

## **PLEURAL PLAQUES – ACTIONABILITY**

### **A Briefing Paper by Rodney Nelson-Jones**

#### **INTRODUCTION**

It is submitted that the issue of whether pleural plaques are actionable should be determined by the application of a general bipartite test spanning the whole spectrum of personal injury cases.

Simply stated, a tort should be actionable if:

- i) it causes injury; and
- ii) its consequences are significant\*

There should be no need for:

- i) the injury itself to be significant, or for
- ii) the consequences to stem from the injury.

On this basis, compensation stems from the tort: logically enough, since the compensation is for the tort. As Smith L.J. points out, this is consistent with the approach manifest in section 32A of the Supreme Court Act 1981.

The advantage of a general test is that it enables established legal principle to govern different types of personal injuries. The alternative, of allowing policy to do so, leaves too much room for judicial inconsistency and even caprice as different judges apply their personal opinions and prejudices, officially described as policy considerations, to a range of different injuries.

A general bipartite test does not rule out specific bipartite or tripartite criteria that are particular to pleural plaques cases. Instead such specific criteria should be seen as the application of the general rule from which they derive their justification.

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\* i.e. not de minimis

## INJURY

### Necessity of injury

For a personal injury claim to arise, there must be a personal injury. This has been appreciated by the claimants in these cases who have never argued that in the absence of plaques anxiety about asbestos disease is compensatable. It is the primary answer to the defendants' contention that it is anomalous that compensation should depend on the presence of pleural plaques. Personal injury law does not compensate those who are not personally injured.

The secondary answer is that pleural plaques provide a very good dividing line between those who can sue in respect of past asbestos exposure and those who cannot. Their central feature is that they are dose related. They may only constitute a minor injury in their own right, but they never occur in those whose asbestos exposure has been minimal. Their imposition as an entry point excludes "the worried well" who have not experienced any physiological change. And it limits compensation to those whose asbestos exposure has been significant.

### Statute Law

There is some limited statutory guidance on the definition of an injury. For example, Section 35(5) of the Supreme Court Act 1981 states that "personal injuries includes any disease and any impairment of a person's physical or mental condition." The word "includes" is not designed to be definitive: for instance, a scar is a personal injury even though it is not a disease or, arguably, an impairment of condition. Incidentally, impairment of mental condition was the ground on which dyslexia was held by the House of Lords to be a personal injury in *Adams v Bracknell Forest Borough Council*.

Section 38(1) of the Limitation Act 1980 contains the same definition of "personal injuries". Section 14 goes further by dealing with their significance.

By s14(1), "In Sections 11 and 12 of this act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts – (a) that the injury in question was significant".

By s14(2), "For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to justify a judgment".

Section 14(1) clearly contemplates not only injuries that are significant but also those that are not. It is not stating that any physical change that is not significant cannot be an injury. However an injury has to be significant to start time running: significance is an essential

element in actionable damage. Therefore on its own, s14(1) might seem to support the defendants' cases.

Nevertheless it is submitted that s14(2) establishes wider criteria. An injury is deemed to be significant if it justifies the institution of proceedings for damages. Damages are awarded for both injury and financial loss. Any reasonable person considers the two together when deciding whether to sue. It may not be reasonable to sue for an injury that is only worth £400, but if it is accompanied by financial loss of £1,000 it is reasonable to sue for the resultant £1,400.

It is not the purpose of the Limitation Act 1980 to define the law of actionability. However it was intended to be consistent with it. So it is of some interest that it allows for the existence of injuries that are too minor to be significant; it does not conflate significance and injury. It is also of interest that it lays down a broad, if somewhat circular, definition of significance in terms of justifying Court action.

### **Case Law**

In doing so, the 1980 Act reflects dicta by the House of Lords in *Cartledge v E Jopling & Sons Ltd*. Although it is the leading case on actionability, *Cartledge* is not determinative of the pleural plaques cases. The reason is that Mr *Cartledge* and the other plaintiffs were suffering from pneumoconiosis which was undoubtedly a disease. It also constituted an injury that was significant. The central point of the judgment was that, under the limitation law that prevailed then, time started to run against the plaintiffs even though they had not known of the disease.

Nevertheless the judgment contains significant dicta on the issue of actionability. Lord Reid stated that “a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible.” In other words, there are personal injuries that are de minimis and do not give rise to a cause of action. Section 14(1) of the Limitation Act 1980 directly reflects this.

After observing that there had been no case that sought to define the borders of actionable injury, Lord Reid concluded that – “The cause of action accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done.” This is directly reflected in Section 14(2) of the Limitation Act 1980. Lord Reid was only considering the direct effects of pneumoconiosis. The more varied types of consequence associated with pleural plaques did not arise for their Lordships' consideration.

Lord Reid stated that “it would be wrong to deny a right of action to a plaintiff who can prove by x-ray photographs that his lungs are damaged but cannot prove any symptom or present physical consequence”. Thus symptomless conditions can be compensated.

Importantly, he then observed that – “It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree”. Four trial judges have considered whether pleural plaques constitute an injury: Pain J. in Church, Otton J. in Sykes, Simon Brown J. in Patterson and Holland J. in the present cases. All four, after hearing medical evidence (unlike the appellate Courts), held that pleural plaques involved an injury. All four were High Court judges at the time; two have subsequently taken higher rank. It is easy to cavil at inconsistencies between their reasons: two (Pain and Otton) appeared to regard the plaques as significant injuries compensatable in themselves, whereby two (Simon Brown and Holland) deemed them to be minimal injuries which required anxiety and future risks to bring them above the threshold of actionability. However it is hard not to be impressed by the fact that all four judges, albeit by different routes, reached the same result. It is for trial judges to decide, and they have decided that pleural plaques are an injury.

Authority apart, the reason that the matter rests with trial judges is that it is a question of fact. The medical evidence in the present cases was that some, though not all, medical textbooks described pleural plaques as a disease. Dr Rudd leant towards the view that they were an injury; Dr Moore-Gillon did not assert the contrary. The expert evidence did not compel, but it certainly entitled, Holland J. to conclude to decide as a matter of fact that pleural plaques were at least a minimal injury. In their conclusions at paragraphs 68-71, the Court of Appeal did not explicitly hold that they were not.

Moreover, on the merits, it is firmly submitted that pleural plaques are an injury. They consist of scar tissue on the pleura. No one doubts that scar tissue on the outside of the body is an injury. So also must scar tissue on the inside of the body be an injury: scarring is an injury wherever it occurs. The difference is cosmetic, in that external scar tissue is visible. This affects the consequences of the injury, but not the fact of it. As Smith L.J. points out in her powerful reasoning at paragraph 117, it is the lesion which is the injury; the cosmetic effect merely increases the damages. Indeed it is the cosmetic effect that causes all but the most minor external scars to be actionable.

It is fair to add that the lack of any cosmetic consequences, combined with their physically symptomless nature, justify the concession and the finding that pleural plaques on their own do not complete a cause of action. However they are an injury, if only a minimal one, and so satisfy the first requirement of general bipartite test.

Policy should not be a factor at this stage. Either a lesion is an injury or it is not. Moreover, once an injury, always an injury. Therefore, for example, the role of claims farmers cannot determine whether pleural plaques are an injury. Claims farmers have become prominent since 2000 when conditional fee agreements became much more widespread. They may be abolished in 2010, if the government finally realises then that they are undesirable. Yet pleural plaques cannot be an injury from 1984 to 2000, cease to be an injury between 2000 and 2010 and become an injury again after 2010. Definition of injury must depend on physiological changes, not social events.

## CONSEQUENCES

### General points

Once an injury is established, a major policy issue is presented to the House of Lords. It is best defined in general terms, as a choice between two competing points of view. On the part of the Claimants, that once an injury exists actionability is determined by the overall consequences of the tort. On the part of the Defendants, that the injury on its own must be actionable, to which they add the further requirement that the consequences must stem from the injury.

The first answer to this may be classified as a point of principle. The purpose of tort compensation is to compensate for the consequences of a tort. If a tort causes three separate consequences – A, B and C – then damages for the tort are A+B+C. And whether the tort is actionable depends on whether the total of A+B+C is significant. It may be doubted whether there is any other area of tort law in which it is even suggested that B and C must be caused by A.

Personal injury law is only different in so far as the tort must cause an injury (I). But when a tort causes separate simultaneous injuries – for instance when a road traffic accident results in a fractured femur (F), a cut head (H) and a sprained wrist (W) – it is never suggested that two of the injuries need depend on the third. Subject to overlap,  $I = F+H+W$ . No one suggests that H and W must depend on F, or vice versa.

The same point applies when financial loss is added. Usually the loss is directly dependent on the injuries, such as loss of earnings consequent on hospitalisation and convalescence. But this is not always so. The loss of no claims bonus, for example, stems from the tort rather than from the injury. Yet no one argues that it is not recoverable. The law compensates for all the consequences of the tort.

The second reason for favouring the Claimant's view is one of policy. It is more just to do so. The reason is that it is fundamentally more fair and equitable to consider the broad consequences of the tort than to concentrate on the narrow factor of the injury. Otherwise startling anomalies arise as the law compensates minor effects at the expense of major ones. As Allan Gore Q.C. remarked in conference, it is surprising to allow actions for mild external scarring causing embarrassment but to reject them for internal scarring resulting in fear of cancer and consequent death.

The matter may be expressed in terms of the following equation. Compensation for a tort (T) consists of damages for the injury (I) and its consequences (C):  $T = I + C$ . I has to be worth: say, 2 units to be material (M), i.e. actionable in its own right:  $M=2$ . Consider then the following examples.

A) An injury is worth 2 units but there are no other consequences. It is compensatable because  $I = M$ . The compensation is  $2+0 = 2$ . Both sides agree on this.

B) The tort causes an injury worth 1 unit and consequences worth 19 units. Compensation, if awarded, would be  $1+19 = 20$ : the Claimant's case. In contrast, the Defendants' case is that compensation cannot be awarded because 1 is less than 2.

An example of type A is *Smith v Cottrell*, a December 1997 decision reported in *Current Law* in which a 21 year old woman suffered a cut to her forehead which bled slightly and healed within one week, bruising in the area of the cut which resolved within two weeks and an ache in her chest which disappeared within two days: none of which injuries, naturally enough, prompted her to seek medical treatment. Her claim was allowed, and she was awarded £450. Further examples are to be found in *Kemp v Kemp* on pages M1049-51. The most striking is *Johnson v Sidaway* in which the claimant was involved in a road traffic accident which caused some stiffness and mild discomfort in his neck a few hours later. All symptoms revolved within 24 hours of the accident. There were no sequelae. He recovered £250 damages. According to the majority in the Court of Appeal, a type B case such as pleural plaques should be rejected even though the damages will invariably be 20 times higher, often 50 times higher and occasionally 100 times higher.

It may be significant in this context that the majority of the Court of Appeal upheld the Claimant's appeal on quantum. They concurred with Smith L.J. in increasing provisional damages to £4,000 - £6,000 and in an approach to general damages that could easily yield £20,000 in a high risk of lung cancer or mesothelioma case. Rather remarkably, therefore, the majority held that the cases were worth more but could not be compensated at all.

The anomaly to which this leads is illustrated by the ninth test case of *Hindson v Pipe House Wharf (Swansea) Limited*. In contrast to the other cases, the Defendants had admitted actionability and in the Court of Appeal the Claimant succeeded in principle in his appeal on quantum against Mr Justice Holland's award of £7,000. The case then reverted to the High Court where, applying the Court of Appeal's principles on quantum, Mr Justice Wyn Williams awarded general damages of £15,500 for pleural plaques and associated anxiety and malignant risks, £8,500 for future loss of earnings and £2,000 for future nursing services and equipment, a total of £26,000. Yet Mr. Hindson only ever had pleural plaques.

The contrast between the *Johnson* and *Hindson* cases vividly illustrates how the Court of Appeal decision, if upheld, would propel this area of personal injury into absurdity. The law would compensate an injury:

- i) lasting 20 hours but not one that is permanent;
- ii) with no physical or psychological sequelae but not one associated with the fear and risk of cancer and death;

iii) worth £250 but not worth £26,000.

There is no direct precedent that determines the issue. Neither position is logically untenable. The ultimate outcome will depend on whether their Lordships prefer the broader view of justice to the narrower one. In the Fairchild appeals, they rejected the narrow logic of the single fibre causation theory. And the above example suggests that there is little doubt where substantial justice lies: that the major (20) should be compensated alongside the minor (2): the £26,000 alongside the £250.

The Defendants' subsidiary contention, that the consequences must depend on the injury, is not at large to the same extent. It is inconsistent with the case of *Fitter v Beal* which established that only one action may be brought in respect of all the damages from personal injury. Much more recently, and much more significantly, it is also inconsistent with Section 32A of the Supreme Court Act 1981 which permits provisional damages to be claimed where, "as a result of the act or omission which gave rise to the cause of action" some serious disease or deterioration may be suffered in future.

This establishes beyond any doubt that, for the purposes of provisional damages, it is the consequences of the **tort** that count. The meaning of the section would have been different if Parliament had used the words "injury or injuries" instead of "act or omission". As Smith L.J. has pointed out in a crucial passage in her judgment, the significance of this extends far beyond provisional damages.

"The purpose of section 32A was limited to permitting claimants to defer part of their damages. It was not intended to change the underlying law of personal injury actions in respect of the recoverability of damages for the risk of future consequences. In passing section 32A, Parliament recognised and implicitly affirmed the old rule that there is only one cause of action for all the personal injury consequences of a wrongful act or omission. If the claimant's cause of action for the consequences of asbestos exposure must include all personal injury consequences, his damage is the sum total of all those consequences. Therefore it is that damage which must be considered when the judge is deciding whether the damage is sufficient to cross the threshold of materiality".

The Claimant's case could hardly be better put.

It is fruitful to consider the matter in general terms. This enables the law to provide greater consistency across different types of injury. It is submitted that the closest comparison is with the needlestick HIV cases. The puncturing of the skin by a needle, often accompanied by some minor bleeding, is undoubtedly an injury. On its own, in the absence of any real or feared HIV complications, it is not material and is therefore not actionable. Even being "HIV positive", it is submitted, does not amount to an injury in its own right; there is as yet no particular physiological charge.

Pleural plaques sufferers could be described as “asbestos positive.” Since plaques are a dose related disease, they have learned that they belong in the upper rather than the lower category of asbestos exposed people. Like the HIV positive, they suffer significant anxiety combined with the prospect of fatal disease. In the HIV cases, admittedly, there is a much greater chance that the condition will deteriorate and cause death, but there is also much more scope for effective treatment. The analogy between the two conditions is inexact, but both are examples of a minimal physical injury that is lifted well above the threshold of actionability by the seriousness of the consequences.

Another advantage of a general approach is that it allows comparisons with other areas of law. Laggors with pleural plaques often express astonishment at the generosity of the law in discrimination cases compared with their own. As far as it affects the quantum of damages, this point has already been taken as far as it can be. In relation to actionability, it is still striking. In *Vento –v- Chief Constable of West Yorkshire Police*, the Court of Appeal held that : - “Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or a one off occurrence.” Everyone accepts this, but do their Lordships then wish to say that those with asbestos related pleural plaques should not be entitled to compensation for the fear of cancer and death? – especially as hurt feelings tend to diminish or disappear with the passage of time, whereas the risks of lung cancer and mesothelioma will remain constant for the rest of life.

A final reason why general principles are desirable in this area is that otherwise different diseases tend to get “beauty paraded” before different judges who decide on their actionability according to different points of view. As the Court of Appeal decision demonstrates, a different result is reached depending on whether the matter is considered by a Lord Phillips or a Lady Justice Smith. Policy is a capricious pet whose conduct is determined by the character of its owner. It is inevitable that the House of Lords must take policy into account, but desirable that they then define the law with sufficient clarity that the courts beneath them no longer need to do so.

### **Surmounting the threshold**

A difficult issue for pleural plaques claimants is precisely how their plaques, conceded not to be actionable in themselves, combine with other consequences of asbestos exposure to become so.

The most widely espoused solution to date is the tripartite approach adopted by Simon Brown J. in *Patterson* and by Holland J. in *Grieves and others*. This aggregates the pleural plaques with associated anxiety and the risks of lung cancer and mesothelioma. It is valid in the vast majority of cases. The answer to Mr Bueno’s  $0+0+0 = 0$  is that  $1+9+10 = 20$ .

However there are dangers in insisting that anxiety is a necessary component of actionable damage. As Lord Phillips asked, where does that leave the claimant who is not anxious or

whose background anxiety about his past asbestos exposure has not been increased by the diagnosis of pleural plaques? If (increased) anxiety is an essential constituent of actionable damage, it has to be accepted that a minority of pleural plaques victims do not have valid claims.

Smith L.J. almost certainly had this problem in mind when stating that: - “In my view, it follows from the extent of the risk of mesothelioma alone that, by the time pleural plaques develop, the claimant must have suffered material as opposed to minimal damage... I would hold that the cause of action is complete as the result of the development of plaques, which are an injury and/or disease, together with the established risks, both caused by the same exposure. In my view, it is not necessary to include any element of anxiety when deciding that the cause of action is complete ... The sum of the very minor physical damage and the much more serious damage comprising the risks amounts to material, actionable, damage”.

This formulation is not entirely free from difficulty either. It arises in provisional damages cases where no claim is being made in respect of the malignant risks. Suppose that a provisional damages claimant does not suffer from anxiety. In that event, the only condition for which damages could be awarded is the very minor physical damage that is conceded not to be actionable on its own. One solution is to hold that both the injury and the risks are required to establish actionability but that, once this is done, immediate damages may be awarded for the minimal injury alone. The alternative is to accept that a pleural plaques claimant who does not suffer from anxiety is not entitled to provisional damages and would, in practice, be better advised to seek a final award.

It is submitted that these difficulties diminish if the general bipartite test proposed above is accepted as the underlying rule. Such problems can then be resolved in the light of it. They only arise in a relatively small minority of cases, since in the large majority all three components – plaques, anxiety and risks – are present and substantially exceed any sensible threshold.

It may also be noted that pleural plaques are often associated with psychiatric injury, loss of earnings, prejudice in the open labour market, increased life insurance premiums or medical fees and expenses, all of which are routinely compensated in personal injury law.

### **Plaques policy**

The course of the Court of Appeal hearing was very unsatisfactory. The Lord Chief Justice spent the first 1½ days saying how unattractive he found the Claimants’ cases, agreeing with the Defendants’ Counsel’s submissions and diligently noting down his arguments on policy and other points. Then, when Frank Burton Q.C. addressed him on the Claimant’s policy arguments, he looked apathetic and failed to take any notes at all. Worse still, the Claimant’s policy arguments simply do not feature in his judgment which, mirroring his conduct during the hearing, consists of the Defendants’ policy points and his agreement with them.

It is therefore essential to reiterate the Claimants' case on policy. Reproduced below is my submission to Leading Counsel on the morning of his advocacy. Although he proceeded to express the points far more elegantly and effectively, the paper has perhaps some value in outlining what these are.

### **Policy points**

“The differences between the U.K. and U.S. legal systems of personal injury compensation, including the stresses placed on U.S. defendants by the exceptionally high level of U.S. damages, are abundantly obvious. Presumably only the lack of supporting U.K. case law led the Defendants to devote so much time to the U.S.

The Lord Chief Justice talks of a limited pot of compensation which is in danger of being exhausted by pleural plaques claimants, leaving little for subsequent mesothelioma sufferers. Yet at least 80% of asbestos disease damages in the UK are paid by vast insurance companies such as Zurich Commercial, Norwich Union, AXA and the Royal & SunAlliance. Little as they like it, they can well afford to do so. Perhaps another 10% is paid by uninsured Defendants and another 10% by Lloyds Syndicates. This may not be without its strains, but they are much more readily absorbed on this side of the Atlantic because of the modest levels of damages and the fact that there is no question of compensating the “worried well” who do not even have pleural plaques.

It is worth noting that the law already compensates conditions which, in various ways, possess points of comparison with pleural plaques: e.g. dyslexia, pinprick/(fear of) HIV infection, genotype infection with fear of Hepatitis C, and embryonic CJD. It also routinely compensates minor physical injuries such as fractured fingers and whiplash injuries that recover after a few weeks. It would therefore be extraordinary to exclude from compensation those with pleural plaques on whom the Defendants have negligently inflicted the permanent fear of painful death due to lung cancer or mesothelioma.

It would also be extraordinary to declare that a condition that 22 senior lawyers sitting as County Court Judges have been compensating with significant awards, recently typically in the bracket £15,000 to £20,000, to be so negligible as not to qualify for compensation at all. To put it colloquially, it would have been the most gigantic cock-up to have been awarding damages to people for a condition for 20 years and then to declare that it was uncompensatable all along. This would create vast anomalies between those unfortunate enough for their plaques to have been manifest before 2005 and those afterwards. It would also be in danger of making the law look a laughing stock.

The separate diseases idea, whether or not it is neat in theory, would lead to chaos in practice. As David Allan QC demonstrated, symptomless pleural plaques, pleural thickening and asbestosis often overlap. The medical evidence before the court is that a substantial minority of those with pleural plaques also have microscopic asbestosis, as yet undetected. Any

separate diseases system would lead both to extra medical x-rays and scans and also to additional claims.

The Lord Chief Justice appears to think it better to wait and allow a proportion of pleural plaques sufferers who will die from lung cancer or mesothelioma to do so, so that their dependants can then recover in full. However, claimants are absolutely entitled to receive compensation themselves for their own condition, bringing with it the satisfaction of having achieved justice and recognition of the defendants' tort. Also, up to a third of claimants are either bachelors, divorced or widowed, so they do not have dependants and the damages then pass as a windfall to the heirs of their estates.

As the U.S. Supreme Court points out, failure to compensate the fear of future risks in the early non-malignant stages of disease leaves an important lacuna in the compensation system. The majority who do not proceed to contract lung cancer or mesothelioma are never compensated for the fear of it. Even for those who do, the many years of fear will be almost forgotten in the inevitable concentration on compensating for cancer.

As illustrated in my earlier paper, "Final Damages" there are many good and logical reasons for the election of final damages. In addition, earlier claims lead to more accurate justice since the events giving rise to the tort are more recent and it is less likely that the defendant companies will become insolvent.

There is one claims farming company, IDC, that advertises for claimants and offers scans. Some solicitors also advertise for pleural plaques claimants. This is what many understandably find unattractive. If so, the answer is for the powers that be to ban it or to regulate it. It ought to be unthinkable, however, to penalise the majority of claimants, who make a natural choice to claim damages after learning of the diagnosis of the disease, for the arguably undesirable activities of others over whom they have no control. The administration of justice needs to be more precise than this. "

### **Final damages**

In both the High Court and the Court of Appeal hearings, Mr Justice Holland and Lord Philips repeatedly stated their opposition to pleural plaques claimants recovering final damages. Holland J said that he could not understand why they did so; and Lord Phillips observed that he found such claims very unattractive. Both judges failed to understand that there are a number of good, indeed compelling, reasons why laggards and other asbestos disease sufferers preferred to claim final damages. Prominent among these are the following.

1. By recovering a worthwhile sum in final damages, typically around £17,500, claimants were able to derive benefit from the damages during their lifetime.

2. This is particularly important in an industry such as thermal insulation where few if any employers provide pensions, so the final damages could provide a lump sum for retirement.
3. Since very few thermal insulation employers provide sick pay, final damages served as financial buffer during any future periods out of work.
4. In an industry in which asbestos has been replaced by other hazardous substances such as phenolic foam, final damages purchased for claimants the freedom to transfer to lower paid but safer work outside the industry.
5. Since the statutory requirement is that there must be serious deterioration in a claimant's condition before further damages can be claimed, significant deterioration short of this level is apt to go uncompensated with provisional damages.
6. If and when claimants eventually contract lung cancer or mesothelioma, more often than not the final damages only become available after their death or when they are too terminally ill for the damages to benefit them.
7. Since legal proceedings are stressful, most claimants prefer to finalise their cases so as to avoid future strain especially that falling on widows in the event of their deaths.
8. As has been spectacularly demonstrated by the insolvency of the Turner & Newall companies, even the largest defendants cannot be relied upon to remain solvent for the few decades in which further damages may be claimed.
9. Many lagging companies fail even to pay current wages on time (since April 2004 the GMB has had to pursue 27 cases of non-payment on behalf of London and Essex ladders), so they can hardly be relied upon to pay final damages many years in the future.
10. Nor is the problem necessarily resolved by insurance, since some of the worst employers either fail to take out any insurance at all or effectively avoid the compulsory insurance legislation by obtaining insurance certificates that only cover only some of their workers.
11. Once terminally ill, claimants find it hard to remember and give good evidence about their work many years earlier. Once they are dead, this becomes impossible. The earlier the evidence is elicited, the better it is likely to be.
12. Some insurance companies become insolvent as well, eg. the Builders Accident and the Iron Trades in recent years, in which event only 90% of the further damages can be

recovered under the Financial Services Compensation Scheme in respect of asbestos exposure before 1972.

### **CONCLUSION**

All is not lost. In recent years, the House of Lords has consistently proved itself a more liberal forum than the Court of Appeal. As the Fairchild appeals demonstrate, it is much more prepared to take a broad rather than a narrow view of the requirements of justice. Moreover, whereas the Claimants in the Fairchild case arrived at the House 0-4 down in terms of judicial opinion, the Claimants in the present cases approach it 5-2 up: a significant advantage when, in Lord Reid's words, a cause of action accrues when it reaches a stage "at which a judge could properly give damages for the harm that had been done." 22 judges, not improperly, have awarded damages between £2,500\* and £35,000 in pleural plaques cases over a period of 20 years.

It is submitted that the solution is the general bipartite test proposed above. It enables the House of Lords to lay down principles spanning the whole of personal injury law. And it concentrates on the consequences of the tort, which are undoubtedly substantial, in line with the approach adopted by Parliament in the Supreme Court Act 1981. If such a general rule is adopted, the particular features of pleural plaques cases can readily be assimilated into it.

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\* RPI adjusted