

**SEMINAR ON PLEURAL PLAQUES AND OTHER RECENT
DEVELOPMENTS IN RESPECT OF ASBESTOS DISEASES**

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On the 15th of February 2005 Holland J., sitting in the High Court of Justice in Manchester, delivered a much awaited and very important judgment in respect of pleural plaques litigation. Namely **GRIEVES (and OTHERS) -and- F.T. EVERARD & SONS & BRITISH URALITE PLC (and OTHERS)**. It is my very clear understanding that this case will now proceed on appeal and will very likely proceed ultimately to the House of Lords. What the final outcome will be remains to be seen. It may be of interest to note that in the United States, legislation is shortly to be enacted which is likely to put an end to claims of this nature. There, the situation has reached the stage where firms of lawyers who act on behalf of plaintiffs (as they are still known there) place large caravans outside supermarkets and invite shoppers to submit themselves to a free chest x-ray to see whether or not a claim could be brought on their behalf for pleural plaques.

It may be useful to begin by consideration of the nature of the condition, its medical causation and medical consequences, then to consider Holland J.'s approach to the question of liability, provisional damages and assessment of damages. Then consider the question of apportionment and to look briefly at the provisional damages procedure, and the consequences for provisional damages orders if the decision in **GRIEVES** is reversed. Finally consider the recent decision of **SYLVIA BARKER –and- SAINT GOBAIN PIPELINES PLC** Neutral Citation Number: [2004] EWCA Civ 545, on appeal from the Court of Appeal to the House of Lords, having regard to the criticisms of the approach to apportionment in **FAIRCHILD –and- GLENHAVEN FUNERAL SERVICES [2003] 1 AC 32**, by Lord Phillips in the House of Lords decision, **GREGG -and- SCOTT**, where an unsuccessful attempt was made to extend the **FAIRCHILD** causation principal into the field of clinical negligence litigation.

WHAT IS THE PLEURA?

The movement of the lung in the course of respiration is facilitated by a slippery membrane covering, that is, the pleura. There are two layers to the pleura: the **parietal pleura** which lines the inside of the rib cage, and the **visceral pleura** which covers the lungs. Normally there is no gap between these layers which are lubricated with pleural fluid. The pleura is separate from, and not part of the lung.

WHAT ARE PLEURAL PLAQUES?

Localised areas of pleural thickening with well demarcated edges. They usually develop on the parietal pleura but occasionally develop on the visceral pleura. They consist of bland fibrous tissue. The pathogenesis remains uncertain but it is believed that the presence of asbestos fibres leads to a prolonged low-grade inflammatory response resulting in the release of chemical mediators, in turn leading to the laying down of fibrous tissue. Pleural Plaques are rarely detected during the first 20 years following exposure to asbestos. However, exposure to asbestos does not necessarily result in the development of plaques notwithstanding the subsequent passage of 20 or more years.

Dr. Rudd Occupational Disorders of the Lung, 2002:

“Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos-related conditions may differ widely between different populations and individuals with plaques.”

NOT TO BE CONFUSED WITH PLEURAL THICKENING

Pleural thickening is a pleural fibrosis arising from inhalation of asbestos that extends continuously over a variable proportion of the thoracic cavity but without well circumscribed margins – it is diffuse and not demarcated. It usually involves the visceral pleura. If sufficiently extensive it may cause restrictive lung function impairment and breathlessness; occasionally it is the cause of persistent chest pain. In itself the condition is benign.

WHAT CONDITIONS CAN ARISE FROM PLEURAL PLAQUES?

Plaques do not in themselves threaten or lead to other asbestos induced conditions nor indeed are they a necessary pre-condition for such; they do not increase the risk of lung cancer; they differ from diffuse pleural thickening; and their pathology is entirely distinct from that of mesothelioma. It is the exposure to asbestos that they evidence, taken in conjunction with the probable life expectancy, which accounts for the risks of further asbestos induced conditions.

OTHER ASBESTOS CONDITIONS

Asbestosis. Is a fibrosis of the lungs caused by exposure to asbestos. A minimum dose of the latter is necessary to bring about the condition; the severity increases with the amount that is inhaled. It does not usually develop within the first 20 years following exposure.

Mesothelioma. Is a malignant terminal tumour found in various parts of the body, most commonly in the pleura. In the main such tumours are caused by exposure to asbestos. The mean latent period between first exposure to asbestos and death from mesothelioma is of the order of 40 years. The incidence of mesothelioma in Western Europe has been increasing: in the United Kingdom it is expected to peak between 2010 and 2020 at some 2,500 – 3,000 cases per annum. There is no cure and death commonly results within 12 to 18 months of the onset of symptoms.

Lung Cancer. Is a cancer arising in the lung which can be caused or contributed to by asbestos. As with asbestosis, the risk of such cancer is related

to the dose of asbestos – the greater the dose, the greater the risk, particularly if the asbestos is amphibole. In this context there is interaction between the exposure to asbestos and smoking so as to compound the risk.

WHAT WERE THE COMPETING ARGUMENTS IN GRIEVES?

On behalf of the Claimants it was argued that the existence of pleural plaques was "damage" or "injury".

On behalf of the Defendants it was argued that there was no "damage" or "injury". The Claimants were described as the "worried well".

WHAT DID HOLLAND J. DECIDE WAS THE INJURY TO BE COMPENSATED?

Holland J.

'The permanent physical penetration of the chest by asbestos fibres to such 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;*
- c. the consequent, potentially continuing anxiety.'*

Thus, Holland J. found a cause of action which none of the parties themselves adopted or argued. Namely, the inhalation of asbestos fibres, demonstrated by the development of pleural plaques.

WHEN DOES THE CAUSE OF ACTION ACCRUE FOR LIMITATION PURPOSES?

Holland J.

I have found that as and when pleural plaques are found so as to confirm permanent penetration that there is a cause of action – it is then, and not before that a limitation issue, if any, can be addressed.

ASSESSMENT OF DAMAGES

Provisional Damages or Final Award?

WHAT IS THE BASIS OF AN A PROVISIONAL AWARD?

An award is made on the assumption that the Claimant will not suffer deterioration in his physical condition arising from tortious exposure to asbestos – with the corollary that in the event of such deterioration a fresh further award can be made.

CAN THE COURT REQUIRE DAMAGES TO BE ASSESSED ON A PROVISIONAL DAMAGES BASIS?

No, see C.P.R. 41.2(1)).

QUANTIFICATION OF DAMAGES

On a Provisional Damages Basis

Holland J.

*In my judgment the currently persuasive authority of Patterson would point to a current provisional general damages award of, say, £2,500. I think that I can and should add moderately to this figure in deference to Mr. Gore's submissions as to the raising of awareness of the possible long term onset of asbestos related conditions during the period that has elapsed since 1986, not least amongst those who have been exposed to asbestos and have the experiences of affected work mates to mind. **Without hesitation I can justify an increase to £3,500; with hesitation, I can go to £4,000 but no higher.** Of course I could make life easy and opt for a figure in the bracket as identified by the J.S.B. but I could not*

reconcile any such decision with Patterson – and given the pressure for moderation in this area I do not feel the urge to do so.

Final Award Basis

Holland J.

My bracket for general damages by way of a final award assuming risk levels as featured in the cases put before me is £6,000 to £7,000.

WHAT WILL BE THE EFFECT ON ANY PROVISIONAL DAMAGES ORDERS IF ULTIMATELY THE DECISION IN GRIEVES IS REVERSED?

There are two potential arguments. First, that following the decision of the Court of Appeal in **FAIRCHILD**, in respect of the provisional damages point raised in that case, that even if a cause of action does not presently exist, a provisional damages order can still be made. The countervailing argument is that the House of Lords will only reverse the decision of Holland J. if it concludes that inhalation of asbestos fibres (or any of the alternative argument is posited on behalf of the Claimants in that case) is simply not actionable. In the latter case, there would be no entitlement to a provisional damages order.

However, if defendants freely enter into provisional damages orders, whatever the outcome of **GRIEVES**, those orders will stand. In effect, that is not necessarily matter of great concern to defendants. Because, the diseases/deterioration anticipated by the orders would be actionable in any event.

At a matter of economics. Defendants can simply pull down the shutters and say that they are not prepared to enter into any agreements until the final appeal in **GRIEVES**, alternatively settle cases at a significant discount.

I think it unlikely that Courts of first instance would (in the absence of agreement) proceed to the determination of the question of actionability, liability and damages whilst the appeal is pending. In the unlikely event that one did, one would simply have to serve notice of appeal pending the outcome of the final decision in **GRIEVES**.

IF THERE IS MORE THAN ONE TORTFEASOR IS LIABILITY APPORTIONED ON THE TIME/EXPOSURE BASIS?

The starting point for considering the question of apportionment generally is the Court of Appeal decision, **HOLTBY-and-BRIGHAM & COWAN (HULL) LIMITED (2000)**.

This case was concerned with asbestosis. His Honour Judge Altman (sitting as a judge of the High Court in Leeds) decided that damages should be apportioned on a time/exposure basis. The Court of Appeal upheld his decision.

Stuart Smith LJ delivering the leading judgement of the Court of Appeal said:

In my judgment as the passages cited from the three House of Lords' decisions show, the onus of proving causation is on the claimant; it does not shift to the defendant. He will be entitled to succeed if he can prove that the defendants' tortious conduct made a material contribution to his disability. But strictly speaking the defendant is liable only to the extent of that contribution. However if the point is never raised or argued by the defendant, the claimant will succeed in full as in Bonnington and McGhee. I agree with Judge Altman that strictly speaking the defendant does not need to plead that others were responsible in part. But at the same time I certainly think it is desirable and preferable that this should be done. Certainly the matter must be raised and dealt with in evidence, otherwise the defendant is at risk that he will be held liable for everything. In reality I do not think that these cases should be determined on onus of proof. The question should be whether at the end of the day and on consideration of all the evidence, the claimant has proved that the defendant is responsible for the whole or a quantifiable part of his disability.

The next decision is **FAIRCHILD V GLENHAVEN FUNERAL SERVICES [2003] 1 AC 32**. Largely for tactical reasons Stephen Stewart QC, leading counsel on behalf on the defendant in that action (which of course was only concerned with mesothelioma), did not argue apportionment before the House of Lords. The House of Lords, in that case in order to enable those suffering mesothelioma and whom had been exposed to asbestos fibres from more than one source, recast the law of causation, but only to the limited extent of enabling those cases to succeed. That point together with the effect of any periods of exposure to a claimant during self-employment were considered at first instance by Moses J. and on appeal by the Court of Appeal in **SYLVIA BARKER and SAINT GOBAIN PIPELINES PLC** Neutral Citation Number: [2004] EWCA Civ 545. Both at first instance and on appeal to the Court of Appeal, it was held that in a case of mesothelioma a claimant could sue any tortfeasor whom had exposed him asbestos fibres and therefore to the risk of developing that condition. That case is now on appeal to the House of Lords and is likely to be heard next year. It remains to be seen what the outcome of that decision will be.

It may be of interest to note that Lord Phillips in the House of Lords decision; *Gregg - and - Scott* was critical of the House of Lords decision of *Fairchild*, not least on the issue of apportionment. Given that the law of causation was redesigned in the interests of "justice" to enable mesothelioma victims to recover damages, one might think that the same principles should ensure that where there has been exposure from more than one source, the liability of any tortfeasor shall be proportionate to its exposure.

HOW DOES ONE SHOW TIME/EXPOSURE

One would normally expect the medical expert to assist in his report. Failing which, there are engineering experts who offer this service.

Do remember that although the provisional damages may be very modest, conceding liability in full, could potentially give rise to a much larger claim in due course.

**WHAT IS THE FORM OF A PROVISIONAL DAMAGES ORDER AND
WHAT DOCUMENTS NEED TO BE LODGED**

PROCEEDINGS TO WHICH SECTION 32A OF THE SUPREME COURT
ACT 1981 OR SECTION 51 OF THE COUNTY COURTS ACT 1984
APPLIES

Application and definitions

41.1 (1) This Section of this Part applies to proceedings to which SCA
s.32A or CCA s.51 applies.

(2) In this Section –

(a) ‘SCA s.32A’ means section 32A of the Supreme Court Act
1981⁽¹⁾;

(b) ‘CCA s.51’ means section 51 of the County Courts Act
1984⁽²⁾; and

(c) ‘award of provisional damages’ means an award of damages
for personal injuries under which –

(i) damages are assessed on the assumption referred to in
SCA s.32A or CCA s.51 that the injured person will not
develop the disease or suffer the deterioration; and

(ii) the injured person is entitled to apply for further damages
at a future date if he develops the disease or suffers the
deterioration.

Order for an award of provisional damages

41.2 (1) The court may make an order for an award of provisional
damages if –

(a) the particulars of claim include a claim for provisional
damages; and

(b) the court is satisfied that SCA s.32A or CCA s.51 applies.

(Rule 16.4(1)(d) sets out what must be included in the particulars of

claim where the claimant is claiming provisional damages)

- (2) An order for an award of provisional damages –
 - (a) must specify the disease or type of deterioration in respect of which an application may be made at a future date;
 - (b) must specify the period within which such an application may be made; and
 - (c) may be made in respect of more than one disease or type of deterioration and may, in respect of each disease or type of deterioration, specify a different period within which a subsequent application may be made.
- (3) The claimant may make more than one application to extend the period specified under paragraph (2)(b) or (2)(c).

Application for further damages

- 41.3 (1) The claimant may not make an application for further damages after the end of the period specified under rule 41.2(2), or such period as extended by the court.
- (2) Only one application for further damages may be made in respect of each disease or type of deterioration specified in the award of provisional damages.
- (3) The claimant must give at least 28 days' written notice to the defendant of his intention to apply for further damages.
- (4) If the claimant knows –
 - (a) that the defendant is insured in respect of the claim; and
 - (b) the identity of the defendant's insurers,he must also give at least 28 days' written notice to the insurers.
- (5) Within 21 days after the end of the 28 day notice period referred to in paragraphs (3) and (4), the claimant must apply for directions.

PRACTICE DIRECTION

CLAIMS FOR PROVISIONAL DAMAGES

- 1.1 CPR Part 16 and the practice direction which supplements it set out information which must be included in the particulars of claim if a claim for provisional damages is made.

JUDGMENT FOR AN AWARD OF PROVISIONAL DAMAGES

- 2.1 When giving judgment at trial the judge will:
 - (1) specify the disease or type of deterioration, or diseases or types of deterioration, which
 - (a) for the purpose of the award of immediate damages it has been assumed will not occur, and
 - (b) will entitle the claimant to further damages if it or they do occur at a future date,
 - (2) give an award of immediate damages,
 - (3) specify the period or periods within which an application for further damages may be made in respect of each disease or type of deterioration, and
 - (4) direct what documents are to be filed and preserved as the case file in support of any application for further damages.
- 2.2 The claimant may make an application or applications to extend the periods referred to in paragraph 2.1(3) above¹.
- 2.3 A period specified under paragraph 2.1(3) may be expressed as being for the duration of the life of the claimant.
- 2.4 The documents to be preserved as the case file ('the case file documents') referred to in paragraph 2.1(4) will be set out in a schedule to the judgment as entered.
- 2.5 Causation of any further damages within the scope of the order shall be determined when any application for further damages is made.
- 2.6 A form for a provisional damages judgment is set out in the Annex

to this practice direction.

THE CASE FILE

- 3.1 The case file documents must be preserved until the expiry of the period or periods specified or of any extension of them.
- 3.2 The case file documents will normally include:
 - (1) the judgment as entered,
 - (2) the statements of case,
 - (3) a transcript of the judge's oral judgment,
 - (4) all medical reports relied on, and
 - (5) a transcript of any parts of the claimant's own evidence which the judge considers necessary.
- 3.3 The associate/court clerk will:
 - (1) ensure that the case file documents are provided by the parties where necessary and filed on the court file,
 - (2) endorse the court file
 - (a) to the effect that it contains the case file documents, and
 - (b) with the period during which the case file documents must be preserved, and
 - (3) preserve the case file documents in the court office where the proceedings took place.
- 3.4 Any subsequent order:
 - (1) extending the period within which an application for further damages may be made, or
 - (2) of the Court of Appeal discharging or varying the provisions of the original judgment or of any subsequent order under subparagraph (1) above,

will become one of the case file documents and must be preserved accordingly and any variation of the period within which an application for further damages may be made should be endorsed on

the court file containing the case file documents.

- 3.5 On an application to extend the periods referred to in paragraph 2.1(3) above a current medical report should be filed.
- 3.6 Legal representatives are reminded that it is their duty to preserve their own case file.

CONSENT ORDERS

- 4.1 An application to give effect to a consent order for provisional damages should be made in accordance with CPR Part 23. If the claimant is a child or patient² the approval of the court must also be sought and the application for approval will normally be dealt with at a hearing.
- 4.2 The order should be in the form of a consent judgment and should contain:
 - (1) the matters set out in paragraph 2.1(1) to (3) above, and
 - (2) a direction as to the documents to be preserved as the case file documents, which will normally be
 - (a) the consent judgment,
 - (b) any statements of case,
 - (c) an agreed statement of facts, and
 - (d) any agreed medical report(s).

- 4.3 The claimant or his legal representative must lodge the case file documents in the court office where the proceedings are taking place for inclusion in the court file. The court file should be endorsed as in paragraph 3.3(2) above, and the case file documents preserved as in paragraph 3.3(3) above.

FINAL FOOTNOTE

STATUTORY INSTRUMENT 2002 No. 2675 which fully came into force on 21 November 2004, contains important statutory duties for landlords of domestic and non-domestic premises and employers in respect not only of their own employees but others.

