

## ***Court of Appeal gives judgment in Nuclear Test Veterans Litigation***

***The Court of Appeal has reversed the judgment of Foskett J, finding that all of the 9 lead cases under appeal were time barred, refusing to apply the section 33 discretion and finding that all of the claims face very great difficulties in proving causation.***

The Court of Appeal has handed down its judgment in *Ministry of Defence v AB and Ors* [2010] EWCA Civ. 1317. Charles Gibson, QC, Adam Heppinstall and Hannah Wilson were instructed on behalf of the Ministry of Defence.

### ***Background***

Between 1952 and 1958, some 22,000 servicemen were involved in a number of atmospheric tests of thermonuclear devices in the region of the Pacific Ocean. This was a group action brought by 1,011 Claimants, comprising mainly former servicemen, as well as their administrators, executors and dependents. It was alleged that the servicemen had suffered injury to health as a result of their having been exposed to ionising radiation at the tests. The Ministry of Defence argued that the claims were time-barred under s.11 (or s.12, where the claim was brought on behalf of a deceased) of the Limitation Act 1980.

Ten lead claims came before Mr Justice Foskett on a preliminary issue of limitation in January and February 2009. The Judge found five of the lead cases not time barred and the other five time-barred, but the Judge exercised his discretion under s.33 to allow those 5 claims to proceed.

The Ministry of Defence, in respect of 9 of the lead cases, appealed to the Court of Appeal.

The Court of Appeal has reversed the judgment of Foskett J, finding that all of the 9 lead cases under appeal were time barred, refusing to apply the section 33 discretion and finding all of the claims face very great difficulties in proving causation. The Court took the opportunity to address many of the vexed issues which arise in limitation proceedings, especially in the context of a Group Action:

### ***Significant injury***

The Court found that time begins to run when a claimant has statutory knowledge of their cause of action. This means the first time that a claimant has statutory knowledge of a significant injury.

## **ALERTER**

Mr Justice Foskett had suggested that a claimant could choose between significant injuries, relying on the latest in time, so as to bring the whole cause of action within the limitation period. The Court of Appeal rejected this approach.

### ***Statutory Knowledge***

The Court of Appeal approved the approach to the issue of 'knowledge' and 'attributability' adopted in the leading case of *Spargo v North Essex District Health Authority* [1997] 8 Med LR 125. They approved the following test for obtaining statutory knowledge: 'a claimant needs only enough knowledge for it to be reasonable for him to set about investigation. He can have knowledge even though there is no helpful evidence yet available to him' (at 85). The Claimant has asserted that they could not have knowledge until they had the results of what they claimed was a breakthrough scientific study (the Rowland study). The Court of Appeal rejected this submission holding that 'the claimants' contention that they did not have knowledge of possible attributability until they received the result of the Rowland study demonstrates a fundamental misunderstanding of the concept of knowledge for limitation purposes' (at 85).

### ***How to apply Section 33***

Mr Justice Foskett had stated that the key question was whether a fair trial of the factual issues would still be possible. The Court of Appeal found this to be an 'important issue' (at 98) but also held that if a fair trial were possible this did not 'render irrelevant the effect on the cogency of the evidence of the delay' (at 101). The delay in this case means the Ministry of Defence would still face considerable evidential difficulty in defending the claims. The Court were concerned that the Judge below had taken a number of other factors into account. The Court held that the wishes of each Claimant to 'have his day in court' could not be a significant factor since claimants always generally wanted their day in Court and every Defendant will want to avoid court where limitation has expired (at 106). The 'need to avoid apparent injustice' was rejected as an appropriate consideration, where that injustice stemmed from the Claimants' subjective belief in the merits of their own case (at 108). Finally, they held, a Court cannot permit a claim to proceed because there was a 'public interest' in launching an inquiry into the subject matter of the claim (at 110).

### *Causation*

The Claimant were seeking to rely on either of the exceptions to the 'but for' rule, as set out in *Bonnington Castings v Wardlaw* [1956] AC 613 and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32. The Court agreed with the Ministry of Defence's submission that *Wilsher* was the test the Claimants would have to meet (at 149). The Court held that *Bonnington* and *Fairchild* were inapplicable. The *Bonnington* method of proving causation is available only where the severity of the disease is related to the amount of exposure to the harmful agent. This was not so with the conditions complained of by the Claimants: 'Cancer is an indivisible condition; one either gets it or one does not' (at 150). Regarding *Fairchild*, which applies where there is only one possible cause of the injury suffered (ie. asbestos) and not several other and different potential causes (as here), the Court was convinced that the present case did not call for an extension to the principle. Indeed, to do so 'would be to upset completely the long established principle on which proof of causation is based' (at 154) and the possibility of the Supreme Court's changing the law so as to accommodate the Claimants was 'so remote that it can be safely discounted' (at 155). In conclusion, the Court found that the Claimants' apparent and considerable difficulties on causation must be given due weight in the broad merits test under s.33, and that the difficulties were such as to tip the balance against the Court's exercising its discretion to allow the time-barred claims.

### *The Future of the Group Action*

We will have to wait and see if the Claimants appeal to the Supreme Court. If the Court of Appeal's judgment, especially as regards causation, remains undisturbed, then it is hard to see how this Group Action can continue.

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