RECENT ISSUES IN PERSONAL INJURY LAW

ISSUE 1

INDEXATION : PRICES OR WAGE INFLATION FOR PERIODICAL PAYMENTS IN RESPECT OF FUTURE LOSS OF EARNINGS AND CARE/CASE MANAGEMENT COSTS?

1. The Problem and the Legal Background

1.1 In the combined cases of Cooke v United Bristol Healthcare NHS Trust *[2004] 1 WLR 251* the Court of Appeal was presented with uncontested evidence that in cases of catastrophically injured Claimants conventional awards for future care and case management on a lump sum basis premised upon the rate of return of 2.5% for multipliers would, over time, be likely to produce substantial shortfalls, leading eventually to the award running out prior to the predicted date of death of the Claimants. This was because historically labour costs for care had increased at a rate of approximately 1½-2% above the retail price index which the discount rate was loosely associated with. Nevertheless the Court of Appeal unanimously rejected the Claimants' contentions that to avoid this deficit the multiplicand should be revised over time with stepped increases. The Claimants' position was simply that if this was not permitted the principle of full compensation set out in Wells v Wells *[1999] 1 AC 345 (at 394G, 400E, 403C D)* would be routinely denied. Lord Justice Dyson said in Cooke that the attempt to calculate damages by allowing

for future inflation for some heads of claim but not others was a plain attempt to subvert the rate of return set by the Lord Chancellor in July 2001 at 2.5%. The Court of Appeal further stated that the full compensation principle could only be achieved in a "rough and ready" way (per Lord Justice Laws para 12). The reason why the Claimants in Cooke sought to increase the multiplicand rather than the multiplier was because of the earlier decision of the Court of Appeal in *Warriner v Warriner [2002] 1WLR 1 703* which had held that Section 1(2) of the 1996 Damages Act (which permitted an alteration to the Lord Chancellor's discount rate where it was "more appropriate in the case in question") could only be invoked in exceptional cases. The Court in Warriner held that the Lord Chancellor clearly had in mind Claimants with life expectancies of between 30 and 50 years when setting the rate and there was nothing in the normal catastrophic cases with considerable life expectancies which made it more appropriate to apply a different rate.

1.2 The problem of systematic under compensation in such cases is substantial. In 1963 an annual payment of £1,000 indexed to RPI would have risen to £14,483 in 2006. If, however, salary based care costs had risen in line with AEI, the cost of providing £1,000 of care would now be £32,891. The shortfall of £18,358 means that only 44.1% of the annual cost of provision would be available after 44 years. In *A V B Hospitals NHS Trust* Mr. Justice Lloyd-Jones accepted evidence that if the infant Claimant's care needs were met by a periodical payment indexed to RPI, assuming a differential of 1.7 per annum between RPI and AEI, there would be a shortfall of £29,030 pa by year 10, £193,091pa by year 27 and £347,015 pa by year 36. Master Lush, in

a paper published in the London Law Review on 19 April 2005, gave details of the case of *Charlie Beattie*, who was knocked off his motorcycle on 19 July 1998, just before his eighteenth birthday. This case settled in 1992 for £1,530,000, £1,050,000 of which was put into a structured settlement providing an annuity of £64,500 then and currently £87,500. Regrettably for Charlie Beattie, between 1992 and 2004 RPI increased by 35%, but his care costs have increased by 60%. The linking of the structured settlement to RPI is producing a substantial shortfall.

1.3 On April 1 2005 the amended Section 2 of The Damages Act 1996 came into force pursuant to the Courts Act 2003 which provided that a Court may make an order for periodical payments even if the parties do not consent. The Department of Constitutional Affairs provided guidance on the new provisions stating that periodical payments were usually a "much better and fairer way of compensating those facing long term future loss and care needs". The explanatory notes to the amendments made by the Courts Act 2003 indicated the Government's intention to promote the widespread use of periodical payments, something which with Lord Chancellor's Department in 2002 had hoped would become the norm in large cases. CPR47.1 and PD41B require that the Court should have regard to all the circumstances of the case and in particular which form of award best meets the Claimant's needs, having regard to all the factors. Specifically, the factors contained in the Practice Direction include issues of contributory negligence, the reasons for the Claimant's preference, the nature of any financial advice received by the Claimant and the

form of award preferred by the Defendant, including the reasons for their preference. Section 2 (8) of the Damages Act 1996 provides:

> "(8) An Order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of Section 833(2)) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedural Rules".

However, this default position of RPI as the index for periodical payments, is subject to Section 2 (9) which reads:

> "(9) But an Order for periodical payments may include provision -
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> (a) disapplying subsection (8); or
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> (b) modifying the effect of subsection (8)".

1.4 The first attempt to re-litigate the issue of indexation under the new regime and in the light of governmental support for periodical payments came in the case of *Flora v Wakom (Heathrow) Limited* *2006 EWCA 1103, [2004] 4 All ER 982*. The Claimant sought to invoke sub-section (9) and to adduce expert evidence that a wages index would be more appropriate for periodical payments for future care. The Defendant's response was to attempt to strike out that part of the Claimant's

Statement of Case and to exclude the evidence of the expert, contending that Section 2 (9) should only ever be used in exceptional circumstances. The Court of Appeal disagreed, saying that there was nothing in the language of either Section 2 (8) or Section 2 (9) to suggest that the power to disapply or modify the effect of Section 2 (8) could only be triggered in an exceptional case. Further, the Court emphasised that the principles of full compensation apply equally to periodical payments and the purpose of a periodical payment was to ensure that the real value of annual payments should be retained over the whole period for which they were payable. The Court also emphasised that a periodical payment was quite different from a lump sum and if Section 2 (9) was read down to only apply to exceptional circumstances, then there would be a real threat that the new legislative scheme would not have the beneficial effect that was intended by Parliament. Accordingly, the Court permitted the Claimant to adduce expert evidence on the issue of what was the most appropriate index to achieve full compensation. The Defendant's petition to the House of Lords was rejected.

1.5 Subsequent Cases

In *A V B Hospitals NHS Trust [2006] EWHC 2 833* the infant Claimant, who was catastrophically injured during his birth in 1999, did not wish to undertake the delay and expense of contesting the issue of indexation and asked the Court to be permitted to take a lump sum of approximately £6.5m. Mr. Justice Lloyd-Jones accepted limited accountancy evidence put before him that if the Claimant took his future care costs as a periodical payment linked to RPI, as the Defendants wished, it would lead "***to a result that there will be a massive shortfall in provision for future care for the***

Claimant". The Judge considered investment evidence which produced calculations showing a medium equity range forecast of a net rate of return of 4.34% per annum over the next 10 years, with a maximum range of 8.07% on a lump sum award. On this basis the Judge considered that there was a good prospect that investment returns would go substantially further than would periodical payments if they were linked to RPI. In those circumstances, the Judge permitted the infant Claimant to accept the lump sum award.

1.6 In *Thompstone v Thameside and Glossop Acute Services NHS Trust[2006]EWHC 2904* the Court first heard expert opinion from a labour economist, an actuary, a financial adviser and an accountant as to whether his periodical payments for future care should be linked to a wages rather than a price index. Mrs. Justice Swift, in a well structured judgment, concluded that the default RPI index should be displaced for an earnings index, namely ASHE 6115 at the 75th percentile (£8.47 average hourly rate). Her choice of this index was on the basis that it was sufficiently sensitive to track changes specific to the care market which were likely to have an effect on the Claimant's care costs.

1.7 In Corbett v South Yorkshire Strategic Health Authority [2006] EWCA CIV 1797 the Defendant Health Authority attempted to adjourn the issue of indexation pending the outcome of the appeal in Thompstone where Swift J gave the Defendant's permission to appeal to the Court of Appeal. The Court of Appeal in Corbett agreed with the first instance decision that the trial on quantum including the issue of indexation should go ahead on the basis that that was a reasonable CMC management decision to make and that if appropriate Corbett could be joined with Thompstone on

appeal. Corbett proceeded to trial and the Judge (HHJ Bullimore) handed down his judgment on the 28/3/07. He found the court did have a power to order a periodical payment on an index other than RPI and ordered that future care in the form of a periodical payment should be linked to ASHE 6115, 70 percentile. He also found that a live in carer required to do 21 hours per day was in breach of the Working Time Regulations 1998.

1.8 Waseem Sarwar v 1. Kamran Ali and 2. Motor Insurers Bureau [2007] EWHC 1255 QB

Lloyd Jones J delivered a thorough judgment on the issue of indexation on the 25/5/07 in this action for damages where a 25% reduction for contributory negligence for failing to wear a seatbelt had been agreed. The effective Defendants were the MIB as Mr Ali was an uninsured driver. The Claimant's initial preference as opened in the case was for periodical payments in respect of future loss of earnings and future care and case management to be on a periodical payment basis but only if linked to an earnings measure. However, following delay between the end of the evidence and submissions the Claimant changed his instructions to a preference for a lump sum. The MIB, however, expressed its preference for periodical payments (linked to RPI) partly on the basis that its annual income was derived from on a levy following estimates of the MIB's financial requirements to pay claims in the following year. The members of the MIB contribute to the levy proportionately according to the amount of motor insurance that each underwrites. The MIB contended that periodical payments enabled it to spread over a longer period its liabilities and therefore the immediate cost to the insured members and through them the insurance paying members of the public would be lower. The judge awarded periodical payments on an

earnings index basis both for future loss of earnings and future care and case management (Ashe aggregate full time males at 90th percentile for earnings and Ashe 6115 90th percentile for care). The case raised the interesting issue as to what weight should be given to the Claimant's preference in circumstances where comprehensive expert evidence has been adduced on his behalf in the trial that his best financial interests would be met by periodical payments on an earnings index. The experts in this case all came to agree that the appropriate measure for a periodical payment in respect of future loss of ***earnings*** would be an earnings based measure although they differed on the appropriate measure. They continued to dispute the appropriate index for care. No appeal was made by the MIB.

1.9 RH (by his mother and litigation friend LW) V United Bristol Health Care NHS Trust [2007] EWHC 1441 (QB)

Mackay J also awarded an earnings based index for care in this action for a six year old CP claimant indicating the 6115 index was the closest proximation to future carer costs.

2. Issues in the Indexation Debate

The Claimant's contentions

2.1 The Claimant's case is that RPI is not an appropriate index for carer's earnings or a Claimant's own loss of earnings because it is a measure which relates to growth in prices. Historically average earnings have increased at c1.5-2% pa above prices. Failure to link a loss of **earnings** claim to an earnings index deprives the Claimant of increases in future productivity that all other workers in the Claimant's pre-accident

position continue to enjoy. The **cost of care and case management** is overwhelmingly made up of labour costs in the region of 95%. Average carer's earnings are likely to continue to increase at a faster rate than prices in the future, probably in the region of 1.7% per annum. Evidence from Maggie Sargent has indicated that in her organisation care costs have increased significantly over RPI and also over AEI in recent years. The reasons for this are disparate but include the effect of the European Working Time Directive and the Working Time Regulations 1998, the Care Standards Act, the Manual Handling Regulations, minimum wage legislation, demand for care in an ageing population and the increasing professionalisation of the care system.

2.2 Once the Claimant has adduced evidence that RPI as an index for periodical payments is inappropriate and may produce substantial under-compensation, it is a matter for the Court to determine which is a more appropriate index. The Claimants have tended to ask the Court to consider AEI, ASHE (at the mean £32,774 for male earnings in 2006, or at the median £25,769), or ASHE6115 at the appropriate percentile matched to the averaged hourly rate in the actual care regime. Other ASHE classifications may be more appropriate for loss of earnings such as SOC1 (£53,879 in 2006) if the Claimant was likely to be a relatively high paid manager.

2.3 The Claimants have accepted that there is no specific index/measure relating to the costs of employing carers in the private sector in the specific area where the Claimant lives and therefore the Court needs to determine the comparative value of different measures or indices to choose the best or least worst.

2.4 English insurers are able to, in the majority of cases, self-fund and the Claimant can obtain the protection of the Financial Compensation Services Scheme. The MIB are now considered by the court to be a relatively secure provider and the NHSLA/NHS Trusts agreement permits continuity of periodical payments from the health budgets. It is accepted that a difficulty arises with foreign insurers who would not come under the FCSS umbrella. It is also accepted that at present there are no annuities on the market linked to AEI/ASHE and accordingly the solution for a foreign insurer would be to purchase an annuity link to RPI plus a fixed percentage, say 1.7%,. In this context the Government actuary has assessed earnings increases as likely to exceed prices by a margin of 1.5-2%.

2.5 Failure to link periodical payments to an earnings index both in respect of care/case management and earnings would produce significant under-compensation and undermine the 100% principle.

3. The Defendant's Contentions and the Claimant's Responses

3.1 Burden of Proof

It is for the Claimant to not only adduce evidence on indexation but to opt for a specific index when making an application under Section 2(9).

Response

This line of argument was rejected by Swift J who determined that the function of the Court was to see what index best suited the Claimant's needs and to determine what was appropriate, fair and reasonable to ensure the value of the index was maintained over the whole of the period for which it was required. This was not a matter to be resolved by appeals to the burden of proof as once the Claimant had adduced evidence the RPI was potentially unsuitable the Court would look at all indices to determine which was the more appropriate.

3.2 Exceptionality

Section 2(9) should only be used in exceptional cases as RPI is the default position under the Act.

Response

First instance Courts are bound by **Flora** which rejected this proposition. The House of Lords may indicate otherwise but the wording of the Statute appears to be relatively straightforward to construe.

3.3 Overcompensation of Other Heads

The Court should consider the benefit to the Claimant of other heads linked to RPI which out perform price inflation. The main example is the accommodation claim that typically occurs in catastrophic cases. House inflation has increased at approximately 2.5% pa over AEI in the last 25 years. This should lead the Court to question whether such "overcompensation" should be notionally off-set against the total award or

alternatively bring into question the appropriateness of having some heads of claim linked to RPI and others to an earnings measure, so-called cherry picking.

Response

Swift J rejected this line of reasoning on the basis that there was no overcompensation as the Roberts v Johnstone [1989] QB 878 claim has been endorsed by the House of Lords in Wells v Wells and accordingly the appellate Courts have deemed that the 100% principle(and impliedly no more than 100%) applies to accommodation claims. Further, as a matter of practice, any value to the Claimant cannot be realised by him but innures principally to the benefit of his Estate. Equity Release schemes are available but usually from the age of 55 or above and the financial markets have not yet responded to cases of shortened life expectancy or altered accommodation. Further, given the way in which accommodation claims are structured through Roberts v Johnstone a Claimant is always required to expend substantial parts of his general damages and/or loss of earnings to purchase the accommodation and it is not immediately therefore obvious as to why the Claimant has a personal advantage. In any event, as a matter of principle, offsetting offends the reasoning in Parry v Cleaver [1970] AC1 (per Lord Reid 20g-21c) and Longden v British Coal Corporation [1998] AC 653 (per Lord Hope at 663d-664) which determined that a perceived benefit or credit in one head of loss (in this case accommodation) cannot be offset against a loss in another head of claim(such as care). It is also arguable that offsetting is contrary to the principle that a Court does not look at what the Claimant has or will spend his money on (Wells v Wells [1999] AC 345 per Lord Clyde at 394h, Lim Poh Choo v Camden & Islington Area Health Authority [1980] AC 174).

3.4 Distributive Justice

The NHSLA in Thompstone adduced evidence that linking periodical payments to an earnings index would cost the National Health Service something in the region of £1.678bn, approximately £255m per annum. Accordingly the Court should invoke the concept of distributive justice as set out by Lord Hoffman in White v Chief Constable of South Yorkshire [1999] 2AC 455 and Lord Steyn in McFarlane v Tayside Health Board [2002] 2AC 59. This engages a concept that if public opinion was consulted it would be of the clear view that notwithstanding the grievous nature of those catastrophically injured they should not receive full compensation because of shared democratic notions of what is fair, just and reasonable in society with a national health system.

Response

Mrs Justice Swift dispensed with this argument as essentially having little to do with the facts on indexation. It is essentially an argument over affordability. It is well settled law that the issue of affordability is not one which the Court can properly take into account (Heil v Rankin [2001[QB 272, Wells v Wells) . Swift J said it was not just or indeed practicable for the Courts to determine the perception of where justice would lie in the public's view. The concept of distributive justice (rooted in Aristotle's Nicomachean Ethics, book V) has been analysed by Brooke LJ in Parkinson v St James NHS Trust [2002] QB 266. He indicated that it would only be exceptionally that there would be a need to recourse to this principle rather than the legal concept of fair, just and reasonable. Adrian Whitfield QC has recently

persuaded the Court in Hayhurst v Cambridge University Hospitals NHS Trust that this concept of distributive justice has in fact nothing to do whatsoever with compensation in Aristotle's ethics and the Court disallowed the Defendant's Application in that case to adduce acturial evidence on the issue of so called distributive justice. Similarly in RH v United Bristol Healthcare NHS Trust [2007] EWHC 251 QB Mr Justice Owen refused permission to the Defendants to adduce evidence on distributive justice as the issue, if relevant at all, could be dealt with by submissions on principle. It is obviously open to the House of Lords to take a wider perspective on this issue. Even if the argument was applicable to the NHSLA (which seems to be doubtful) it is difficult to see how it could apply to a general insurer.

3.5 Methodological Attacks on the Indices/Measures

5.1 AEI

This is a measure of earnings data on an aggregate basis which is indicative of movements in the whole of the economy and therefore not to any particular sector such as carers. A periodical payment index should reflect hourly rates and AEI does not do this. Further AEI is skewed towards higher earnings at the mean because the effect of a small number of very high earners. It also excludes the self-employed and those employers employing less than 20 employees.

Response

Although a measure of a rate of increase AEI can easily be turned into an actual figure such as ASHE mean. It is accepted that at the lower hourly rates for care AEI has the potential for slight overcompensation although this is much less than the substantial undercompensation by using RPI. AEI is a long-standing and well respected measure which is shortly to be used to index pensions. On the facts of Thompstone Swift J did not prefer AEI because of its potential to overcompensation. This will be a question of fact depending on the hourly rate for care. With respect to earnings losses AEI may well be an appropriate index depending on the likely level of earnings of the Claimant.

5.2 ASHE (mean, median or centiles)

ASHE has only been available since 1998, it is an annual survey of 1% of all employees amounting to a sample of 240,000 collected in April, published in October and confirmed in the October the following year. As with AEI using ASHE at the mean or average can create a distortion because of the effect of high earners. Using ASHE median does not take into account so-called pay drift and productivity improvements which can lead to costs in a Claimant's care package being lower than costs in the general care market.

Response

ASHE is a well respected aggregate measure replacing the NES and is relatively familiar to lawyers. The median may be a better measure than the mean for the same reasons concerning AEI namely it avoids the potential to over compensate due to the effect of high earners. It remains the most comprehensive sample of inflation on the

level of earnings in Great Britain. The data can be used on an hourly or an annual basis annual wage basis and can be analysed by regions.

5.3 ASHE 6115

The sample for ASHE 6115 is relatively small and the data shows substantial annual fluctuations indicating that the index is volatile. It is not known what the precise composition of the sample is but it is probably dominated by local authority workers and workers caring for the elderly in residential homes and this may not therefore match home-based carers earnings. Reclassification is due in 2010 which could produce difficulties if, as is likely, home-based carers are put into a separate occupational classification. Like all of the ASHE data it fails to take into account pay drift and productivity. Difficulties arise in calculating the average hourly rate. For example, averaging the hourly rate between days, nights and weekends raises the issue as to whether a night sleeper should be treated as six hours for which they are paid or for ten hours for which they are actually on the premises.

Response

The sample is a valid and reliable one produced by the ONS and conforms to statistical norms and no expert has yet made any proper methodological attack upon it. 6115 is the closest match there is to carers' earnings.

In some cases the Defendants have attempted to adduce evidence to counter Maggie Sargent's evidence on the cost of care in recent years. For example, Barbara Scandrett from Complete Case Management Limited has indicated that in her organisation,

contrary to Maggie Sargent's experience, they have managed to produce care packages over time running at or below RPI. However her analysis is based upon four clients only out of c17 or which are cared for at home.

What the Defendants describe as volatility in the index may be construed as the index being a reliable and valid one flexible enough to pick up changes in the care market such as the effect of the Working Time Regulations, the Care Standards Act and increasing use of immigrant workers.

The concept of pay drift is probably a red herring. Pay drift refers to the differences between wage settlements reached by agreement in the public sector principally affecting Local Authority workers and actual increases in the rate of pay in that sector. The two rates are different for a number of reasons such as service based increments, productivity agreements, bonuses, and pay restructuring. The fallacy of this argument is that it assumes that the Claimant employing carers in his own home will somehow be immune to the effects of wages in the larger public sector. On the contrary it is likely that if a Claimant wishes to keep a high quality carer or maintain the quality of general carers he will have to pay the market rate which will be influenced by what carers could obtain both in terms of pay and conditions elsewhere such as in the public sector.

As to productivity few examples have been provided by the Defendants as indicating why over time the level of care will decline because of technological or other changes. Most Claimants already have the benefit of up to date technology in the form of beds, mattresses, chairs and environmental controls. Those with directly employed carers have also obtained the productivity which can accrue from moving away from agency-based care.

Reclassification is likely to occur in ASHE 6115 but the ONS has indicated that they intend to obtain two years' data during the years of reclassification so that if carers are put into a new category on the basis of them working at home they can be traced and the appropriate percentile in the new occupational category easily ascertained.

Once the Court decides on how to calculate night sleeping care it is a matter of simplicity to construct an average hourly rate and the correct decile for ASHE 6115 could be read off from a table published in Facts and Figures updated annually

(Swift J also dealt with other technical problems such as the 18 month delay between the collection of ASHE data and publication in her Judgment at p.134-35.

SUMMARY

4. These are the main arguments used by both parties in this issue and no doubt other ones will emerge over time. At present that the Claimants have a clear ascendancy on this issue with all judgments in their favour. What the Court of Appeal in November and thereafter possibly the House of Lords will make of the issue remains to be seen. So far the indexation issue has been associated with catastrophically injured Claimants. In principle, particularly with respect to loss of earnings, there is no reason why the argument should not be applied to cases where there is a substantial loss of earnings over a substantial period of time.

ISSUE 2 : PLEURAL PLAQUES

Rothwell v Chemical & Insualting Co. Ltd and others [2006]EWCA Civ 27

Court of Appeal (Phillips LCJ, Longmore and Smith LJJ)

This case involved a number of appeals from the decision[1] of Holland J, that a group of claimants, who had each developed asymptomatic pleural plaques as a result of negligent exposure to asbestos, were entitled to damages for personal injury. In all but one of the cases (that of Mr Hindson), the Defendants had contended that pleural plaques did not amount to an actionable injury. One of the Claimants, Mr Grieves, had also been diagnosed as suffering from a recognised psychiatric illness. Another, Mr Rothwell, developed diffuse pleural thickening, which was detected during the course of the trial.

The Court of Appeal held that the Claimants had not established more than minimal damage and allowed the Defendants' appeals on liability.

Decision of Holland J

It was agreed by the medical experts that pleural plaques are markers of asbestos exposure, but do not develop into more sinister conditions. A person who has developed pleural plaques is more likely to develop cancer, but this is due to the exposure to asbestos which caused the plaques and not the presence of the plaques themselves. Pleural plaques do not, save in exceptional circumstances, cause respiratory disability.

1 [2005] EWHC 88

Holland J held that the exposure to asbestos and the consequent penetration of the chest wall by asbestos fibres was permanent and a possible catalyst for the onset of further asbestos-related disease. This physiological change, considered together with the anxiety it caused and the risks of future malignant disease, was more than minimal damage. Each of the Claimants had therefore suffered a significant injury and established a complete cause of action.

The appropriate range of damages on a provisional basis (excluding the risk of further asbestos-related disease) was £3,500 to £4,000. On a full and final basis, the range was held to be £6,000 to £7,000 (although Mr Grieves, who had developed a psychiatric illness, was awarded £10,000). The judge declined to make any award for contingent and prospective loss, such as the loss of income in the lost years or the likely cost of care in the event of malignant complications, on the grounds that this was too speculative.

The appeals

The Defendants appealed against the finding on actionability and on the grounds that the awards were excessive. The Claimants cross-appealed on the issue of quantum. Mr Hindson lodged a separate appeal on the quantum of his claim for general damages and for his contingent loss.

Actionability

The Court of Appeal was split on the issue of actionability. The majority (Phillips LCJ and Longmore LJ) held that Holland J erred in finding that the Claimants had suffered a significant injury and allowed the appeals. Smith LJ (dissenting) held that the Claimants had suffered damage that was more than minimal and would have dismissed these appeals.

The majority decision

It had been agreed that pleural plaques by themselves did not amount to more than minimal damage and were insufficient to establish a cause of action. The ingestion of asbestos fibres into the lungs, and the penetration of the lungs by these fibres, could not amount to an actionable injury and Holland J was incorrect to find that it would.

The essential question was whether the pleural plaques, in combination with the risks of other asbestos-related disease and the attendant anxiety, amounted to more than minimal damage. There was no direct appellate authority on whether or not these different elements could be aggregated in determining this question. The issue was not foreclosed by the decision of the House of Lords in *Cartledge v Jopling*[2] where it had not been considered. Two earlier High Court cases brought against the MOD, *Church*[3] and *Sykes*[4], were distinguished on the grounds that they did not involve the aggregation issue. A third, *Patterson*[5], was not followed.

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[2] [1963] AC758
[3] unreported; Peter Pain J, 23rd February 1984
[4] unreported; Otton J, 19th March 1984
[5] Unreported; Simon Brown J, 29th July 1986

The majority held that there was no binding authority on this point and that they were persuaded by principles of policy that it was undesirable for pleural plaques to give rise to a cause of action. These principles included the a claimant should not be forced to bring a claim in order "to protect his position" (presumably as to limitation); that bringing legal proceedings is stressful; that those "who make a business out of litigation" will encourage workers to undergo CT scans for the sole purpose of bringing claims for compensation; that some claimants will opt for full and final awards, thereby ignoring the risks of future disease and "gambling" to their own possible prejudice; that the cost of litigation of these claims is disproportionately high; and, that it is unjust that the right to recover damages should depend on the "fortuity" of developing pleural plaques (i.e. someone with the same level of exposure, the same risks of future disease and the same anxiety, but who had not developed pleural plaques, would be unable to claim damages) [see paragraph 67].

There was no legal precedent, beyond first instance decisions, for aggregating the three heads of claim which, individually, did not constitute sufficient damage to found a cause of action. Policy considerations pointed in the opposite direction. It was thus held that there was no cause of action. The judge's formulation, focusing on the presence of asbestos fibres rather than pleural plaques, was rejected.

It was held that the case of Mr Rothwell, who had developed pleural thickening that had been detected during the course of the trial, should be treated as indistinguishable from the others and should also fail.

Mr Grieves also failed. He had a recognised psychiatric illness, as a result of the diagnosis of an asbestos-related disease, and had developed irritable bowel syndrome. He contended that his case should stand, even if the others fell. The majority held that Defendant was not liable as the principle in *Page v Smith*[6] could not be extended to allow a claimant, who had been negligently exposed to the risk of a disease, to recover for free-standing psychiatric illness caused by the fear of contracting the disease. Further, there was no evidence that it was reasonably foreseeable that a man of normal fortitude would suffer this type of psychiatric damage.

The dissent

Smith LJ dissented. The question of whether there was an injury was one of fact. The legal principles were clear and there was no need to resort to policy.

There is only cause of action, not (as the Defendants had argued) a separate cause of action in respect of each asbestos-related condition that might arise, and only one chance to sue for all the consequences of the breach of duty. The potential injustice of this common-law rule was mitigated by the introduction of the provisional damages regime. But section 32A of the *Supreme Court Act 1981* reinforces the principle that there is only one cause of action and was not intended to change the underlying law of personal injuries.

Accordingly, the Claimant must sue for all the personal injury consequences of the tort (subject to the right to defer the assessment of part of the damages) and thus the

[6] [1996] AC 155

damage sustained must include the risks that other serious conditions might eventuate. Therefore both the existing condition and the future risks must be brought into account when considering whether or not the damage is more than minimal.

Pleural plaques are a permanent abnormal change in the tissue of the pleura. There was no dispute that in those rare cases where the pleural plaques gave rise to symptoms, there would be an injury. But these symptoms are not the injury, they are a measure of its seriousness. And if extensive plaques causing symptoms are an injury then so to are the more limited variety. The plaques are akin to scarring caused by a cut, burn or radiation. A scar may sound in damages because of the cosmetic effect, but it is the lesion which is the injury, the cosmetic effect merely increases the damages. Pleural plaques should also be regarded as a disease as they are a capable of progressing, without further exposure to asbestos, due to an internal bodily process.

By themselves, Smith LJ held, pleural plaques would not ordinarily amount to more than minimal damage, but when considered together with the risks of malignancy (which arise as a result of the same wrongful act and are therefore to be taken into account) this is more than minimal damage. The risk of contracting mesothelioma may appear small at 1%, for instance, but that is about 100 times greater risk than that faced by the average person and, if the risk is 5%, it was 500-fold. This should not be characterised as trivial damage. Anxiety was an element in each of these cases but it was not necessary to prove it to establish a significant injury.

Smith LJ was not persuaded by the policy arguments that had played a dominant role in the judgment of the majority (see paragraph 137-146 for a detailed critique) and

held that a more important policy consideration was the need to do justice to the injured claimants.

Damages

It was necessary for the Court to decide the issues on damages in order to resolve Mr Hindson's appeal, where liability was not in dispute. The leading judgment was delivered by Smith LJ, with whom the other members of the Court agreed.

The provisional awards made by Holland J were too low and the range was too narrow. They ignored years of practice in the county courts where the judiciary had substantial experience in assessing damages in cases of modest injuries and had developed a good sense of what was appropriate. Damages for different kinds of injury and should correlate and reflect the purchasing power and current levels of earnings. Smith LJ held that the appropriate range was £4,000 to £6,000, although the facts of an individual case could take it outside this bracket.

Smith LJ also held that the full-and-final awards were too low. Holland J should not have sought to keep the damages down or penalised those who opted for full and final awards. Damages should seek to compensate as far as possible. A standard uplift on a provisional award was convenient but not logical. It was not just for someone with a 20% risk of malignancy (i.e. Mr Hindson) to be awarded the same as someone with a 4% risk (i.e. Mr Storey). Smith LJ held that she would have made higher awards, based on the percentage risk of malignant complications faced by the individual

claimants, discounted for accelerate receipt. Similarly, where the risks were more than fanciful, the court ought to make an award for the prospective and contingent loss.

Mr Hindson therefore succeeded on all aspects of his appeal, on general damages and prospective loss, and his case was remitted to the trial judge for an assessment of damages in accordance with these principles. Following a retrial on the issue of damages Wyn Williams J. awarded Mr Hindson a total of £26,000 in damages, £15,500 for general damages, £8,500 for future loss of earnings and £2,000 for the risk that he would require nursing services should he contract a malignant disease.

The Claimants appealed to the House of Lords on the issue of actionability. Speeches were concluded on the 28th June and judgment is awaited.

Frank Burton QC

3rd September 2007