human interaction and interfere unduly with freedom of expression. That said, it may be that the Court went too far in narrowing the tort's scope, by not considering more fully Lord Hoffmann's suggestion in *Wainwright* that severe distress short of harm be actionable. Lord Neuberger (with whom Lord Wilson agreed) indicated this may be the case in his short concurring judgment. According to His Lordship: "It is not entirely easy to see why, if an intention to cause the claimant significant distress is an ingredient of the tort and enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation" (at [119]).

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REINTERPRETING THE REINTERPRETATION OF THE REINTERPRETATION OF *FAIRCHILD*

FAIRCHILD v Glenhaven Funeral Services Ltd. [2002] UKHL 22; [2003] 1 A.C. 32 was a hard case that made bad law. Now, for the fourth time, an appeal has gone to the highest tribunal, to unravel *Fairchild*'s resulting complications. *International Energy Group Ltd. v Zurich Insurance plc.* [2015] UKSC 33; [2015] 2 W.L.R. 1471 ("*Zurich*") represents "yet another demanding chapter in [that] difficult series of decisions": at [189], per Lord Neuberger and Lord Reed. *Zurich's* resolution took seven judges, in four reasoned judgments, 211 paragraphs, or 80 pages of the law reports – some 46,000 words.

The dispute in *Zurich* was not between a negligent employer and a mesothelioma victim (such a claim having already been made and settled), but between that liable employer (IEG) and its liability insurers (Zurich). This resembles *Durham v BAI (Run Off) Ltd.* [2012] UKSC 14; [2012] 1 W.L.R. 867 (the "*Trigger*" litigation). But *Zurich* raised new questions. First, the applicable law was that of Guernsey, which shares the English common law (i.e. *Fairchild*), but where section 3 of the Compensation Act 2006 does not apply. This raised the issue whether *Barker v Corus UK Ltd.* [2006] UKHL 20; [2006] 2 A.C. 572 has survived *at common law* in situations where section 3 is inapplicable. That was crucial because the employer, IEG, had been insured with Zurich for only 6 of the 27 years of the victim's asbestos-infested employment. Apart from two years with another insurer, IEG had been self-insured (i.e. uninsured), for, while it has been mandatory to insure against liability to employees in England since the Employers' Liability (Compulsory Insurance) Act 1969, Guernsey law placed employers under such an obligation only in 1993. In that situation, could IEG recover from Zurich Insurance a full indemnity

for its *Fairchild* liability to its employee, or only a pro rata indemnity (i.e. for 6/27 years)? The majority held that in principle, Zurich were liable in full – but could claim a contribution from other insurers and indeed from IEG, the assured. In dissent, Lords Sumption, Neuberger, and Reed reasoned that Zurich should be liable only pro rata.

The Supreme Court unanimously held that *Barker* remains good law in Guernsey. The (unanimous) decision of the Court of Appeal [2013] EWCA Civ 39; [2013] 3 All E.R. 395 was overruled. It had, Lord Sumption recorded at [146], provoked "consternation" among insurers. If an employer had been insured by a number of companies over the course of a mesothelioma victim's career, and if each of those insurers were to be liable to indemnify in full, the employer "could be expected to pick off the 'easiest target'" in a way that would subvert the statutory and industry-agreed schemes for assigning liability in multi-insurer (or insolvent insurer, or uninsured employer) situations (on which see at [119] and [172]–[173], although compare Lord Mance, at [79]–[81]). But, quite apart from the awkward consequences that followed from its decision, the Court of Appeal had been wrong in law (albeit that it had overruled Cooke J. [2012] EWHC 69 (Comm); [2012] Lloyd's Rep. I.R. 594 on the authority of the Supreme Court's own *Trigger* judgment, handed down subsequently to the learned judge's decision).

Notwithstanding the decision in *Trigger* that *Fairchild* liability was for *causing mesothelioma* (and not, as Lord Phillips had argued in dissent, for *increasing the risk* of mesothelioma), the Supreme Court in *Zurich* accepted that, as a matter of common law, *Barker* had rightly held employers liable only in proportion to their exposure. That sounds scarcely controversial. After all, that proportionate liability was the very thing about *Barker* that Parliament had found objectionable and reversed, so swiftly, in the Act of 2006. But was this interpretation of *Barker* not precluded by the decision in *Trigger*, as the Court of Appeal in *Zurich* had thought? No. Lord Mance gave the leading judgment in *Zurich*, as in *Trigger*. His Lordship explained that, although in *Trigger* the Supreme Court had indeed defined *Fairchild* liability as "causing mesothelioma", it had not conceived of causation "in its ordinary sense" but with an exceptional and "unconventional" "weak" or "broad" meaning (see *Zurich*, at [29], citing *Trigger*, at [66]). *Trigger* "cannot therefore be said to affect or undermine the reasoning or decision in *Barker*", which remains "convincing at common law" (*Zurich*, at [29], [31]).

With *Trigger*'s effect on *Barker* clarified, the Supreme Court experienced no difficulty in holding that the Compensation Act 2006 reversed *Barker* only to the extent which section 3 requires. As Lord Mance explained at [27], *Barker*'s reasoning remained "both coherent and understandable" as a matter of common law; "Parliament's reaction was its right, but does not alter the common law position apart from statute, or have any necessary

effect in jurisdictions where the common law position has not been statutorily modified." As the 2006 Act does not extend to Guernsey, *Barker* remained good law there. Lord Mance rejected IEG's argument that, because according to section 16(3) of the 2006 Act, "section 3 shall be treated as having always had effect", Parliament had purported to (and had) altered the common law itself. That submission mistook the nature of the common law. For, as Lord Sumption said at [179], it is "not a series of ad hoc answers to particular cases, but a body of general principle" and, as such, the common law itself was "left … intact" when the 2006 Act "carved an exception out of it for mesothelioma".

Because *Barker* applied to the Guernsey employer's, IEG's, liability to its employee, it followed that IEG was only liable for a (six out of 27-year) proportion of its employee's loss *during the period of insurance with Zurich*. And obviously, it would have been pretty odd had Zurich been required to indemnify IEG's *full* liability (rather than a like proportion). It would be "contrary to the nature of annual insurance" for an insurer to indemnify in respect of periods of time "when he was not on risk or there was no insurance in place at all" (Lord Sumption, at [113]). Yet, for the majority, Lord Mance held that this "anomalous" result did indeed follow from the Supreme Court's reasoning in the *Trigger* case, where each and every exposure to asbestos was held to cause the victim's mesothelioma (albeit to "cause" in the "weak" sense). (The dissentients did not accept that this followed from *Trigger*.) The majority accepted that this "unique result" would violate the fundamental principles of liability insurance. But, for the majority, that violation was to be avoided by further developing the common law to permit Zurich to claim against the assured (and against other insurers) for contribution to its liabilities. As Lord Hodge said, concurring, at [101], this solution was "radical".

For Lord Sumption, dissenting, the radicalism went too far and was moreover unnecessary. It would be yet another unfortunate example of special rules in the "*Fairchild* enclave" (at [179]). The cases since *Fairchild* had already "cruelly exposed the problem of dealing with complex and interrelated issues piecemeal" (at [128]). Lords Neuberger and Reed warned at [206]–[207] that to invoke "a new and wide general equitable power" to allow contribution claims in *Fairchild* cases (only – or supposedly only) will "open up a dangerous seam of potential litigation, as an exception is made to another established principle". For the three dissenters, the correct solution was found by interpreting the contract of insurance in line with its "nature" (see [113], quoted above). This approach avoided the anomaly that Lord Mance's innovation was invoked to resolve. It did not have "any unfortunate wider ramifications" (at [207]). But it was, admittedly, hard to reconcile with *Trigger* (at [204]).

None of their Lordships found the case simple to resolve. The Supreme Court was faced with two imperfect alternatives (there is commentary on

the defects of the disfavoured solution in all four judgments). Assuredly, this will not be the last word on *Fairchild* liability. (*Trigger* – and now *Zurich* – are bound to trigger further litigation regarding re-insurers' liabilities.) *Zurich* contains further disobliging dicta on the saga to date. In particular, Lords Neuberger and Reed voice powerful criticisms at [209]–[211]. *Fairchild* liability has "not [been] satisfactory either in terms of legal certainty or in terms of public time and money". Above all, future courts must recognise that "they cannot legislate in the public interest for special cases, and they risk sowing confusion in the common law if they attempt to do so". (For an earlier contention that *Fairchild* was a wrong-headed attempt to legislate for an exception at common law, see J. Morgan in R. Goldberg (eds.), *Perspectives on Causation* (Oxford 2011).) As their Lordships said at [191], *Fairchild*, however well intentioned, has unleashed "a sort of juridical version of chaos theory". But, despite Lord Hoffmann's retrospective and extrajudicial encouragement to do so, the judges seem unable to turn back, being "Stepp'd in so far that, should they wade no more/ Returning were as tedious as go o'er".

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TUMULTUOUS CONTROVERSY: POLICE LIABILITY FOR RIOTING

THE Riot (Damages) Act 1886 rarely looms large in the legal imagination. It is brief and apparently straightforward. Section 2(1) of the Act obliges police authorities to compensate owners whose property has been damaged by "persons riotously and tumultuously assembled together" in their area. There is, notably, no requirement to show that the police were at fault. Two appellate cases on the Act arose from disturbances at the Yarl's Wood detention centre in 2002 (see D.J. Feldman [2010] C.L.J. 433). The London (and nationwide) riots of 2011 have occasioned further consideration.

In *Mitsui Sumitomo Insurance Co (Europe) Ltd. v Mayor's Office for Policing and Crime* [2014] EWCA Civ 682; [2015] Q.B. 180, compensation under the Riot (Damages) Act 1886 was held (unsurprisingly) to extend to financial losses consequential on damage to property. The second, more controversial issue was the proper construction of "riotously and tumultuously assembled". "Riotously" bears the same meaning as the offence of riot (Public Order Act 1986, ss. 1, 10(1)). What though does "tumultuously" mean, and why did Parliament include this additional condition for liability?

In the leading case, *JW Dwyer Ltd. v Metropolitan Police District Receiver* [1967] 2 Q.B. 970, Lyell J. held that "tumultuously" connotes