

House of Lords rejects pleural plaques claims

- (1) [Johnston v NEI International Combustion Ltd](#)
- (2) [Rothwell v Chemical & Insulating Co Ltd](#)
- (3) [Topping v Benchtown Ltd](#)
[Conjoined Appeals]
- (4) [Grieves v F.T.Everard & Sons](#)

House Of Lords – 17 October 2007

Yesterday the House of Lords handed down its judgment in the above-mentioned test cases concerning liability for pleural plaques.

The five Law Lords unanimously held that the Court of Appeal had been right to rule that claimants with pleural plaques cannot sue for damages in tort.

Background

The insured employers had negligently exposed the Claimants to asbestos dust. All of the Claimants were diagnosed with pleural plaques, areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional circumstances, they cause no symptoms and there is only a very small risk that the sufferer will go on to contract other asbestos-related diseases.

However, they do signal that the sufferer has been exposed to asbestos, such that a diagnosis of pleural plaques may cause the sufferer to contemplate their future with some anxiety.

First Instance

In February 2005, Holland J had held in *Rothwell* at first instance that the penetration of the chest wall by asbestos fibres and the consequent physiological

change as manifested by pleural plaques in the Claimants' lungs, considered together with the anxiety this caused and the risk of future malignant disease, was more than minimal damage.

Each of the Claimants had therefore suffered sufficient injury to establish a cause of action in tort.

Court of Appeal

An appeal was brought by Norwich Union, acting on behalf of an umbrella group of insurance companies.

As at first instance, the essential question for the Court was whether the pleural plaques, combined with the risk of asbestos-related diseases and the anxiety felt by the Claimants, constituted sufficient damage to found a cause of action in tort.

It was common ground that, individually, these heads of claim were incapable of doing so. The Court of Appeal therefore had to consider whether the separate elements could be 'aggregated'.

By a majority (Phillips LCJ and Longmore LJ, Smith LJ dissenting), the Court of Appeal held that Holland J had erred in finding that the Claimants had suffered a significant injury. There was no binding authority for combining the several heads of claim to establish more than minimal damage. Further, the Court considered that Holland J had been wrong to hold that the presence of asbestos fibres in the body, evidenced by the plaques, was any more capable than the plaques themselves of founding a cause of action.

A further issue was that one of the Claimants, Mr Grieves, had also been

diagnosed as suffering from a psychiatric illness. It was submitted that he had a freestanding claim, in that the psychiatric injury he had sustained had been a foreseeable consequence of the employers' breach of duty.

Alternatively it was argued that, because physical injury was a foreseeable consequence of that breach, recovery could be made for psychiatric injury in accordance with the principle in *Page v Smith [1996] HL*, where it was decided that damages are recoverable for psychiatric injury when physical injury is sufficiently foreseeable, even though no physical injury is suffered.

However the Court held that the employers were not liable, as the principle in *Page v Smith* could not be extended to allow a claimant who had been negligently exposed to the risk of a disease to recover for freestanding psychiatric illness caused merely by the fear of contracting a disease.

Further, there was no evidence that it was reasonably foreseeable that an employee of normal fortitude would suffer this type of psychiatric damage.

House of Lords

The Lords unanimously agreed that pleural plaques do not give rise to an actionable claim for compensation in tort.

A claim in tort based on negligence is incomplete without proof of damage and there was no proof that pleural plaques had damaged, in the sense of being physically worse off, the Claimants.

Moreover, pleural plaques do not become damage, for the purposes of a claim in tort, when 'aggregated' with the risk of contracting an asbestos related disease or with the anxiety that this caused in the Claimants. Neither the risk of future injury, nor anxiety at the prospect of future injury, was actionable in tort.

With regard to the case of Mr Grieves, who suffered not only anxiety but clinical depression, the Lords again rejected his appeal. They considered the question of whether the Defendants should have reasonably foreseen his psychiatric illness as a result of him contracting an asbestos related illness. However, as he had not actually contracted an asbestos related illness, then the Defendants could not be blamed for not foreseeing his psychiatric illness. Someone who suffers psychiatric illness because of something that may, or may not, happen in the future, is in a different category to the victims in *Page v Smith*.

Comment

Insurers will welcome the judgment as finally laying down a position on the issue of provisional compensation in tort for asymptomatic conditions. Some commentators have estimated that it could reduce future claims to insurers by up to £1.4 billion in relation to UK asbestos liabilities.

The House of Lords, whilst sympathetic to the anxiety being suffered by the Claimants, was simply not prepared to hold that they had yet sustained an injury for which the law gave them a remedy for damages in tort.

There was no disputing the point, either amongst insurers or the Law Lords, that should the Claimants go on to contract mesothelioma or asbestosis, then they would have an action in tort.

Interestingly, two of the Law Lords (Hope and Fosco) commented that the position may have been different had the Claimants brought their claims for breach of the duties owed to them by the Defendants under their employment contracts, as opposed to in tort, but this was not fully explored.

If you require any further information in relation to the way in which these developments impact upon your business, contact Nick Bradley, William Sturge, Colin Peck or David Breslin on 020 7379 0000 at LG.