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## **Emerging trends in asbestos litigation**

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**ASBESTOS DISEASE LITIGATION**

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## EMERGING TRENDS IN ASBESTOS DISEASE LITIGATION

### Introduction:

We have known for about a century that asbestos is bad for our health<sup>1</sup>. Yet this danger to the community is still litigated controversially into the 21st century. Many thought that the decision of the House of Lords in **Fairchild -v- Glenhaven Funeral Services Limited**<sup>2</sup> might put an end to that, but nothing seems further from the truth. **Barker v Corus (UK) Plc**<sup>3</sup> and **Johnston v NEI International Combustion Ltd**<sup>4</sup> have taught us that unanswered questions remain in abundance and that what one commentator<sup>5</sup> has called ‘the asbestos wars’ is likely to be with us for some time. My task is to review current issues of controversy. Some questions I will ask and answer. Others I can only express an opinion upon, and that is my own, for which I alone accept responsibility. I cannot cover all that is developing in the time available and admit to a personal selection of what interests me. Those who have wider questions to raise should feel free to do so.

### Liability issues:

At the end of the day, it is the nature and quality of the evidence that determines outcome. In **Brett v Reading University**,<sup>6</sup> the deceased throughout his working life worked in jobs that could have exposed him to asbestos. He developed

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<sup>1</sup> First recorded fatal case of lung fibrosis in an asbestos worker in the UK was described by Dr. H. Montagu Murray in his evidence to a Home Office Departmental Committee on Compensation for Industrial Diseases in 1907, the death having occurred in 1900, and the anonymous victim having given the doctor a history of being the last surviving member of his work room.

<sup>2</sup> [2002] 3 All ER 305.

<sup>3</sup> [2006] UKHL 20 [2006] 3 All E R 785 HL

<sup>4</sup> [2007] UKHL 39

<sup>5</sup> Dominic de Saulles in [2006] JPIL 215 and 301

<sup>6</sup> [2007] EWCA Civ 88

mesothelioma and died aged 75 in 2001. Inhalation of asbestos fibres was the recognised cause of the disease. Reading University was the only employer sued. Brett had worked for the university for five years as a clerk of works and supervised the tearing down of an old library. The judge found it proved that while in the university's employ Brett had worked in an environment where there was asbestos but it was not proved, nor could he infer, that asbestos fibres had become airborne in that environment or had been inhaled by Brett. Therefore there was no liability. The Court of Appeal held that the judge was wrong to compare sources of exposure as it did not matter to one defendant's liability for contributing to the material risk that another party, whether a defendant or not, could also have contributed to it. Applying *Fairchild*<sup>7</sup> they confirmed that an employer is liable if it had materially and tortiously contributed to the risk of producing the mesothelioma, without need to prove direct causation of the condition. The Court of Appeal defined the questions to be asked in relation to any party alleged to be liable for contributing to the risk in cases like this one as:

- i. did that party in fact made any such contribution;
- ii. if so, whether the party was legally at fault.

The two questions sometimes overlapped. For example evidence that full precautions had been taken could answer both questions in a defendant's favour. If there was only one employment in which asbestos exposure could have occurred, the inference that that was where it did occur would be almost irresistible.

Looking at the evidence here they concluded that it was at its lowest sufficient to show a number of things:

- i. that demolition was being undertaken in the old library;
- ii. that work was going to liberate asbestos dust, and;
- iii. that Brett had from time to time to inspect the work as it proceeded.

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<sup>7</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

They confirmed that it is not a defence in itself that the work was done by reputable contractors under professional supervision. There was documentary evidence that the contractors had been given instructions to take the necessary safety precautions but no evidence either way as to whether or not they did so. The critical question was whether the exposure to which it was likely that Brett was subjected put the university in breach of its common law or statutory duties to him.

The claimant must establish the elements of his case and one such element in a personal injury action is that the injury was caused by a breach of duty on the defendant's part. However they held that the absence of any documentary evidence confirming compliance with the Asbestos Regulations 1969 was as consistent with compliance as non-compliance by the contractors.

They held that while the evidence was sufficient to enable the court to infer that Brett had come into contact with asbestos in the course of working for the university, it was not sufficient to show that the university had failed to take necessary steps to protect him from inhaling it. The fact that Brett had developed mesothelioma could not fill the gap as he had been in jobs that were equally capable of bringing him into contact with airborne asbestos throughout his working life.

They confirmed that if there had been adequate evidence of breach of duty on the part of the university, Brett's estate and dependants would have recovered agreed damages in full notwithstanding the possible responsibility of other employers. However without such evidence the action against the university had to fail.

The appeal was dismissed. The decision is a salutary reminder of where the burden of proof lies and the standard of proof required. Increasingly insurers are putting claimants to proof of exposure and fault in asbestos cases and there are

a growing number of cases where the evidence has been found wanting, of which this is but one example. This may be a reflection of the fact that there are fewer and fewer cases on behalf of ladders or the like and more and more cases of unusual and less intense exposure. This is not a new trend<sup>8</sup> but there are several modern examples. In **Spencer v Birkby's Plastics**<sup>9</sup> the action failed because the widow failed to establish on a balance of probabilities that the dusts to which her late husband was exposed comprised or contained asbestos. A recent fact specific attempt to allege liability failed in **Pinder v Cape PLC**<sup>10</sup> where Ramsey J held that the Defendant was not liable in negligence to a Claimant who was exposed playing in asbestos waste the Defendant had deposited on a local tip, each of those events having taken place in the 1950's. he concluded

“that Cape did not owe Mr Pinder a duty of care in the 1950s as a child playing on the council tip after asbestos waste had been deposited on that tip. He was not within a category of person who Cape ought reasonably to have had in mind and, in any event, by the standards of the 1950s he was not exposed to a level of asbestos dust which would be reasonably foreseen as causing injury to him.”<sup>11</sup>

But if care is taken to condescend to such detail, even the most difficult cases can be won. The example is **Maggs v Anstey**<sup>12</sup> in which 1 day of exposure was found to have occurred and held to be sufficient to give rise to liability. Such decisions of fact are then extremely difficult to overturn on appeal.<sup>13</sup>

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<sup>8</sup> **Morrison -v- CEGB** (1986) 15th March unreported and **Banks -v- Woodhall Duckham Ltd** (1995) 30th November C.A. (being cases where the Claimant failed to establish liability) are examples of failure to establish that asbestos dust was of such a character and to such extent as to be likely to be injurious judged by the standards of knowledge prevailing at the time of exposure are

<sup>9</sup> (2005) 16th September, Poole J., QBD Manchester unreported Lawtel AC0110520

<sup>10</sup> [2006] EWHC 3620 (QB)

<sup>11</sup> Judgment paragraph [100]

<sup>12</sup> [2007] EWHC 515 (QB) Roderick Evans J..

<sup>13</sup> See for example **Cox v Rolls Royce Industrial Power (India) Ltd** [2007] EWCA Civ 1189

Another example is the interesting imposition of duties akin to employers' duties on a body at one remove from the process in **Rice v Secretary of State for Trade and Industry**<sup>14</sup> in which Silber J found the Defendant as successor to the liabilities of the NDLB responsible in law for the mesothelioma of a dock worker exposed while employed by stevedoring companies unloading cargoes of asbestos in Hessian sacks. The Court of Appeal upheld the decision<sup>15</sup> but with some misgiving in that May LJ observed :

“The judge was concerned that he was being asked to determine whether the NDLB owed the claimants a duty of care without the scope or extent of the duty of care also being determined. That is a concern which I share. Negligence claims are habitually advanced and analysed compartmentally by considering whether the defendant owed the claimant a duty of care; whether the defendant was in breach of that duty; and whether the defendant's breach of duty caused the claimant loss. This may often be convenient, but it is conceptually suspect. Damage is the essence of a cause of action in negligence and the critical question in a particular case is the composite one, that is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the claimant claims to have suffered. ... Accordingly, the bare question whether a defendant owes a claimant a duty of care, without defining the scope of the duty with reference to the injury or loss for which the claimant claims damages, is conceptually questionable.”<sup>16</sup>

### Insurance issues:

In day-to-day practice the biggest practical problem for Claimants and Defendants alike is the identification of appropriate Defendants to sue or be sued. Problems in the insurance industry in the form of both insurer failure<sup>17</sup> and future solvency have meant that hard pressed insurers are increasingly

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<sup>14</sup> [2006] EWHC 1257

<sup>15</sup> [2007] EWCA Civ 289 [2007] PIQR P23

<sup>16</sup> Judgment paragraph [6]

<sup>17</sup> Builder's Accident, Chester Street, Drake, and Independent are examples.

demanding both exactitude and supporting evidence that the correct legal personality has been sued, and that a valid policy actually covering the alleged liability existed. Not only does this affect the conduct of the primary victim driven compensation claim but a veritable industry of CPR Part 20 satellite litigation is developing<sup>18</sup>.

**Bolton MBC v Municipal Mutual Insurance Ltd**<sup>19</sup> may not an isolated example. The worker was exposed in the 1960's and 1970's by an employer insured for a time by MMI whose policy covered "accidental bodily injury or illness ... to any person employed ... if such injury or illness arises out of and in the course of employment ... when such injury illness loss or damage occurs during the currency of the policy". There was a later CU policy which covered "bodily injury to or illness of any person ... occurring during the period of indemnity as a result of an accident and happening or caused as described in the Schedule ..." which was never found. The Court of Appeal held that actionable injury does not occur on exposure or on initial bodily changes occurring, but they specifically left open the question of whether for the purposes of the policy wording it occurs when the tumour 'is created' or when identifiable symptoms from it first occur.<sup>20</sup> On the particular facts of this case that at the time the tumour was created 10 or so years before symptoms, MMI was still on cover because they remained so after

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<sup>18</sup> Examples include but are not limited to claims between insured and insurer about policy wording (**Turner & Newall Ltd -v- Royal & Sun Alliance Plc** (2003) 2 All E R (Comm) 939 Collins J, deciding amongst other things, that a policy exclusion of fibrosis of the lung due to asbestos did not exclude liability of the insurers for mesothelioma), claims between transferor and transferee company about succession to liabilities (**Babcock International Ltd -v- Mitsui Babcock Energy Ltd** yet to be heard), actions seeking to enforce indemnities in respect of failed insurers (**R -v- Financial Services Compensation Scheme ex p Geologistics Ltd** (2003) EWCA Civ 1905 CA unreported), actions concerning the contractual validity under the Third Party (Rights against Insurers) Act 1930 of claims handling arrangements made by insurers after the insolvency of the insured (**Freakley v Centre Reinsurance International Co** [2006] UKHL 45, and see also **Bolton MBC v Municipal Mutual Insurance Ltd** [2006] 1 WLR 1492 in which it has been held that in a public liability policy, 'injury' was not at the first exposure of the body to asbestos or at initiation of otherwise non-actionable changes, a point that the FSCS are now relying on in relation to Builders' Accident Insurance policies).

<sup>19</sup> [2006] 1 WLR 1492

<sup>20</sup> Judgment paragraph [18]

1979<sup>21</sup>, the Court of Appeal upheld the decision that the employer was entitled to indemnity from MMI.

While this implies that ‘injury’ occurs when the tumour first starts to develop, what if that 1980 event had occurred in a context where the policy cover had ceased in 1975? Caution suggests claimant lawyers must pay much more attention to policy wordings. It may be that a sufficiently detailed letter of claim estops an insurer who has accepted it is on risk from later disputing that,<sup>22</sup> but beware that there is no pre-action entitlement to sight of the policy<sup>23</sup> and after commencement there is no clear authority relating to EL entitling the Claimant to disclosure.<sup>24</sup>

Untested possible tactics include :-

- Against dissolved companies,
  - prevent the insurer participating in any part of the litigation until damages have been assessed – until that point unless it has admitted that there is cover and it is on risk, there is no subrogation right it can invoke

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<sup>21</sup> Judgment paragraph [12]

<sup>22</sup> Subsequent incurring of cost in the form of issue fees and disbursements may be acting in reliance on the representation

<sup>23</sup> See *Burns v Shuttlehurst* [1999] PIQR P229 – though relating to an RTA policy, the writer submits equally applicable to EL because the presence or absence of a right to sue a third party under the Third Party (Rights against Insurers) Act 1930 is neither relevant to the issues between Claimant and Defendant in the proposed proceedings nor is the insurer likely to be a party in the subsequent action between the Claimant and the Defendant

<sup>24</sup> Although see *First Tricity Finance Ltd v O T Computers Ltd* [2004] EWCA Civ 653 [2004] 3 WLR 886 where after commencement in a commercial action disclosure of insurance information was ordered because of the effect it would have on the Claimant’s decision whether to continue with the litigation. Irwin J relied on this reasoning in *Harcourt v Griffin* [2007] EWHC 1500 QB when ordering the provision of CPR Part 18 Further Information regarding the public liability insurance of the Defendants because a policy limit affected both how the quantum side of the claim was to be conducted and whether there was any point in seeking a periodical payments order.

- order for substituted service on last registered office of company and (for information) on its putative insurers<sup>25</sup>
- Against extant defendants,
  - inform them that their insurers have not confirmed indemnity
  - invite indemnity proceedings
  - explore whether the result is a conflict of interest in the conduct of the defence.

Being tried commencing in June 2008 are the so-called “Trigger Issue Cases” in which, in a group of lead cases, some involving asbestos victims but several between insurers or between insured and their insurers, arguing about entitlement to contribution or indemnity, the Court will decide whether the wording of certain pre-1972 EL policies covers asbestos induced illness claims where illness developed years after the insurers in question ceased to be on risk. The writer is lead to believe that these cases only affect pre-1972 policies.<sup>26</sup> The issues not only relate to construction of a variety of different policy wordings, but will revisit the question of when precisely it is that injury is suffered, including therefore the medical question of when in relation to periods of exposure, do asbestos induced illnesses start to develop. In the meantime, the question arises of how to deal with other claims affected by this litigation. Master Whitaker in London is refusing to stay these cases which therefore either proceed in effect undefended, to judgment, whereafter enforcement is put on hold, or, if insurers who may become on risk after the Trigger Cases are concluded, want to be

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<sup>25</sup> See CPR Part 6.8 - it should appear to the court that, notwithstanding the steps taken and attempts made to serve the document by the means normally permitted by the rules, such means had proved impracticable: ***Cadogan Properties v Mount Eden Land Ltd*** [1999] All ER (D) 695, CA

<sup>26</sup> Because after the Employer’s Liability (Compulsory Insurance) Act 1969 came into force on 1<sup>st</sup> January 1972, EL policies had to provide cover to the minimum extent provided for by the statute whose wording is wide enough to avoid this being an issue

permitted to defend, they must undertake to pay the costs of doing so in any event.<sup>27</sup>

## Victim Issues

### What is actionable injury?

The first reported award of damages in England and Wales for pleural plaques appears to be **Blackburn v Goole Shipbuilding & Repairing Co Ltd**.<sup>28</sup> The 65 year old Claimant was awarded £6,000 for pain and suffering and loss of amenity in respect of a condition causing him respiratory disability estimated at 10% and leaving him with a 24% chance of developing malignant disease. Later in the 1980's the actionability of pleural plaques in the usual symptomless case, was considered in three decisions at first instance in each of which the Ministry of Defence sought to argue that they did not give rise to a cause of action. In all three cases, the High Court judges who went on to achieve considerable eminence, found in favour of the plaintiffs. Their reasoning was not altogether consistent.

In the first case was **Church v Ministry of Defence**<sup>29</sup>, a fitter had until 1954 worked with asbestos in the naval dockyard at Chatham. A routine X-ray in 1980 revealed pleural plaques. Peter Pain J said<sup>30</sup> that it was “an error to treat the pleural plaques on their own.” He held there was damage caused “by the asbestos passing through the lungs and causing the plaques to form.” Adding

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<sup>27</sup> Although this is practical pragmatic case management, the writer questions its legality – see the background of, debate and judgment of the Court of Appeal in **Rees v Mabco (102) Ltd & Eagle Star Insurance Co Ltd** (1998) 11<sup>th</sup> December, unreported, CA ref CCRTI 98/0947/2

<sup>28</sup> (1980) 4<sup>th</sup> December unreported, QBD, Leeds, Mustill J (as he then was)

<sup>29</sup> (1984) 134 NLJ 623

<sup>30</sup> at page 6 of the judgment a transcript of which remains available

that to the plaques themselves, he decided that it was not damage “so minor that the law should disregard it.”

A month later Otton J (as he then was) gave judgment in **Sykes v Ministry of Defence**.<sup>31</sup> The plaintiff had worked with asbestos in the naval dockyard at Portsmouth. The judge was referred to the decision in **Church** but his reasoning was not quite the same. He held that there was no need to add anything to the plaques to produce damage sufficient to attract compensation, and that it was sufficient that there had been a “definite change in the structure of the pleura”. That gave the plaintiff a cause of action and therefore, in assessing the damages, one could take into account the risk of other diseases and the plaintiff’s anxiety. He awarded a global sum of £1,500 damages for “the three elements of physical damage, anxiety and the risks of further complications” but he did not, and did not need to, explain how he would have assessed damages for the symptomless plaques alone.

Section 6 of the Administration of Justice Act 1982 inserted section 32A into the Supreme Court Act 1981 and introduced the jurisdiction to the High Court to award provisional damages. The first contested claim for provisional damages for pleural plaques was **Patterson v Ministry of Defence**<sup>32</sup>, another similar case from the naval dockyard at Chatham. Simon Brown J (as he then was) did not accept that a “symptom-free physiological change” such as a plaque was an actionable injury. If Otton J had decided the contrary, he disagreed. However, he held that the plaques together with the risk of future disease and anxiety could add up to a cause of action. The reasoning was therefore based upon a theory of aggregation. The proposition was that a physiological change which is not damage that alone attracts compensation, can be aggregated with risk and anxiety (neither of which would by themselves give rise to a cause of action) to create a cause of action.

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<sup>31</sup> The Times, 23 March 1984 – a full transcript of the judgment remains available

<sup>32</sup> [1987] CLY 1194 – a full transcript of the judgment remains available

Since these decisions, claims have regularly been settled on the basis that pleural plaques are actionable injury. As Lord Rodger observed :-

“79. For about twenty years pleural plaques have been regarded as actionable. Courts have awarded damages for them. Employers and their insurers have settled many claims for damages for them. Even though this has not resulted in an unmanageable flood of claims, in the present cases the defendants and their insurers have taken a stand. They wish to close the gates by establishing that asymptomatic plaques are not actionable.”

The certainty of this historical state of affairs and the resolution of difficult causation issues in relation to malignant diseases<sup>33</sup> resulted in the research finding that asbestos cases were the least risky of employer’s liability disease claims and failed hardly more often than employer’s liability accident cases<sup>34</sup> such that they only justified a success fee of 27.5% to achieve the cost neutrality upon which conditional fee agreement funding was predicated, which figure is now enshrined in the Civil Procedure Rules.<sup>35</sup>

In 2004, parts of the insurance industry decided to challenge this status quo. In **Grieves v F T Everard & Sons**,<sup>36</sup> ten test cases were selected for trial before Holland J, before whom the claims succeeded. On appeal in seven of those cases, in **Rothwell v Chemical & Insulating Co Ltd**,<sup>37</sup> the Court of Appeal, by

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<sup>33</sup> See **Fairchild v Glenhaven Funeral Services Ltd** [2003] 1 AC 32 and **Barker v Corus UK plc** [2006] 2 AC 572

<sup>34</sup> Fenn and Rickman’s unpublished research on calculating reasonable success fees in employer’s liability disease claims commissioned by the Department of Constitutional Affairs to inform the mediation process that led to the fixing of success fees in these cases

<sup>35</sup> CPR Part 45.23(3)(c) and 45.24(2)(a)

<sup>36</sup> [2005] EWHC 88 QB

<sup>37</sup> [2006] EWCA Civ 27

majority, allowed the appeals and the claims failed. Before the House of Lords, in **Johnston v NEI International Combustion Ltd**<sup>38</sup> four remaining cases failed to overturn the decision of the Court of Appeal.

The successful insurers have claimed costs of £1.9m from the after the event insurers who had backed the successful trials at first instance. The impact of the result on the ATE market, and on the insurability of disease claims in the future remains unclear but the effect on access to justice will be substantial. Before analysing the reasoning and considering wider impact, it may be material to note that in these 13 claims, heard by 12 judges, 7 of whom were or became Law Lords, 3 of whom were or became Lord Justices, and 2 of whom were puisne judges, 5 found in favour of the Claimants and 7 found against. Moreover, if ultimately it is a question of fact and degree to decide in any given case whether the threshold of actionability has been passed, it may be noteworthy that that the first instance judges of the facts unanimously found in favour of actionability. Political and philosophical questions arise as to whether issues such as this, affecting so many thousands of people that the insurance industry has estimated that the decision of the House of Lords may have saved it £1.5 billion<sup>39</sup>, should be decided by such narrow margins in the courts, or despite being questions of fact and degree, should be conclusively determined by appellate judiciary, rather than being considered by Parliament and becoming the subject of legislation.

The House of Lords' decision:

Injury or not an injury?

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<sup>38</sup> [2007] UKHL 39

<sup>39</sup> Stewart Douglas writing in Insurance Daily, 18<sup>th</sup> October 2007 citing an actuarial report commissioned prior to the commencement of this test case litigation

Although the decision of the House of Lords was unanimous to the effect that the Appellant Claimants should not succeed, extracting a clear ratio of what was decided is far from easy.

Lord Hoffmann reasoned it thus (the emphasis is that of the writer):-

“10. Holland J found that the plaques in themselves were not damage which could found a cause of action. He said (at para 80a): “I start by rejecting any notion that pleural plaques per se can found a cause of action. I am not satisfied that for forensic purposes they can be categorised as a ‘disease’ nor as an ‘impairment of physical condition’.”

“11. This finding of fact is in my opinion unassailable. As the judge noted, the point was conceded by the claimants, who preferred to rely upon the aggregation theory adopted by Simon Brown J in *Patterson v Ministry of Defence* . The same concession was made in the Court of Appeal but withdrawn in the House of Lords. ... I do not see how it was open to the judge, on the evidence, to come to any other conclusion. ... The important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life. They had no effect upon their health at all.”

“12. If the pleural plaques are not in themselves damage, do they become damage when aggregated with the risk which they evidence or the anxiety which that risk causes? In principle, neither the risk of future injury nor anxiety at the prospect of future injury is actionable. These propositions are established by the decisions of the House in *Gregg v Scott*<sup>40</sup> ... and *Hicks v Chief Constable of the South Yorkshire Police*<sup>41</sup> ... respectively. How then can they be relied upon to create a cause of action which would not otherwise exist?”

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<sup>40</sup> [2005] 2 AC 176

<sup>41</sup> [1992] 2 All ER 65

“19. .... One is not concerned with whether the plaque is in some sense "injury" or (as she went on to decide) a "disease". The question is whether the claimant has suffered damage. That means: is he appreciably worse off on account of having plaques? The rare victim whose plaques are causing symptoms is worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings) the plaques have no effect. They have not caused damage.”

Is he saying that pleural plaques are an injury that is not actionable (paragraph 19), or is he saying that they are not an injury at all (paragraphs 10 and 11), or is he sidestepping the dichotomy (paragraph 19)? The answer is not clear, but the conclusion is that they are not a legal, that is, actionable, injury.

Lord Scott reasoned differently (the emphasis is that of the writer):-

“62. None of the appellants has yet contracted any asbestos related disease.”

“65. ... a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the claimant's cause of action.”

“68. ... The judge's conclusion, concurred in by all the members of the Court of Appeal, that pleural plaques could not be characterised as a disease or as an impairment of physical condition was in part a finding of fact but also a conclusion of law. ... The facts, however, lead inevitably in my opinion to the conclusion reached by the judge. Pleural plaques are not visible or disfiguring. None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos related disease. The inhalation of the fibres and the

formation of the plaques involved no pain or physical discomfort. Those being the facts the conclusion that the presence of pleural plaques could not *per se* suffice to complete a tortious cause of action in negligence is, in my opinion, unassailable.”

“71. ... A scar or lesion on the skin may constitute a tortiously relevant injury because it is disfiguring. A lesion hidden within the body is plainly not of that character.”

The clear conclusion reached is that pleural plaques are not an injury, and that is determinative of the issue of actionability.

Lord Hoffmann does not pass comment on the speeches of others. Lord Scott purports to agree *inter alia* with the opinion of Lord Hoffmann.<sup>42</sup> They do not appear to say the same thing even though they concur as to the result. Lord Mance agrees however with both speeches.<sup>43</sup> He says (the emphasis is that of the writer):-

“103. More specifically, I agree with the reasons given in the opinions of my noble and learned friends, Lord Hoffmann, Lord Scott of Foscote and Lord Rodger of Earlsferry, for concluding that the pleural plaques did not by themselves constitute or involve injury and damage sufficient to enable an action to lie in tort and that such injury and damage cannot in law be found by "aggregating" the pleural plaques, the risk of future asbestos-related disease and/or the anxiety experienced in relation to such risk, in circumstances where none of such factors alone will suffice.”

Is he agreeing with Lord Scott that there is no injury, or is he interpreting the speech of Lord Hoffmann as to the same effect, thereby enabling him to agree

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<sup>42</sup> Judgment paragraph [74]

<sup>43</sup> Judgment paragraphs [102] and [103]

with both of them? If however, that is not the proper interpretation of the speech of Lord Hoffmann, surely he cannot be agreeing the reasons of Lord Scott.

Lord Hope however appears to accept that pleural plaques are an injury but not one that is sufficiently serious to pass the threshold of actionability. He reasoned it thus (the emphasis is that of the writer):-

“38. ... The pathological process that gives rise to them is such that pleural plaques may be described as a disease or an injury. But they do not normally give rise to any physical symptoms. They may become more extensive. But they do not in themselves give rise to, or increase the risk of developing, any other asbestos induced conditions. The appearance of the pleura is altered. But this is detectable only by way of chest X-ray or CT scan or, after death, by autopsy. There is no cosmetic deficit. Their physical effects cannot, in any normal sense of the word, be described as harmful. In essence, they are only indicators. They do no more than evidence exposure to asbestos.”

“39. ... There must be real damage, as distinct from damage which is purely minimal .... . Where that element is lacking, as it plainly is in the case of pleural plaques, the physical change which they represent is not by itself actionable.”

“49. ... while the pleural plaques can be said to amount to an injury or a disease, neither the injury nor the disease was in itself harmful. ... Pleural plaques are a form of injury. But they are not harmful. They do not give rise to any symptoms, nor do they lead to anything else which constitutes damage.”

“59.... But they have not yet sustained an injury for which the law can give them a remedy in damages.”

Lord Rodger sidesteps the issue, concluding that :-

“88. ... Taken by themselves, however, the plaques are benign and asymptomatic. So, even assuming that the plaques could constitute a relevant ‘injury’ to the claimants’ bodies, they do not cause them any material damage and so do not give rise to a cause of action.”

Thus it seems to the writer Lord Scott clearly holds there to be no injury, but Lord Hope clearly holds there to be an injury, but one that is de minimis and does not cross the threshold into actionability. In purporting to agree with the speech of Lord Hoffmann, it is implicit that Lord Scott believes that Lord Hoffmann is holding there to be no injury, and in agreeing with the speeches of both of them, implicitly so to does Lord Mance. Lord Rodger assumes there could be an injury without expressing a concluded view on the issue. There are therefore 1 clear and 2 equivocal findings of ‘no injury’ which appears therefore to be the majority view.

#### Cause of Action in contract:

The search for a ratio on the above dichotomy is relevant to wider issues. Lord Scott opines :-

“74. ... Each of the appellants was employed under a contract of service. Each of the employers must surely have owed its employees a contractual duty of care, as well as and commensurate with the tortious duty on which the appellants based their claims. It is accepted that the tortious duty was broken by the exposure of the appellants to asbestos dust. I would have thought that it would follow that the employers were in breach also of their contractual duty. Damage is the gist of a negligence action in tort but damage does not have to be shown in order to establish a cause of action for breach of contract. All that is necessary is to prove the breach. The amount of damages recoverable, once the breach of contract has been proved, is subject to well known rules established by the leading cases

and, applying these rules, it might be well arguable that the breach of a contractual duty to provide a safe working environment for employees, an environment where reasonable precautions had been taken to avoid their exposure to injurious asbestos dust, would justify an award of contractual damages to compensate the employees for subjecting them to the risk of contracting in the future a life-threatening asbestos related disease. Damages for breach of contract should, in principle, compensate the victim for being deprived of the contractual benefit to which he was entitled. However these are matters that have not been debated at all, either before your Lordships or in the courts below. Mr Burton QC made expressly clear in the course of the hearing of this appeal that the appellants' claims were based on tort and not on breach of contract. In the absence of claims based on contract and submissions from counsel about the possibilities and limitations of such claims, my speculation as to whether contractual damages claims by the appellants might have been viable can be taken no further. I would, however, observe that sections 11 and 14 of the Limitation Act 1980, which apply to negligence actions for damages for personal injuries, not only apply to actions based on breach of a tortious duty of care but can surely apply also to actions based on breach of a contractual duty of care.”

Lord Hope agreed, saying that :-

“59. ... The question whether employees might have a remedy against their employers in contract has not been explored in the present context, as my noble and learned friend Lord Scott of Foscote points out. There may be room for development of the common law in this area.”

Lord Mance also agreed, saying that :-

“105. ... I also note that the scope of an employers' contractual liability might require examination in another case, but it has not and cannot be examined in this case.”

Other commentators agree.<sup>44</sup> There are several reasons why this writer questions that conclusion.

First, if, which is not clear for the reasons analysed above, the ratio is that there is no injury in these cases, then the cause of action in contract is not an action “in respect of personal injuries” within the meaning of section 11 of the Limitation Act 1980. As such it does not benefit from the date of knowledge relaxation of the primary limitation periods in contract or tort, and the primary contractual limitation period of six years from date of breach will continue to apply.<sup>45</sup> If that be the case, then in respect of the pleural plaques, any contractual right of action becomes statute barred six years after the cessation of the defendant’s exposure of the claimant in breach of duty. Only if either the decision of the House of Lords is to the effect that pleural plaques are an injury but are not actionable as such, or a later Supreme Court (as by then the House of Lords will have become) in a contract action engages in “not so much reinterpreting as rewriting the key decisions”,<sup>46</sup> can this conclusion avoided.

Secondly, other problems beyond the scope of this article exist in relation to making alternative claims in contract, including but not limited to whether the policy wording of usual employer’s liability indemnity insurance policies would

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<sup>44</sup> See for example Colin McCaul QC: Plaques are back: New Law Journal 9<sup>th</sup> November 2007 page 1564

<sup>45</sup> Limitation Act 1980 section 5 provides that “An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.” The cause of action is the relevant breach and not the time of damage: see *Gibbs v Guild* (1881) 8 QBD 296.

<sup>46</sup> Lord Rodger’s description in *Barker v Corus UK plc* [2006] 2 AC 572 at paragraph [71] of the reasoning of the majority about the earlier decisions of the House of Lords in *Fairchild* (op cit) and *McGhee v National Coal Board* [1973] 1 WLR 1

cover such claims, whether provisional damages would be available, and whether damages for pain and suffering and loss of amenity would be available.

### What is actionable?

Lord Hoffmann opined (the emphasis is that of the writer):-

“7. Some causes of action arise without proof of damage. Trespass and breach of contract are examples. Proof of the trespass or breach of contract is enough to found a cause of action. If no actual damage is proved, the claimant is entitled to nominal damages. But a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capability.”

“8. How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. De minimis non curat lex. But whether an injury is sufficiently serious to found a claim for compensation or too trivial to justify a remedy is a question of degree.”

“19. It seems to me, with respect, that Smith LJ asked herself the wrong question. One is not concerned with whether the plaque is in some sense “injury” or (as she went on to decide) a “disease”. The question is whether the claimant has suffered damage. That means: is he appreciably worse off on account of having plaques? The rare victim whose plaques are causing symptoms is worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings) the plaques have no effect. They have not caused damage.”

Lord Hope agreed, saying (the emphasis is that of the writer):-

“39. ... There must be real damage, as distinct from damage which is purely minimal ... . Where that element is lacking, as it plainly is in the case of pleural plaques, the physical change which they represent is not by itself actionable.”

“47. ... In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless.”

Lord Scott also agreed, saying :-

“65. ... First, a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the claimant’s cause of action.”

“68..... The facts, however, lead inevitably in my opinion to the conclusion reached by the judge. Pleural plaques are not visible or disfiguring. None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic

and were not the first stage of any asbestos related disease. The inhalation of the fibres and the formation of the plaques involved no pain or physical discomfort. Those being the facts the conclusion that the presence of pleural plaques could not *per se* suffice to complete a tortious cause of action in negligence is, in my opinion, unassailable.”

Lords Rodger and Mance clearly also agreed.

Thus, the unanimous conclusions of the House of Lords were that :-

- Actionable damages requires there to be some harm or detriment, which requirement is not satisfied in respect of invisible physical changes that cause no symptoms, do not progress and do not lead in themselves to other serious consequences;
- Aggregating those changes whether with each or both of
  - risk of other serious diseases developing independently in the future
  - anxiety, even if genuine and foreseeable, as to future health and welfare, but falling short of frank psychiatric illnessis impermissible and does not complete the cause of action because each constituent element on its own does not constitute actionable damage.<sup>47</sup>

### W(h)ither Pleural thickening?

Mr Rothwell had been diagnosed as exhibiting pleural thickening as well as pleural plaques, upon re-examination shortly before trial at first instance, but

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<sup>47</sup> For that reason, the decisions of Peter Pain J in *Church* (op cit), Simon Brown J (as he then was) in *Patterson* (op cit) and Holland J in *Grieves* , together with the minority views of Smith LJ in *Rothwell* (op cit) all of which were one way or another based on what was referred to by the House of Lords as the ‘aggregation theory’ are now to be regarded as wrong in law

there was no dispute that both conditions were symptomless.<sup>48</sup> By virtue of the ruling of the House of Lords as to what was actionable damage, he therefore also failed to establish liability.

However the writer submits that the result may require revisiting in future cases where the medical evidence has addressed the new test delineating the border of actionability. Two reasons are suggested for that conclusion.

First, since none of the cases sought to litigate actionability of symptomless pleural thickening, there was no generic medical evidence as to its causes,<sup>49</sup> or as to the ways and frequency with which it progresses to cause symptoms. Accordingly, there was neither evidence nor submission as to on which side of the retained dividing line represented by **Cartledge v E Jopling & Sons Ltd**<sup>50</sup> cases of symptomless pleural thickening fell. The House of Lords were unanimous in neither criticising the conclusions or reasoning in **Cartledge**, nor seeking to limit its ambit or effect. Lord Hoffmann in **Johnston** put it thus (the emphasis is that of the writer):-

“8. ... Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly. It has however arisen in connection with the Limitation Act, under which the primary rule is that time runs from the date on which the cause of action accrues. In an action for negligence, that means the date upon which the claimant suffered damage which cannot be characterised as trivial. To identify that moment was the vital question in *Cartledge v E Jopling & Sons Ltd* ... , in which the employees had suffered death or serious injury from damage to their lungs caused by

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<sup>48</sup> For the detail, see the judgment of Lord Phillips LCJ in **Rothwell** (op cit) at paragraph [3]

<sup>49</sup> Is pleural thickening scarring that is or may be the consequence of bouts of asbestos pleurisy, and if and insofar as such pleurisy does cause symptoms, is that actionable ‘harm’?

<sup>50</sup> [1963] AC 758

exposure to fragmented silica. At a date earlier than the commencement of the limitation period their lungs had suffered damage which would have been visible upon an X-ray examination, reduced their lung capacity in a way which would show itself in cases of unusual exertion, might advance without further inhalation, made them more vulnerable to tuberculosis or bronchitis and reduced their expectation of life. But in normal life the damage produced no symptoms and they were unaware of it."

Secondly, emerging research may be associating pleural thickening with the development of peritoneal mesothelioma<sup>51</sup> in which case on that ground it may constitute harm in the new sense.

#### W(h)ither Asbestosis?

Concession was made by the insurers in ***Rothwell***<sup>52</sup> that :-

"Asymptomatic asbestosis and pleural thickening are, for the purpose of these actions alone, accepted to be compensatable. The reason for this is that the diagnosis cannot be made without characteristic lesions in the lung being seen. Those lesions require a heavy dose of exposure. These two considerations lead to the following assumptions: a person with heavy exposure has a significant increase risk of both asbestos related malignancy and of advancement of the insipient seizures which have just been diagnosed i.e. the asbestosis or pleural thickening. As was explained by Lord Pearce the reason why an asymptomatic condition can be compatible with the suffering of real injury (and hence actionable injury) is that at first what is destroyed is "spare" lung capacity. However at some stage the (at present) asymptomatic injury will progress so as to destroy

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<sup>51</sup> Reid et al : The additional risk of malignant mesothelioma in former workers and residents of Wittenoom with benign pleural disease or asbestosis (2005) Occup. Environ. Med 665

<sup>52</sup> Michael Kent QC for the insured defendants in the Appellant Defendants' Skeleton Argument before the Court of Appeal

sufficient lung capacity so as to cause symptoms on even light exertion. There is thus existing loss of faculty. Compare this to PP which can (almost) never advance so as to give rise to symptoms. Whereas the other conditions are apt to advance, PP are an aetiological cul-de-sac. Put another way, asbestosis, diffuse pleural thickening (and since it is relied upon by C) silicosis may be asymptomatic in their early stage, but that is merely a stage preparatory to the causation of symptoms.”

However, in **Owen v Esso Exploration & Production UK Ltd**,<sup>53</sup> Judge Stewart QC found as follows :-

“25. There is no doubt that, without reference to the risk of progression to symptomatic pleural thickening and/or asbestosis, the Claimant’s condition in the present case is worse than in the case of **Rothwell**. The fibroses constituting pleural thickening and asbestosis tend to reduce lung capacity (cf **Rothwell** paragraph 70). They are not merely evidence of a degree of exposure to asbestos.”

“26. However there is not before me any evidence, as there was in **Cartledge**, that the injured condition of the lungs is advanced, the scarring extensive or that the damage is such that it is sufficient to diminish appreciably the elasticity of the lungs and deprive them of much (or indeed any) of their reserve capacity.”

“27. The problem which Mr Owen has is that (save for the risk of progression to which I shall turn later in this judgment) he has not proven that his asymptomatic pleural thickening and/or asbestosis has actually affected the reserve capacity of his lungs to any extent whatsoever. ...”

“28. In summary the Claimant has not proven anything more than asymptomatic fibrosis which may possibly (but not proven on the balance

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<sup>53</sup> (2006) 16<sup>th</sup> November, unreported, Liverpool County Court. Permission to appeal to the Court of Appeal was granted by Judge Stewart QC but the appeal was stayed by consent by Smith LJ pending the decision of the House of Lords in **Johnston**. The Claimant’s solicitors have decided not to pursue the appeal.

of probabilities) have affected his reserve capacity. Nor has he proved that there is any significant effect on the elasticity or functioning of the lung tissue. I must make it clear that this is by no means to say that asymptomatic asbestosis and/or pleural thickening can never give rise to a cause of action. Evidence of significant effect in the reserve capacity and/or the elasticity of the lung tissue in another case may well yield an entirely different finding.”

Better evidence in future cases specifically addressing the nature, effect on lung capacity, and progression of asbestosis is likely, in the writer’s submission, to result in symptomless asbestosis being held to be actionable harm. It remains to be seen whether the Court of Appeal will so hold in this case on the above evidence because, to paraphrase Lord Scott, this Appellant has already contracted an asbestos related disease<sup>54</sup>, and is at the first stage of an asbestos related disease.<sup>55</sup>

Limitation:

The writer submits that Lord Hope was correct in saying :-

“50. ... I would hold however that there is no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage, and because of the absence of a direct causative link between them and the risks and the anxiety which, on their own, are not actionable. I would apply the same proposition for the purposes of the limitation rules. Time has not yet begun to run against any of the claimants who may have the misfortune of developing an asbestos-related disease in the future which is actionable.”

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<sup>54</sup> Johnston at paragraph [62]

<sup>55</sup> Johnston at paragraph [68]

Accordingly, a finding of pleural plaques communicated to a patient does not set time running against him/her for the purposes of limitation. There may still be litigation. As Dr Rudd observed in giving oral evidence in Grieves :-

“Different experienced readers looking at the same scans ... will disagree with each other in a proportion of cases. On CT scans that proportion is usually around 5%. That was shown in one of our studies, whereas on plain x-rays it may be as high as 20 to 30% disagreement as to whether one is looking at plaques or diffuse thickening ... It is easy to pick a series of cases in which no-one would disagree, but the usual run of cases will include some which are more difficult and in any large series there will be inter observer disagreement and even intra observer disagreement, meaning that the same observer looking at them on different occasions may reach different conclusions.”

One can anticipate therefore limitation disputes hinging on whether a given case at a given time showed pleural plaques (such that time did not start to run and a subsequent claim was not statute barred) or diffuse pleural thickening that was actionable (such that time started to run leaving the current claim statute barred).

Another fertile area for future litigation is to ask in what circumstances might those who have in the past successfully claimed full and final awards of damages for symptomless pleural plaques which are now declared to have been non-actionable, able to claim damages for malignant disease that has developed subsequently.

Legislative intervention:

Lord Hope said :-

“59. I share the regret expressed by Smith LJ that the claimants, who are at risk of developing a harmful disease and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy.”

But the Government response from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice has been to say<sup>56</sup> :-

“The House of Lords considered the issues very thoroughly on the basis of all the evidence put before them and reached the unanimous decision that pleural plaques do not constitute actionable or compensatable damage. Having considered the judgment very carefully, the Government have decided that it would not be appropriate to legislate on the issue.”

Scotland may lead in a different direction because although Alex Salmond, the First Minister is reported to have said :-

“As the ruling was in the context of an English Appeal, it is not binding at the present moment in Scotland”<sup>57</sup>

he may not have been aware that two months earlier, Lord Uist in **Wright v Stoddard International plc**<sup>58</sup> anticipated that the decision of the House of Lords would in fact be determinative of this issue and by supplementary opinion he decided<sup>59</sup> that pleural plaques caused no harm and were not actionable, in

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<sup>56</sup> Hansard, 13 November 2007

<sup>57</sup> Reported by Jon Robins in Deadly decision?: The Gazette 8<sup>th</sup> November 2007 page 22

<sup>58</sup> [2007] CSOH 138 at paragraph [156] – [157]

<sup>59</sup> [2007] CSOH 173 at paragraph [159] – [161]

conformity with the House of Lords' decision. The Scottish Justice Secretary Kenny MacAskill announced on 29<sup>th</sup> November 2007:<sup>60</sup>

"The effects of asbestos are a terrible legacy of Scotland's industrial past and we should not turn our backs on those who contributed to our nation's wealth in the past. Pleural plaques in anyone exposed to asbestos mean they have a greatly increased lifetime risk of developing mesothelioma and a small but significantly increased risk of developing bronchial carcinoma. This will mean that people diagnosed with this condition will have to live with the worry of possible future ill health for the rest of their lives. That is why this Scottish Government is to take steps to reverse the House of Lords Judgment and ensure that people with pleural plaques can continue to raise an action for damages. We have listened to the many voices who have campaigned on behalf of asbestos sufferers. This Government takes this issue very seriously and I hope this move will bring some relief to people living with this condition."

It remains to be seen whether the twin spectre of forum shopping, and the fact that claims may become possible in Scotland against Scottish defendants which are denied to English claimants or against English defendants may cause the Government to reconsider its stance. The following exchange took place at Prime Minister's Question Time on budget day (12<sup>th</sup> March 2008) :-

**“Mr. Stephen Hepburn (Jarrow) (Lab):** The Prime Minister will be aware of the disgraceful plight of pleural plaque sufferers in this country, who are being denied their rightful claim to compensation by the courts. Does he agree that it does not matter how the issue is dressed up: pleural plaques are a working-class industrial injury caused by negligent exposure to asbestos? Will he meet the group of MPs who have been campaigning on the issue, so that we can bring an end to this dreadful, Victorian scandal?

**The Prime Minister:** I am grateful to my hon. Friend for raising the House of Lords judgment, which now has to be answered. Asbestosis and mesothelioma are terrible diseases, and all of us who have seen the

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<sup>60</sup> <http://www.scottishexecutive.gov.uk/News/Releases/2007/11/29102156>

effects that they cause know that we have to do more to help the victims of those diseases. On pleural plaques, we are looking at the matter at this very moment. We will publish a consultation document soon. We are determined to take some action, and I am very happy to meet his delegation.”<sup>61</sup>

The Scottish Government has taken the lead and introduced on 24<sup>th</sup> June 2008 the Damages (Asbestos Related Conditions) (Scotland) Bill, which will allow victims of pleural plaques to claim damages. The reach of the Bill has also been extended to include asymptomatic asbestosis and pleural thickening. It provides as follows:-

#### **“1 Pleural plaques**

(1) Asbestos-related pleural plaques are a personal injury which is not negligible.

(2) Accordingly, a person who has them may recover damages in respect of them from a person liable for causing them.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques are not a personal injury or are negligible ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable for causing (or materially contributing to the development of) a personal injury.

#### **2 Pleural thickening and asbestosis**

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused, is not causing or is not likely to cause impairment of a person’s physical condition is a personal injury which is not negligible.

(2) Those conditions are—

(a) asbestos-related pleural thickening; and

(b) asbestosis.

(3) Accordingly, it is not necessary for a person seeking damages in respect of asbestos related pleural thickening or asbestosis to prove that it has caused, is causing or is likely to cause impairment of the person’s physical condition.

(4) But where a person seeking damages claims, in relation to the amount of damages sought, that the thickening or asbestosis has caused, is causing or is likely to cause such impairment, it remains for the person to prove those matters.

#### **3 Limitation of actions**

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<sup>61</sup> Hansard 12 Mar 2008 : Column 277

- (1) This section applies to an action of damages for personal injuries—
- (a) in which the damages claimed consist of or include damages in respect of—
    - (i) asbestos-related pleural plaques; or
    - (ii) a condition mentioned in section 2(2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition; and
  - (b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.
- (2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

#### **4 Commencement and retrospective effect**

- (1) This Act (other than this subsection and section 5) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.
- (2) Sections 1 and 2 are to be treated for all purposes as having always had effect.
- (3) But those sections have no effect in relation to—
- (a) a claim which is settled before the date on which subsection (2) comes into force (whether or not legal proceedings in relation to the claim have been commenced); or
  - (b) legal proceedings which are determined before that date.”

The writer submits that Clauses 1(1) and 2(1) need attention. As drafted at present, if in future the courts say that to be actionable requires more than being ‘not negligible’ (for example Lord Phillips as the new head of the Supreme Court persuading it to hold in a future that for an injury to be actionable in law requires there to be symptoms, as the majority held in *Rothwell*), that would sidestep this provision, which could instead read

“(1) Asbestos-related pleural plaques are a personal injury which is damage actionable in law.

The Limitation wording in clause 3(2) would have to be different for England and Wales. Moreover, the retrospectivity should be back to the date of the decision of Holland J rather than to the date of the House of Lords as presently drafted because otherwise there is an embarrassing lacuna of non-actionability between those 2 dates because the CA reversed Holland J.

In England, on 9<sup>th</sup> July 2008 the Government published Pleural Plaques: Consultation Paper CP 14/08 open until 1<sup>st</sup> October 2008. It :-

- proposes that action should be taken to improve understanding of pleural plaques and in particular to provide support and reassurance to those diagnosed with pleural plaques to help allay their concerns;<sup>62</sup>
- considers the issues that arise in relation to changing the law of negligence and invites views on whether this would or would not be appropriate, but implicitly favours a no fault compensation scheme as an alternative to legislation;<sup>63</sup>
- prefers a narrow scheme that only makes payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 because only that group had an expectation prior to the House of Lords decision that compensation for pleural plaques would be available.<sup>64</sup>

It remains to be seen whether any legislation will be passed either in Scotland or in England before the next general election.

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<sup>62</sup> Paragraph 24

<sup>63</sup> Paragraph 42

<sup>64</sup> Paragraph 72

## Nervous shock

A Claimant who has suffered any physical injury in the form of asbestos induced illness, other than injury that is de minimis enjoys a complete cause of action<sup>65</sup>. Any Claimant who suffers in addition any psychological injury, whether a frank psychiatric illness or not is entitled to damages reflecting that psychological injury<sup>66</sup>. Whether a Claimant who has suffered no physical injury whatsoever as a result of exposure to asbestos but who may be at risk of developing physical injury in the future<sup>67</sup>, can recover for psychological injury is moot. It is submitted that:-

- A person exposed to a significant quantity of asbestos today, who is told that he is at risk of physical injury in the future, and develops a frank psychiatric illness as a result is entitled to damages<sup>68</sup>
- But someone who merely suffers shock and upset is not.<sup>69</sup>
- Someone who does not recover damages under the above principles has suffered no damage that is actionable, no cause of action that is complete, and no injury in respect of which time runs for the purposes of the Limitation Act 1980<sup>70</sup>.
- Someone who was exposed to a significant quantity of asbestos in the past but has as yet developed no physical injury but when today is told

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<sup>65</sup> Following the reasoning in Cartledge -v- E. Jopling & Sons Ltd [1963] AC 758.

<sup>66</sup> Following the reasoning in Page -v- Smith [1996] AC 155.

<sup>67</sup> The 'worried well'

<sup>68</sup> Following the reasoning in Hinz -v-Berry [1970] 1 All ER 1074.

<sup>69</sup> See Nicholls v Rushton (1992) 29<sup>th</sup> April, unreported, CA

<sup>70</sup> There is no injury that is significant within the meaning of Section 14.

that he is at risk of development of asbestos induced illness in the future will not be able to recover damage for psychological injury falling short of frank diagnosed psychiatric illness<sup>71</sup>.

- Someone culpably exposed to asbestos in the past who suffers no physical injury but is told today that he is at risk thereof and as a result develops frank psychiatric illness may not be able to recover<sup>72</sup>.

Thus it is submitted that the scope for claims by the “worried well” in the U.K. may be strictly limited<sup>73</sup>.

One of the Appellant Claimants in ***Johnston***<sup>74</sup> (Mr Grieves) suffered frank psychiatric illness (clinical depression) as a result of being told that his pleural plaques indicated a significant exposure to asbestos and of the risk of future malignant disease. Not only did the House of Lords hold that such was not reasonably foreseeable to the reasonable employer at the time of the exposure in breach of duty, and therefore not actionable,<sup>75</sup> but it also held that any such illness was not caused by the exposure or therefore the breach of duty, but rather

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<sup>71</sup> If the injury is less than frank diagnosed psychiatric illness there is no actionable injury by analogy to ***Nichols -v- Rushton*** (1992) The Times June 19th C.A. See also ***Colemen v British Gas Services Ltd*** (2002) 27<sup>th</sup> February QBD Toulson J (as he then was) unreported where a claim for exacerbation of psychological problems allegedly due to the belief that exposure to carbon monoxide had in fact caused poisoning (which it had not) was dismissed.

<sup>72</sup> Subject to medical evidence in given cases, the psychiatric injury was not caused by the culpable exposure to asbestos in the past, but by the communication today of the existence of future risk, which may be fatal to proving causation.

<sup>73</sup> Contrast the position in the U.S.A. where legislation is being proposed to limit asbestos claims to those who have suffered some discrete physical injury.

<sup>74</sup> Ante

<sup>75</sup> Per Lord Hoffmann at paragraph [30] and Lord Hope at paragraph [55] and Lord Scott at paragraph [77] and Lord Rodger at paragraph [100]

by the communication 20 years later that the claimant was at risk of future serious illness.<sup>76</sup>

### Limitation

Limitation of actions is a quicksand for Claimants and insurers alike making it particularly difficult to give any party definitive advice. Recent decisions may be overturning traditional understanding.

For example:

- Lord Hoffmann in **A v Hoare**<sup>77</sup> opined that:-

“Section 14(2) is a test for what counts as a significant injury. The material to which that test applies is generally "subjective" in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed "objective" knowledge under section 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably" have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his

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<sup>76</sup> Per Lord Hoffmann at paragraph [33] and Lord Hope at paragraph [53] and Lord Rodger at paragraph [95]

<sup>77</sup> [2008] UKHL 6 at paragraph [34]

instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”<sup>78</sup>

He continued :-

“This does not mean that the law regards as irrelevant the question of whether the actual claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings. But it deals with that question under section 33.”<sup>79</sup>

Accordingly matters that personal injury lawyers used to think were relevant to issues of ‘section 14 knowledge’ are no longer so to be considered and those matters fall instead to be considered in relation to ‘section 33 discretion’ although it remains to be seen how the courts will do so in practice.

In ***Furness v Firth Brown Tools Ltd***<sup>80</sup>, the first case decided by the Court of Appeal since new guidance was given by the House of Lords as to limitation of action in ***A v Hoare***. Smith LJ<sup>81</sup> and more so, Buxton LJ<sup>82</sup> remind us and judges of “the need ... to address and to make findings on each of the elements that arise under section 14” which therefore requires a structured approach.

- First, the questions to be decided must be formulated clearly, even where the answers “may appear to be obvious”.<sup>83</sup>

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<sup>78</sup> This view was accepted also by all of the judges. The effect is to doubt the correctness of ***McCafferty v Metropolitan Police Receiver*** [1977] 1 WLR 1073 and ***KR v Bryn Alyn Community Holdings Ltd*** [2004] 2 All E R 716 CA

<sup>79</sup> Paragraph [44]

<sup>80</sup> [2008] EWCA Civ 182

<sup>81</sup> at paragraph [4]

<sup>82</sup> at paragraph [30]

<sup>83</sup> Buxton LJ at paragraph [30]

- Secondly the court must specifically address the question of burden of proof in relation to each element. Failure to do the first can lure the unwary into fatal error as a result of the second.
- it is suggested, in the correct order, the issues are as follows.
  - First, what is the nature of the cause of action? Is it an action in relation to personal injuries, or is it some other sort of action?<sup>84</sup>
  - Secondly, when did the cause of action accrue? The answer is when actionable damage that was more than de minimis was suffered. Damage is the gist of the tort. Therefore, knowing that you have been exposed to excessive noise from 1969 and that it was dangerous<sup>85</sup>, does not complete the cause of action. That is the reason why Lord Hope was correct in saying that neither the fact of nor the diagnosis of otherwise non-actionable asbestos pleural plaques set time running for the purpose of limitation.<sup>86</sup>
  - It being for the Claimant to prove that s/he has a cause of action, it follows that it is for the Claimant to (plead and) prove what was the actionable injury and when it was suffered.
  - The next question is what is the claimant's date of knowledge? This element itself breaks down into constituent parts, namely that injury was significant, and attributable to the proposed defendant who is identified, but the critical point is that the effect of section 14 draws a distinction between what the claimant knew ('actual knowledge') and what s/he ought to have known ('constructive knowledge'). **A v Hoare** reminds us that the burden of proof varies depending on

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<sup>84</sup> An action for professional negligence against a solicitor or barrister would not be an action in relation to personal injury as such and would neither attract section 14 nor any discretion to disapply the limitation period unless it is alleged that their breach of duty itself caused discrete actionable further personal injury - see generally Jackson & Powell on Professional Liability 6<sup>th</sup> ed. Paragraph 5-28 and **Ackbar v C F Green & Co Ltd** [1975] Q B 582) and **Bennett v Greenland Houchen & Co** [1998] PNLR 458

<sup>85</sup> the facts, according to Smith LJ at paragraph 6

<sup>86</sup> **Johnston v NEI International Combustion Ltd** [2007] UKHL 39

which is being alleged, and **Furness v Firth Brown Tools Ltd** reminds us that if we do not so identify, we will be led into error.

- Thus, the third question is : what was the claimant's date of actual knowledge? 'Actual knowledge', viewed correctly as an alternative date to the date of accrual of the cause of action, in the first instance, is itself a matter for the Claimant to (plead and) prove. It was common ground at the hearing that the Appellant had actual knowledge for the purposes of section 14 as from the date of the consultant otolaryngologist's report dated 12 September 2004.<sup>87</sup> Smith LJ observed in **Furness** that

“the real question was from what date the appellant was fixed with constructive knowledge that he had a significant injury and that the injury was attributable in whole or in part to exposure to noise at work”<sup>88</sup> – that is the ‘constructive knowledge’ question. Lord Carswell in **Hoare** illustrated the dividing line thus :- “If a claimant in the course of his employment inhaled fibres of asbestos, which unknown to him set up the physiological process resulting many years later in his developing mesothelioma, he had no knowledge at the time of inhalation that he had suffered an injury. In the course of time he may develop chest symptoms of increasing severity. He may not connect them with his previous exposure to asbestos, but the stage may be reached at which he ought reasonably to realise that something may be wrong and take medical and any other appropriate expert advice. At that stage, if he is advised of the nature and aetiology of his medical condition, he is to be deemed, by virtue of subsection (3), to have the requisite

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<sup>87</sup> per Smith LJ at paragraph [19]

<sup>88</sup> judgment paragraph [19]

knowledge of those matters. It is at that point in time that subsection (2) has to be considered. If a reasonable person, that is to say, an informed third person who has the knowledge possessed by or attributed to the claimant, would consider the injury significant, as defined by subsection (2), then the limitation period starts to run from that time.”<sup>89</sup>

- Thus the fourth question is : what was the claimant’s date of constructive knowledge? ‘Constructive knowledge’, viewed correctly as an alternative to actual knowledge, displaces actual knowledge as a trigger date. Since it is for the claimant to prove actual knowledge as a trigger date, it is logical and the law that to displace it by constructive knowledge places upon the defendant (the alleging party) the burden of (pleading and) proof. <sup>90</sup> And this is where the judge fell into error. As Smith LJ observed :-

“Under section 14, a claimant does not have ‘knowledge’ until he knows that the injury in question was significant. There was no reference in the judgment to when the appellant knew or ought (with expert advice which it was reasonable for him to seek) to have known that his injury was significant, in the sense set out in section 14(2), namely, when the appellant would reasonably have considered the injury to be sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”<sup>91</sup>

Thus, she said :-

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<sup>89</sup> [2008] UKHL 6 [2008] 2 WLR 311 at paragraph [67]

<sup>90</sup> per Smith LJ at paragraph [27] and Buxton LJ at paragraph [30]

<sup>91</sup> judgment paragraph [22]

“the judge had not dealt with the question of when the appellant knew or ought to have known that his injury was significant.”<sup>92</sup>

Buxton LJ agreed, saying :-

“The judge therefore had to decide, for section 14(2) purposes, when disability springing from the last of those causes had been perceived by Mr Furness to have reached a level which a reasonable person would have considered sufficiently serious to justify proceedings. The judge never identified that as a separate question; and as my Lady has demonstrated, it was impossible from the evidence to determine what his answer must have been had he asked himself the question.”<sup>93</sup>

Essentially what the judge had done was to conflate the third question (where the burden was upon the claimant) with the fourth question (where the burden was upon the defendant), thereby failing to appreciate that the difference was material, as to do so was to fail to perceive the relevance of the burden of proof.

What the court must do is to separately consider the constituent questions. Thus Smith LJ found that :-

“the Limitation Act provides that the test for when a person is to be fixed with knowledge that his injury is significant is based upon what it was reasonable for him to think and do, given the facts of which he was aware. That is to be decided objectively by the judge applying the standards of the ordinary reasonable man. In my

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<sup>92</sup> judgment paragraph [23]

<sup>93</sup> judgment paragraph [30]

judgment, it cannot be said that, as soon as a man is aware of some minor inconvenience in respect of his hearing, he is to be fixed with the knowledge that he would acquire if he immediately took expert advice.”<sup>94</sup>

The trial judge had failed to do so because :-

“If I were asked to consider whether there was a date by which I could properly hold that the appellant had knowledge that his injury was significant (as defined by section 14(2)), I would say that it would be difficult to reach any firm conclusion; the point was not sufficiently explored in evidence. Accordingly, because the burden of proof under section 14 lies on the respondent, I conclude that that burden has not been discharged. The defence under sections 11 and 14 has not been made out.”<sup>95</sup>

Buxton LJ agreed.<sup>96</sup>

It followed that while on the one hand the decision of the trial judge could not stand, on the other hand, the Court of Appeal could not substitute its own decision, but had to allow the appeal. The effect is a retrial. One reason might have been that the Court of Appeal also questioned the trial judge’s approach to section 33 because :-

“the respondent relied on prejudice in the conduct of a trial resulting from the fact that all the documents relating to the respondent’s operations at the premises where the appellant had worked had

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<sup>94</sup> per Smith LJ at paragraph [26]

<sup>95</sup> per Smith LJ at paragraph [27]

<sup>96</sup> see paragraph [30]

been destroyed when the business closed in 1991 or, if not then, certainly by the time the premises were demolished in about 1995. The appellant made the obvious point that these documents would not have been available however quickly he had brought proceedings. Yet the judge relied on the alleged prejudice in his judgment. For that reason, it does seem to me that his decision was open to criticism.”<sup>97</sup>

In **Horton v Sadler**<sup>98</sup> the House of Lords decided that true question for the court under s.33 of the Act was always whether it was equitable or inequitable as between the parties to override the time bar. That analysis could not be reconciled with **Walkley v Precision Forgings Ltd**<sup>99</sup> (which had held that section 11 could not prejudice a claimant who had commenced proceedings within the three-year period and so it was only in exceptional circumstances that such a claimant could have the time-bar disapplied), and therefore **Walkley** was overruled.

### Legal Causation

In **Fairchild**<sup>100</sup> the majority (Lord Hutton dissenting on this point<sup>101</sup>) decided that **McGhee -v- National Coal Board**<sup>102</sup> did decide a question of law which remains authority today to the effect that no distinction was to be drawn between making a material contribution to causing the disease in question and materially

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<sup>97</sup> per Smith LJ at paragraph [28]

<sup>98</sup> [2006] 3 All E R 1177

<sup>99</sup> [1979] 1 WLR 606

<sup>100</sup> Ante.

<sup>101</sup> See judgment para 106 where he took the view that the decision in **McGhee v National Coal Board** [1973] 1 WLR 1 could be explained as a decision based on an inference from the facts.

<sup>102</sup> Ante.

increasing the risk of contracting it, in circumstances where the Claimant faced an insuperable problem of proof if the orthodox test of causation was applied<sup>103</sup>.

Thus where:

- The Claimant was employed at different times and for different periods by employer A and employer B.
- A and B were both subject to a duty to take reasonable care or to take measures to prevent inhalation of asbestos.
- Employer A and Employer B were in breach of that duty with the result that the Claimant inhaled excessive quantities of asbestos dust.
- The Claimant is found to be suffering from an indivisible disease such as mesothelioma<sup>104</sup>.
- Any other cause of mesothelioma other than inhalation of asbestos dust at work can be effectively discounted.
- But the Claimant cannot because of the current limits of medical science prove on balance of probabilities whose asbestos caused his disease.

any or each of the culpable exposing employers are liable to the Claimant for his disease<sup>105</sup>.

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<sup>103</sup> Thereby doubting the correctness of the contrary view expressed by Lord Bridge in *Wilsher -v- Essex Area Health Authority* [1988] 1 AC 1074 at 1090.

<sup>104</sup> Or the writer submits lung cancer which results from an analogous malignant transformation of a single cell.

<sup>105</sup> Thereby impliedly endorsing the correctness of the decision in *Bryce -v- Swan Hunter Group Plc* [1988] 1 All ER 659.

When to the contrary the disease in question is divisible (in the sense of being the result of total asbestos exposure whether culpable or not or sued or not) is subject to different principles<sup>106</sup> apply by which each culpable exposor is liable for that degree of disease attributable to its culpable exposure.

At common law, the award of damages in respect of indivisible disease as opposed to the finding of liability is not apportionable<sup>107</sup>, except where the special rule in *Fairchild* was relied upon, in which special case, each culpable exposor is only liable to the extent to which its exposure contributed to the overall risk of the development of indivisible disease<sup>108</sup>.

In the specific case of mesothelioma, with Royal Assent on 25<sup>th</sup> July 2006, the Compensation Act 2006 section 3 provides :

“(1) This section applies where—

(a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos,

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

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<sup>106</sup> *Holtby -v- Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421, the Court being split however on the question of whether the burden of proving apportionment lies on the Claimant (the majority view) or the Defendant.

<sup>107</sup> See *Dingle v Associated Newspapers Limited* [1961] 2 QB 162 at 188-189 per Devlin LJ as he then was, *Rahman v Arearose Limited* [2001] QB 358 at 361-362 per Laws LJ at paragraphs 17-18, *Hatton v Sutherland* [2002] ICR 613 at 629-632 per Hale LJ as she then was at paragraphs 37-43 cited with approval by the House of Lords sub nom *Barber v Somerset County Council* [2004] 1 WLR 1089 per Lord Walker at paragraph [39] and Lord Scott at paragraphs [5], and [7] - [8].

<sup>108</sup> See *Barker v Corus (UK) Plc* [2006] UKHL 20 [2006] 3 All E R 785 HL allowing the Defendants' appeal by a 4:1 majority.

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable—

(a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos—

(i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or

(ii) by the responsible person in circumstances in which he has no liability in tort), and

(b) jointly and severally with any other responsible person.

(3) Subsection (2) does not prevent—

(a) one responsible person from claiming a contribution from another, or

(b) a finding of contributory negligence.

...

(5) In subsection (1) the reference to causing or permitting a person to be exposed to asbestos includes a reference to failing to protect a person from exposure to asbestos.”

Note that this provision does not deal with lung cancer cases and the writer is aware of no reported or decided case in the UK courts in which the law of causation in lung cancer cases has been considered. What is clear is that Barker survives sufficiently to have an impact on the issue but precisely what that impact will be is unclear.

Whether and to what extent either non-smokers or tobacco smokers can establish liability for lung cancer in those who have been exposed to asbestos is

controversial.<sup>109</sup> In **Shortell v BICAL Ltd**,<sup>110</sup> Mackay J decided that since on a balance of probability, the deceased ex-smoker had been exposed to enough asbestos to have more than doubled the risk of development of lung cancer, relative to the risk due to smoking, the lung cancer was caused by the asbestos, and the Defendants were liable for its full consequences subject only to a deduction of 15% on account of having continued to smoke after the mid 1970's, by which time reasonable people would have acted upon Government health warnings and stopped. No appeal was made against the decision on causation. More than doubling of the risk was agreed to be sufficient to discharge the burden of proof.<sup>111</sup>

In **Badger v Ministry of Defence**<sup>112</sup> Burnton J had held that where medical evidence concluded that "... lung cancer and hence premature death (was due) to both tobacco and asbestos" it was appropriate to find contributory negligence for continuing to smoke tobacco after the commencement of Government health warnings and contrary to specific medical advice.<sup>113</sup> It is unclear whether and to what extent this conclusion survives **Barker** – is the liability of the Defendant full or limited to the extent to which asbestos contributed to the risk of the lung cancer or reduced on account of contributory negligence for smoking? In **Shortell**, the evidence was that the synergistic or multiplicative effect of asbestos

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<sup>109</sup> Mr Frank Burton Q.C. has suggested and the writer agrees that subject to proof of a sufficient level of asbestos exposure such claims will succeed but leaving open the question of whether any and if so what portion of the value of the claim might be "lost" to tobacco smokers for the contribution made thereby to the risk of development of that disease. Anecdote and experience suggest that this is acknowledged by the insurance industry which is settling lung cancer cases. See also **Ellis, Executor of the Estate of Paul Steven Cotton (Deceased) v State of South Australia** [2006] WASC 270 and the article written on this issue by Andrew MacDonald entitled 'Lung Cancer Claims Where Asbestosis is Absent' to be published in APIL Focus March 2008

<sup>110</sup> (2008) 16<sup>th</sup> May, QBD Manchester unreported – see Lawtel AC0117404

<sup>111</sup> See judgment paragraphs [47] – [53]. For another example of the same approach, see **Novartis Grimsby Ltd v Cookson** [2007] EWCA Civ 1261

<sup>112</sup> [2003] 3 All E R 173

<sup>113</sup> For the medical evidence see paragraphs 17 and 18. It is the writer's understanding that not all chest physicians would agree with this analysis.

and tobacco acting in concert was ‘indivisible’ such that primary liability was entire rather than proportionate, with the result that the liability of the Defendant though not limited to its contribution to the risk of lung cancer, was subject to reduction on account of contributory negligence for smoking. Accordingly the question was one of contribution not causation.

Other issues as yet undecided by the Courts include:

- Whether in the case of awards for divisible or indivisible disease it is justiciable when trying the liability action to apportion between insured and uninsured periods<sup>114</sup>.
- What should be the approach to apportionment of damages for divisible disease<sup>115</sup>?

### Medical causation

The Defendant’s contention that chrysotile (white asbestos) does not cause mesothelioma was rejected in ***Jones v Metal Box Ltd***.<sup>116</sup> The contention that lung cancer in an ex-smoker was due to smoking rather than due to asbestos exposure was rejected in ***Shortell***. Mackay J decided that since on a balance of probability, the deceased ex-smoker had been exposed to enough asbestos to

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<sup>114</sup> The writer submits it is not open to the Court so to do because irrespective of whether the disease and hence the damages are divisible, the cause of action is against the named Defendant and is entire, rather than being against the Defendant in respect of insured periods alone. The writer submits that this question of apportionment is justiciable only in proceedings to enforce an unsatisfied judgment under the Third Parties (Rights Against Insurers) Act 1930, in which proceedings the burden would be on the insurer to plead and prove any apportionment contended for.

<sup>115</sup> Contrast the result in ***Holtby*** (ante) in which the rejection by the trial Judge of a mechanistic time exposed apportionment was not disturbed by the Court of Appeal, with the rejection by Mitting J. in ***Matthews -v- Associated Portland Cement Manufacturers Ltd*** (2001) 11th July QBD unreported of an attempted quantitative analysis as being too speculative.

<sup>116</sup> 11<sup>th</sup> January 2007 Cardiff CC HHJ Hickinbottom unreported Lawtel AC0114339

have more than doubled the risk of development of lung cancer, relative to the risk due to smoking, the lung cancer was caused by the asbestos not smoking.

### Damages for Pain and Suffering:

Considerable care should be taken before reliance is placed in cases where the court has departed from the JSB bracket. In **Cameron v Vintners Defence Systems Ltd**<sup>117</sup>, two particular points were missed. Firstly, when writing the foreword to the current edition of the JSB Guidelines, Mr Justice Owen said:

“This small book since 1992 has been widely adopted as the starting point in negotiating levels of pain for general damages in personal injury cases. The aim of the book has remained to report on those **awards made by the courts** in England and Wales. In fact it is only **in rare cases** that courts make awards outside the margins reproduced in the guidelines. Anecdotal evidence suggests that this is also the case in **negotiated settlements**, although those amounts **fall outside the remit of the text**. Although amendments to the figure included in this book are therefore now largely a result of inflation, the editorial team also keeps a constant eye on the way in which the information is laid out and makes every effort, often as a result of comments from its readership, to ensure that the breakdown of the amounts under each heading is as clear as possible.” (My emphasis)

Citing this with approval, Master Whitaker (as he then was), in charge of the mesothelioma list at the Royal Courts of Justice more recently said this in **Smith v Bolton Copper Ltd.**<sup>118</sup>

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<sup>117</sup> [2007] EWHC 2267 (QB) Holland J

<sup>118</sup> (2007) 10<sup>th</sup> July QBD Lawtel ref **AC0115223**

“10. In my judgment, while this is only a guideline, as a bracket it is a very fair spread which is intended and, in my judgment, does take into account, all cases of mesothelioma, from those of the shortest duration to the longest, and is capable of taking account of varying levels of pain and varying levels of medical procedure and surgical intervention. In my judgment, the bottom of the bracket is intended for people who contract the disease but who suffer only the worst symptoms commonly suffered before death and the death itself, and not a protracted period of gradually worsening symptoms before hand.

11. The question which has been raised in this case is whether there can be exceptional cases which fall outside the guideline bracket and whether this case is one of them. ... this bracket does not start at £0. It starts at about £49,000 now, as updated using Kemp. Can there be cases which could fall below that? I have no doubt ... that there could be exceptional cases but what is meant by that?

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13. So if there are exceptional cases, what could they be? I recognise the fact that what I am going to say now is obiter but it seems to me, for example, that a person who is run over by a bus within a week or two of suffering the early symptoms of mesothelioma would fall outside the bracket. As I say, mesothelioma victims typically suffer the worst symptoms in the last few weeks and sometimes the last few months of their illness. This is a well-known phenomenon. It is reflected, and always has been reflected, in the amount of and intensity of care predicted by the medics or the care experts in the last weeks or months, and there is no doubt ... that the symptoms become much worse at this later stage.

14. A typical victim with a survival from the onset of symptoms of 18 months will, for example, have suffered all the invasive procedures, the biopsies, et cetera, at perhaps an earlier stage and will not be, if I can put it in the vernacular, 'poked about' so much during the very worst stages in the last few months, but what makes this type of case, a case of short duration, worse, in my judgment, rather than one which is better (if one can put it that way) is that the two things get telescoped. This is a man who suffered the whole lot of the worst symptoms and medical procedures during a period of between two and three months. Not only the worst symptoms, the final symptoms, the trauma, the pain, the bewilderment, the anxiety, the shock, as it has been described, of the diagnosis, but also has had to go through the procedures, the drainage, the biopsies, et cetera, during the very same period. It all happened extremely quickly. That, in my judgment, is no reason for saying that the damages should fall outside the bracket. Far from it.

15. So it may well be that there are cases in which those final symptoms and the painful mesothelioma related death (because I think one has to bear in mind of course that the damages have also got to take into account the fact that this is a painful and unpleasant death) do not occur, because the victim dies from something else, and therefore did not suffer them. That, in my judgment, might be said to be an exceptional case, because in those circumstances the person will not die the horrible death of mesothelioma and may avoid, mercifully, much of the symptoms. If that is an exceptional case, I have yet to meet one. Perhaps one day in the course of this specialist list here I will, but until then I maintain that this claim is one which is not in any way exceptional. It is one of suffering of the symptoms expected in the last couple of months of life, suffering them more rapidly than most and therefore more frighteningly, and

causing more anxiety and of going through the characteristic medical procedures.”

He awarded £55,000.

Secondly, Smith LJ in **Rothwell v Chemical & Insulating Co Ltd**<sup>119</sup> acknowledged without demur that the usual award in a mesothelioma case was £60,000 and her conclusions as to damages were agreed by the majority.<sup>120</sup>

Both Smith LJ and Master Whitaker are correct. The attached Table at Appendix 2 represents an analysis of all reported damages cases for mesothelioma since and including **Heil v Rankin**<sup>121</sup> and suggests the following conclusions :-

- The proper bracket of award was considered by the Court of Appeal in **Heil** in which the fact that awards for mesothelioma had risen faster than RPI was noted and observed<sup>122</sup> but still the Court of Appeal increased the awards in both of the mesothelioma cases before it, therefore implicitly approving the bracket of awards for that disease;
- The bracket of awards as opposed to settlements reflected in the decided cases is properly described by the JSB;
- Settlement in fact follow the same course;
- The correctness of that bracket was reaffirmed implicitly by the Court of Appeal in **Rothwell**;
- As Lord Woolf MR (as he then was) observed in Heil :-

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<sup>119</sup> [2006] EWCA Civ 27 (the so-called ‘pleural plaques cases’) at paragraph [180], reflecting on submissions including those reported at paragraph [174]

<sup>120</sup> Judgment of Phillips LCJ at paragraph [104]

<sup>121</sup> [2001] P.I.Q.R. Q3

<sup>122</sup> Judgment paragraph [80]

“4. ... levels of general damages for personal injury have traditionally been regarded as more appropriate for final consideration by the Court of Appeal. We refer here to the well known statement of Lord Diplock in **Wright v British Railways Board** [1983] 2 AC 773 at p.785 A-B :

"The Court of Appeal, with its considerable caseload of appeals in personal injury actions and the relatively recent experience of many of its members in trying such cases themselves, is, generally speaking, the tribunal best qualified to set guidelines for judges currently trying such actions, particularly as respects non-economic loss; and this House should hesitate before deciding to depart from them, particularly if the departure will make the guideline less general in its applicability or less simple to apply."

5. It is clear that Lord Diplock also intended the Court of Appeal to have the responsibility for keeping guidelines up to date.”

- Holland J and Judge Walton were seriously out of step in the awards they made<sup>123</sup>;
- The correlation between award and duration of symptoms is at best crude;
- The reason for the lack of close correlation between award and duration of symptoms is as described by Master Whitaker in Smith;

There is not even crude correlation between age of claimant and award.

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<sup>123</sup> In fact Holland J in **Cameron** implicitly so recognises because refrains from following it – see paragraphs [6] and [7]

A table of awards for mesothelioma adjusted to today's values is attached as an Appendix. For clarity the table distinguishes only cases decided in and since *Heil -v- Rankin*<sup>124</sup> and distinguishes between awards and settlements. Smith LJ in *Rothwell v Chemical & Insulating Co Ltd*<sup>125</sup> described £60,000 as 'the usual award' in 2006. Notice also the higher award where radical surgery was undertaken.<sup>126</sup>

Lung cancer tends to attract lower levels of damages<sup>127</sup> although as yet there are remarkably few (modern) decided cases.<sup>128</sup>

#### Financial loss – benefits and credits:

An award made during lifetime or posthumously under the Pneumoconiosis Etc (Workers' Compensation) Act 1979 is treated as analogous to a part-payment on account of damages and as such it is deductible in computing loss, and is treated as deductible from either or both the award for financial loss or the award for pain

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<sup>124</sup> [2000] PIQR Q187 in which two of the eight conjoined appeals concerned mesothelioma.

<sup>125</sup> [2006] EWCA Civ 27 at paragraph 174

<sup>126</sup> *Small* – see second Table in Appendix 2 below

<sup>127</sup> Hence the separate and lower bracket in the JSB Guidelines

<sup>128</sup> *Bone v MoD* (2006) 31<sup>st</sup> July: Lawtel: settlement: male 73, symptoms about 5 months £30,000 (£31,692.70 at December 2007) – the writer submits that this award was too low and out of step with brackets and cases; *Williams v Vosper Thornycroft Ltd* (2006) 26<sup>th</sup> May; Lawtel; male 85, symptoms 3 years but also suffered unrelated prostate cancer which reduced life expectancy; award £55,000 (£58,338.39 at December 2006); and in *Shortell v BICAL Ltd* (2008) 16<sup>th</sup> May QBD, Manchester, general damages were agreed at £62,500

and suffering and loss of amenity<sup>129</sup>. This ruling may not be capable of surviving the decision of the House of Lords in **Barker v Corus (UK) Ltd**<sup>130</sup> but neither the courts nor Parliament have yet to consider the point. It is as yet undecided whether the award is deductible before or after calculating interest but the writer submits that if the award is treated as diminishing the calculation of loss in the first place, it is logical to give credit for it first against past financial loss and then against general damages for pain and suffering and loss of amenity, and therefore in each case before calculating or adding any interest.

In **Cameron V Vinters Defence Systems Ltd**,<sup>131</sup> Holland J held that a payment made to a widow should not fall to be disregarded under section 4 of the Fatal Accidents Act 1976 as having resulted from death, simply because as a matter of the timetabling relationship between the claim and the proceedings, the Claimant got a payment that had the proceedings been pursued earlier she would not have been entitled to and she would not have recovered.<sup>132</sup> Credit therefore had to be given for it against the civil claims made by the widow.

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<sup>129</sup> **Ballantine -v- Newalls Insulation Company Limited** [2000] PIQR Q327.

<sup>130</sup> Ibid

<sup>131</sup> [2007] EWHC 2267 QB Holland J

<sup>132</sup> Because at the time of this action, payments were only available where no route to tortious compensation existed, for example because the employer was a dissolved company in respect of which it had been impossible to identify insurers who could satisfy the potential claim

The writer submits that while the end result of the decision was correct, the route to it may have been erroneous. Suppose, as is often the case, that it was the deceased primary victim who made the application and received the award during lifetime. A claim pursued by him to a conclusion during his lifetime, or on behalf of his estate after his death would have been bound by the result and reasoning of the Court of Appeal in **Ballantine**. As such, in determining loss, credit would have to have been given for the award against financial loss in the first instance, but in the event of an excess of award above financial loss, then also against the award of general damages for pain and suffering and loss of amenity. The law treats the award as a payment in substitution for damages, because, although as a matter of policy and practice, the state does not seek to recover payments if claimants go on to recover damages, the awards are supposed only to be available in cases where no claim has been made or appears to be viable against an extant employer or a solvent and identified insurer.<sup>133</sup> The awards therefore are to replace in part damages that might have been awarded if available, thereby providing a safety net of last resort to those who suffer this disease.

The problem that arises in cases such as **Cameron** is that posthumous claims can be made and if successful, they are paid as here, to the dependent of the deceased. However, the 1979 Act is silent as to what the payment is made in respect of. While the learned judge may have been right to recognise that a

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<sup>133</sup> See sections 2(1) of the Act in respect of lifetime claims and 2(2) of the Act in respect of posthumous claims

posthumous claim was only available to dependents and appeared to result from death,<sup>134</sup> would it not have been simpler to hold that although the payment is made to the dependents, it is made in respect of the deceased's loss and suffering because, pursuant to section 2(2)(b) it is paid "by reason of the deceased's death as a result of the disease" and that as such it is to be credited against the award to the estate under the Law Reform (Miscellaneous Provisions) Act 1934? Alternatively, by the same reasoning, could not the court have held that pursuant to section 3 of the Fatal Accidents Act 1976, to the extent that a payment was made under the 1979 Act, there was no loss, and that loss was limited to the extent to which awards under the 1976 Act exceeded the payment under the 1979 Act? No mention is made of section 3 of the 1976 Act in the judgment.

To what extent this body of law will survive the Child Maintenance and Other Payments Act 2008 is unclear until such time as the subordinate regulations are drafted and published. Sections 46 and 47 in effect widens the class of persons who will be able to apply for a statutory award in that all persons with mesothelioma or their dependants will be able to apply for a lump sum payment, but section 54 enables the making of regulations to make payments under the 1979 Act or the 2008 Act relevant benefits and therefore recoupable out of damages under the Social Security (Recovery of Benefits) Act 1997. There is concern about how the 2008 Act will operate in that it is rumoured that the level of payments will diminish to pay for the wider group of applicants, because there

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<sup>134</sup> Judgment paragraph [17(a)]

will be no 'new money', and it is to be assumed in accordance with the general law relating to the 1997 Act that recoupment will be 'in full' whether or not recovery is in full.

The standard recoupment provisions in the Social Security (Recovery of Benefits) Act 1997 apply to awards for asbestos induced illness whether made during lifetime or after death and the Act operates in the usual way. Of specific relevance to asbestos induced illness claims, the following points are noteworthy:-

- Industrial Injuries Disablement Benefit which is the trigger benefit awarded in any case in which a payment under the Pneumoconiosis Etc (Workers' Compensation) Act 1979 is made is only deductible from claims for loss of earnings, such that if the deceased became ill after retirement and lost no earnings before death, there is no head of claim against which the Defendant can withhold the amount of IIDB paid, and the Defendant must satisfy the certificate from the Compensation Recovery Unit in addition to the payment of the full award of damages to the Claimant;
- Benefits that may be deductible from either the award for care or the award for travel expenses are only deductible from damages to the extent to which such claims are made and in the writer's

experience where disability living allowance mobility component has been received, it often exceeds the value of any claim made for past travel expenses such that it is rarely deductible in full from the award of damages

- benefits are deductible from both the award of damages itself, and if not exhausted thereby, from any interest awarded thereon.<sup>135</sup>

**ALLAN GORE QC**

14<sup>th</sup> July 2008

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<sup>135</sup> *Griffiths v British Coal Corporation* [2001] 1 W.L.R. 1493

## Appendix

### Mesothelioma cases

	claimant	status	judge	date	age	duration*	award	current**
award	Taylor	deceased	Owen J	26.01.01	53	4.5 years	65000	80119.48
guideline			JSB 8th edition	01.06.06			74300	78941.31
award	Small	deceased	Master Whitaker	11.01.05	52	15 months	67000	74803.08
award	Welch	deceased	Master Nussey	22.02.07	32	12 months	70000	72688.03
award	Shanks	alive	HHJ Hickinbottom	24.05.07	59	2.75 years	70000	71595.68
award	Butler	deceased	Master Whitaker	05.03.07	70	3 years	65000	67066.74
guideline	Rothwell		Court of Appeal	26.01.06			60000	65429.22
award	Simon	alive	HHJ Mackie QC	07.02.08	64	16 months	64500	64500
award	Wilkins	deceased	DHJ Wilkinson QC	30.11.00	41	14 months	52500	64335.86
award	Mason-Cave	deceased	Master Rose	12.06.07	66	7 - 8 months	62500	63955.6
award	Rees	deceased	Court of Appeal	23.03.00	74	19 months	50000	62618.58
award	Faith	deceased	DJ Wade	16.09.02	80	? months	52500	62343.98
award	Hunt	deceased	HHJ Bonvin	14.04.00	59	13 to 14 months	50000	61992.65
award	Hunter	deceased	Gray J	14.08.00	75	18 months	50000	61847.27
award	Fairchild	deceased	Curtis J	01.02.01	60	16 months	50000	61308.16
award	Kelly	deceased	Mackay J	09.11.00	70	16 months	47500	58208.78
award	Overton	deceased	Master Whitaker	16.07.04	52	over 12 months	51000	57579.82
award	Smith	deceased	Master Whitaker	10.07.07	65	2 to 3 months	55000	56280.5
award	Dawber	alive	HHJ Swanson	16.02.02	44	over 2 years	45000	54605.62
guideline			JSB 8th edition	01.06.06			47850	50838.92
award	White	alive	Master Eyre	25.09.00	81	9 months	40000	49131.73
award	Cameron	deceased	Holland J	12.10.07		5 to 6 months	35000	35334.95
award	Gallagher	deceased	HHJ Walton	17.01.07	79	3 months	20000	20922.33

agreed	Thomas	alive		24.08.07	78	over 6 months	67500	68671.96
agreed	Hatton	alive		24.08.07	58	18 to 24 months	65000	66128.85
agreed	White	deceased	Nelson J	11.01.02	58	a year ?	52500	63890.64
agreed	H	alive		28.02.06	54	about 2 years	57000	61901.78
agreed	Edwards	deceased	Recorder Nolan QC	02.10.02	76	14 months	47500	56310.79
agreed	Schofield	deceased	Court of Appeal	23.03.00	57	?	44000	55104.35
agreed	Eaton	deceased	Mackinnon J	11.02.04	58	very short	45000	51634.46
agreed	Mahmoud	deceased		19.10.04	69	12 months	45000	50321.01

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where claimant alive duration is to anticipated date of death

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updated to 1st December 2007

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