

Anxiety pays

A new chapter in the story of asbestos litigation.

The High Court has been considering whether there should be compensation for negligent exposure to asbestos when this has caused no physical or recognised psychological condition but where the claimants have experienced anxiety about the risk of further injury.

In *Grievs v FT Everard & Sons* (LTL 16/02/05), Mr Justice Holland was looking at the cases of 10 claimants, each of whom displayed radiological evidence of asbestos pleural plaques. These plaques were caused by their occupational exposure to asbestos fibres due to the defendants' negligence. Although the claimants were free from any respiratory or other physical symptoms, the judge decided that they were still entitled to be compensated for their injuries.

On behalf of the claimants, it was argued that symptom-free pleural plaques constituted a 'disease'; it was said that the formation of the plaques should be considered alongside concomitant factors, including the risk of further and more significant disease or injury and the anxiety engendered by that risk.

Earlier decided cases

Three similar asbestosis cases came before the High Court in the 1980s and have remained unchallenged since. Two of the three predated the introduction of provisional damages. In each case, the defendant argued that a claimant who is free from symptoms should not, as a matter of principle, be awarded damages. All three trial judges overcame this argument by relying on the perceived anxiety of the claimant about the risk of further injury.



None of these cases had gone to the Court of Appeal – doubtless, the defendants avoided the expense of appealing because of the modest sums awarded – and so, although persuasive, they were not binding on Mr Justice Holland. In the 1980s, it could not be anticipated that there would be the number of pleural plaque cases that are seen today nor could it be foreseen that the average size of current awards would be so high.

What is ‘injury’?

The defendants’ principal argument was that pleural plaques cannot be regarded as a ‘disease’ and that, in any event, they give rise to no physical impairment. Although pleural plaques amount to scarring of the lungs, they have no impact upon bodily function. The defendants also argued that anxiety engendered by the risk of further injury is not, as a matter of law, something which may be compensated; it cannot contribute to ‘damage’ so as to found a claim.

Mr Justice Holland said that “damage” or “injury” in these cases was: “the permanent physical penetration of the chest by asbestos fibres to such an extent as to give rise to:

- (a) the actual development of pleural plaques;
- (b) the possible future onset of symptoms, even of a terminal condition; and
- (c) consequent, potentially continuing anxiety”.

He agreed that pleural plaques could not, in themselves, be categorised as a “disease” or

“impairment of physical condition” but, relying on *Cartledge v Jopling* (1963) AC 758, he found that “anxiety engendered by tortiously inflicted physiological damage can properly contribute to damage or injury so as to complete the foundation of a cause of action”. On this basis, he decided the cases in favour of the claimants.

Low awards

The insurance industry can take little comfort from Mr Justice Holland’s findings on liability; but there is some consolation in his findings on quantum. For those claimants claiming provisional damages, the judge considered general damages for pain and suffering to be worth between £3,500 and £4,000.

For those claiming damages on a full and final basis, where the anticipated risk of further injury was low, he refused to follow the approach to assessment taken by county courts, which have commonly been making awards starting at around £12,500; he considered a bracket of £6,000 to £7,000 to be more realistic.

It should be noted that this decision is the subject of an appeal.

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