monitoring data, noting that there was no evidence that such records ever existed, nor that their absence was deliberate.

- Practical Implications:

This decision is a salient reminder of the evidential burden on claimants in mesothelioma litigation, particularly where exposure is indirect or at a low level. The following points are of particular note for practitioners:

- **Materiality Threshold:**

The Court has reaffirmed that an increase in risk must be more than de minimis. Exposure resulting in a negligible increase over background risk is insufficient to establish liability.

- **Importance of Robust Expert Evidence:**

The outcome of such cases will often turn on the quality and persuasiveness of expert evidence. Practitioners must ensure that expert reports are grounded in factual evidence and supported by reliable occupational hygiene data.

- **Record-Keeping and Disclosure:**

While the absence of historical records will not automatically result in an adverse inference, employers should be mindful of the importance of maintaining comprehensive records of workplace conditions and safety practices.

- **Judicial Approach to Methodology:**

The courts retain a broad discretion to prefer one expert's methodology over another, provided the reasoning is adequately explained and supported by the evidence.

Conclusion

Johnstone v Fawcett Garage (Newbury) Limited EWCA Civ serves as an important authority on the application of the "material increase in risk" test in asbestos-related disease claims. The judgment underscores the continuing challenges for claimants in proving causation in cases of low-level or environmental exposure and highlights the centrality of expert evidence in these complex and technical disputes. Practitioners should take careful note of the Court of Appeal's reasoning when advising clients and preparing evidence in similar cases.

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.