

## **2D. BOX 5: ESTABLISHING WHICH OF SEVERAL DEFENDANTS CAUSED THE INJURY AND RECOVERING AGAINST ANY ONE OF THEM**

Other legal rules designed to simplify the causation enquiry and ensure wrongdoers do not escape liability due to scientific uncertainty help individual claimants of tobacco-related harm access the courts. These include:

### *a) Multiple causes*

Where a person's injuries may have been caused by multiple factors (such as tobacco use and diet or asbestos exposure, for example) the defendant can still be legally liable if the tobacco exposure materially contributed to the injury even if the other factors were also a cause. This is the approach taken in many common law jurisdictions, and there is no reason in principle why it should also not be followed in civil law jurisdictions.

### *b) Multiple tortious causes*

In some circumstances common law courts have made a deliberate policy choice that any scientific uncertainty about the cause of a claimant's injuries should rest with the defendant. One situation where this approach is taken, which is highly relevant to tobacco litigation, is where a person is a victim of multiple tortfeasors and is unable to prove which of the wrongdoers caused the injury even though the actual agent that caused the disease is clear. Many smokers have smoked different brands during their lifetime and there may be uncertainty as to whether some exposures contributed to, and therefore which tobacco manufacturer is responsible for, the injury suffered.

The United Kingdom's House of Lords dealt with this question in the case of *Fairchild*.<sup>1</sup> In that case, a victim of mesothelioma was unable to prove which of several defendants, who had all negligently exposed him to asbestos, had caused his disease. Given the cause of this uncertainty was that more than one defendant had committed a wrong against the claimant it would be unjust to visit the consequences of this evidentiary uncertainty on the claimant. The House of Lords found that where an employee had been exposed by different defendants, in breach of each defendant's duty of care, and the risk of injury had eventuated but the onset of the disease could not be attributed to any particular or cumulative wrongful exposure based on current medical knowledge, a modified approach to proof of causation was justified. In such a case proof that each defendant's wrongdoing had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements for his liability.<sup>2</sup>

Canada has achieved the same result as the *Fairchild* exception in English law for tobacco claims through the Provinces' Tobacco Damages and Health Care Cost Recovery legislation. For example section 7 of the British Columbia legislation provides that if a plaintiff has been exposed to a tobacco product and suffers disease as a result of the exposure, but is unable to establish which defendant caused or contributed to the disease, the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages incurred equal to the proportion of its contribution to that risk of disease.<sup>3</sup>

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<sup>1</sup> *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)*. [2002] UKHL 22; [2003] 1 A.C. 32.

<sup>2</sup> The same principle was recognised by the Brazilian court in *Sivieri v Cia De Cigarros Souza Cruz*. (County of Porto Alegre - 3<sup>rd</sup> Civil District of the Central Court, Mauro Caum Goncalves J, 29 June 2010).

<sup>3</sup> The provision only applies, and is only necessary, in relation to claims not brought on an aggregate basis.