

Case Note

Johnston v NEI International Combustion Ltd; Rothwell v Chemical & Insulating Co Ltd; Topping v Benchtown Ltd; Grieves v F T Everard & Sons (The pleural plaque test case)

[2007] UKHL 39, on appeal from [2006] EWCA Civ 27

House of Lords (Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Mance)

17 October 2007

The main issue was whether the Appellants, who had been negligently exposed to asbestos and developed pleural plaques, could sue their employers in tort. They argued that pleural plaques alone amounted to an actionable injury and, alternatively, that the plaques combined with the risks of other asbestos-related disease, and the attendant anxiety, crossed the threshold of actionable damage; the so-called aggregation theory.

A separate issue was raised by one of the Appellants, Mr Grieves, who had also suffered from psychiatric illness and irritable bowel syndrome as a result of the diagnosis of pleural disease. He argued that he should be entitled to sue, even if pleural plaques were not actionable, on the grounds of his psychiatric illness, following *Page v Smith* [1996] AC 155.

At trial, Holland J held that the Appellants had sustained an actionable injury and awarded substantial damages. The Court of Appeal reversed this decision. The majority held that the damage was not more than minimal as the pleural plaques did not cause symptoms or increase the risk of future disease. And they held that the law should not allow the claims for a variety of assorted policy reasons.

The House of Lords unanimously dismissed the appeal and upheld the decision of the Court of Appeal.

Simple pleural plaques

Lord Hoffmann gave the leading speech. A claim in tort based on negligence is incomplete without proof of damage. In this sense, damage is an abstract concept of being “worse off”, physically or economically, so that compensation is appropriate. It does not mean a simple physical change, which is consistent with making one better (as in a successful operation) or with a neutral change, which has no perceptible effect on health or capability.

How much worse off must the claimant be to maintain a claim? That is a question of degree. The trial judge held that pleural plaques alone were insufficient to establish a cause of action. This finding of fact, according to Lord Hoffmann, was unassailable. The plaques caused no symptoms, did not increase their susceptibility to other disease or shorten life expectancy, and had no effect on the health of the appellants.

Lord Hope, Lord Scott and Lord Rodger expressed similar opinions.

Aggregation theory

The House unanimously rejected the aggregation theory. Lord Hoffmann held that neither the risk of injury (following *Gregg v Scott* [2005] 2 AC 176) nor anxiety at the prospect of future injury (*Hicks v Chief Constable of the South Yorkshire Police* [1992] All ER 65) is actionable. They could not be aggregated to establish a cause of action which would not otherwise exist.

Lord Hoffmann was not persuaded by the “rather speculative” policy considerations applied by the majority of the Court of Appeal. The case should be decided by the application of established legal principles.

The Appellants relied on the single action rule, which requires the injured party to sue for all the damage he has suffered, or will suffer, arising out of the same cause of

action in a single claim. The corollary of this rule is that a claimant may recover for the risks of further injury. But Lord Hoffmann held that this principle could not be invoked by the Appellants to establish a cause of action: it was a rule intended to protect defendants from multiple suits and was effective only when there was an existing actionable injury.

Lord Hope said that the policy of the law was not to entertain a claim for damages where the physical effects of the injury were no more than negligible. He found the other policy considerations relied on by the majority of the Court of Appeal to be unattractive. But this was not a case where a claim of low value required the support of other elements to make it actionable. It was a claim with no value at all in law.

It was not possible to introduce the risks by applying the ordinary laws of causation. These risks arose from the same exposure to asbestos, but not the pleural plaques. The same could be said of the anxiety; which was generated by the risk of a future harmful disease. There was no cause of action because the pleural plaques in themselves did not give rise to any harmful physical effects, constituting damage, and because of the absence of a direct causative link with the risks and anxiety which, on their own, were not actionable. Lord Rodger expressed a similar opinion.

Psychiatric injury

The House unanimously dismissed the separate appeal made by Mr Grieves. Lord Hoffmann held that in cases of psychiatric illness, that which needs to be foreseen is that “the event which actually happened” would have caused psychiatric illness to a person of “sufficient fortitude” or “customary phlegm”. So, in this case, the general rule required that the creation of the risk of an asbestos-related disease would cause psychiatric illness to a person of reasonable fortitude. There was no evidential basis for such a finding. The other members of the House agreed.

Mr Grieves contended that he was a primary victim, within *Page v Smith*, and so it was necessary only to show that physical injury was foreseeable.

Lord Hoffmann said that the ratio of *Page v Smith* was that where a foreseeable event (the collision in that case) might cause physical injury or psychiatric injury or both, it was unnecessary to ask whether what actually happened would have that consequence. Either form of injury is recoverable in these circumstances. But this does not apply to Mr Grieves's case. The foreseeable event, that he would contract asbestos-related disease, had not occurred. The psychiatric illness was caused by his "apprehension" that it may occur. This would be an unwarranted explanation of the principle set out in *Page*.

Lord Hope agreed that Mr Grieves's case was distinguishable on two grounds. Firstly, the psychiatric injury was not precipitated by a single stressful event. The category of primary victim should be confined to persons who had suffered psychiatric injury caused by fear or distress resulting from involvement in an accident or its immediate aftermath. But this situation lacked the characteristic "immediacy" of the primary victims described by *Page*. Mr Grieves was in a separate category. Secondly, the causal chain between the inhalation of asbestos dust and the psychiatric injury was stretched far beyond that envisaged by *Page*. This was not an immediate response to a sudden and alarming incident. Mr Grieves suffered the psychiatric injury in response not to the exposure to asbestos but to the intervention of a doctor, telling him about the plaques, many years later. His exposure at work was not to stress, but to risk.

The House declined the Respondent's invitation to depart from *Page v Smith*. They did not think it was necessary on the facts of the case.

The case in contract

But the pleural plaque saga may still not be finished.

Lord Hope expressed regret that the Appellants, who are at risk of developing harmful disease and who already suffer from anxiety, should be denied a remedy. The question of whether there might be a remedy for them in contract had not been explored but “there may be room for development of the common law in this area”.

Similarly, Lord Scott held that the conclusion that none of the appellants had a cause of action struck, for him at least, a “discordant note”. Each was employed under a contract of service under which it is necessary only to prove a breach to establish a cause of action. It might be arguable that the breach of the contractual duty to provide a safe working environment would justify an award of contractual damages to compensate employee for the subjecting them to the risk of life-threatening asbestos-related disease.

Lord Mance thought that the scope of the employers’ contractual liability might require examination.

But they all agreed that such examination would have to be left to another case.

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