HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 39

on appeal from: [2006] EWCA Civ 27

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Johnston (Original Appellant and Cross-respondent) *v.* NEI International Combustion Limited (Original Respondents and Cross-appellants)
Rothwell (Original Appellant and Cross-respondent) *v.* Chemical and Insulating Company Limited and others (Original Respondents and Cross-appellants)
Topping (Original Appellant and Cross-respondent) *v.* Benchtown Limited (formerly Jones Bros Preston Limited (Original Respondents and Cross-appellants)
(Conjoined Appeals)
Grieves (Appellant) *v.* F T Everard & Sons and others (Respondents)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
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LORD HOFFMANN

My Lords,

Summary

1. The question is whether someone who has been negligently exposed to asbestos in the course of his employment can sue his employer for damages on the ground that he has developed pleural plaques. These are areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional cases, they cause no symptoms. Nor do they cause other asbestos-related diseases. But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestosis or mesothelioma. In consequence, a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression.

2. Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the

possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury. The same is true even if the anxiety causes a recognised psychiatric illness such as clinical depression. The right to protection against psychiatric illness is limited and does not extend to an illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortious injury. The risk of the future disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk.

The earlier rulings

3. In the 1980s the actionability of pleural plaques was considered in three decisions at first instance. In all three cases the judges found in favour of the plaintiffs. But their reasoning was not altogether consistent. The first case was *Church v Ministry of Defence* (1984) 134 NLJ 623, an action by a fitter who had until 1954 worked with asbestos in the naval dockyard at Chatham. A routine X-ray in 1980 revealed pleural plaques. Peter Pain J said (at p. 6) that it was "an error to treat the pleural plaques on their own." There was, he said, damage caused "by the asbestos passing through the lungs and causing the plaques to form." Adding that to the plaques themselves, it was not damage "so minor that the law should disregard it."

4. A month later Otton J gave judgment in a similar case (*Sykes v Ministry of Defence* The Times, 23 March 1984). The plaintiff had worked with asbestos in the naval dockyard at Portsmouth. The judge was referred to the decision of Peter Pain J in the *Church* case but his reasoning was not quite the same. In the opinion of Otton J, there was no need to add anything to the plaques to produce compensatable damage. It was enough that there had been a "definite change in the structure of the pleura". That gave the plaintiff a cause of action and therefore, in calculating the damages, one could take into account the risk of other diseases and the plaintiff's anxiety. As the judge awarded a global sum of £1,500 damages for "the three elements of physical damage, anxiety

and the risks of further complications", he did not have to explain how he would have calculated damages for the symptomless plaques alone.

5. *Patterson v Ministry of Defence* [1987] CLY 1194 was another similar case from the naval dockyard at Chatham. Simon Brown J did not accept that a "symptom-free physiological change" such as a plaque was an actionable injury. If Otton J had decided the contrary, he disagreed. But the plaques together with the risk of future disease and anxiety could add up to a cause of action. The reasoning of Simon Brown J was therefore based upon what was called, in argument before your Lordships, a theory of aggregation. The proposition was that a physiological change which is not compensatable damage can be aggregated with risk and anxiety (neither of which would by themselves give rise to a cause of action) to create a cause of action.

6. Since these decisions, claims have regularly been settled on the basis that pleural plaques are actionable injury. But now the insurers have decided to challenge the practice. Ten test cases were selected for trial before Holland J, who also found that the plaques were actionable. In seven cases the insurers appealed to the Court of Appeal, which reversed the decision of the judge. Four of the claimants now appeal to your Lordships' House. In order to decide the point, it is necessary to go back to first principles.

The concept of actionable damage

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

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

degree. Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly. It has however arisen in connection with the Limitation Act, under which the primary rule is that time runs from the date on which the cause of action accrues. In an action for negligence, that means the date upon which the claimant suffered damage which cannot be characterised as trivial. To identify that moment was the vital question in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, in which the employees had suffered death or serious injury from damage to their lungs caused by exposure to fragmented silica. At a date earlier than the commencement of the limitation period their lungs had suffered damage which would have been visible upon an X-ray examination, reduced their lung capacity in a way which would show itself in cases of unusual exertion, might advance without further inhalation, made them more vulnerable to tuberculosis or bronchitis and reduced their expectation of life. But in normal life the damage produced no symptoms and they were unaware of it. The House of Lords affirmed the view of the trial judge and the Court of Appeal that a cause of action had arisen and the claims (as the law then stood) were statute-barred.

9. The members of the Court of Appeal and the House of Lords used slightly different words to express the degree of injury which must have been suffered. In the Court of Appeal ([1962] 1 QB 189) Harman LJ spoke (at p 199) of loss or damage "not being insignificant" and Pearson LJ said (at p 208) that the cause of action accrues when "the plaintiff concerned has suffered serious harm". In the House of Lords ([1963] AC 758) Lord Reid said (at pp 771-772) that the cause of action accrues when the wrongful act has caused personal injury "beyond what can be regarded as negligible". Lord Evershed (at p 774) spoke of "real damage as distinct from purely minimal damage". Lord Pearce (with whom all the rest of their Lordships agreed) said (at p 779):

> "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… It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand, evidence that in unusual exertion or at the onset of disease he may suffer from his hidden impairment tells in favour of the damage being substantial."

Are pleural plaques actionable damage?

10. Holland J found that the plaques in themselves were not damage which could found a cause of action. He said (at para 80a):

> "I start by rejecting any notion that pleural plaques per se can found a cause of action. I am not satisfied that for forensic purposes they can be categorised as a 'disease' nor as an 'impairment of physical condition'. This whole forensic exercise arises because for practical purposes there is no disease, nor is there any impairment of physical condition. If I am wrong, then, the expert evidence as to their significance points (as is in effect, conceded) to them being disregarded as 'de minimis'. I do not think that that status can be enhanced by associating with such, the risk of onset of asbestos related symptomatic conditions as arise not from the plaques per se but from the history starting with the initial exposure – still less do I think that that status can be altered by invoking anxiety arising out of the now articulated risks."

11. This finding of fact is in my opinion unassailable. As the judge noted, the point was conceded by the claimants, who preferred to rely upon the aggregation theory adopted by Simon Brown J in *Patterson v Ministry of Defence*. The same concession was made in the Court of Appeal but withdrawn in the House of Lords. If the case lay on the borderline, I would have thought that the judge's finding was open to him on the evidence and should not be disturbed. But this was not a borderline case and I do not see how it was open to the judge, on the evidence, to come to any other conclusion. It was not merely that the plaques caused no immediate symptoms. That was also the case in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758. The important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life. They had no effect upon their health at all. As the judge put it at para 64:

> "the identification of pleural plaques has an 'evidential' rather than a 'substantive' significance. Thus, their existence confirms the significant permanent physical penetration by asbestos fibres but does not add in any way to the resultant disabilities, actual or prospective. It is with

> that confirmation to hand that the physician is able to make risk assessments that are based upon the level of exposure and the history – risk assessments that do not stem from, nor are influenced by the plaques but which flow from the now evidenced initial exposure. Further, it is not the plaques per se that engender anxiety (save to the unforeseeably irrational); it is again the now evidenced internal presence of asbestos and the risk assessments arising from such."

The aggregation theory

12. If the pleural plaques are not in themselves damage, do they become damage when aggregated with the risk which they evidence or the anxiety which that risk causes? In principle, neither the risk of future injury nor anxiety at the prospect of future injury is actionable. These propositions are established by the decisions of the House in *Gregg v Scott* [2005] 2 AC 176 and *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65 respectively. How then can they be relied upon to create a cause of action which would not otherwise exist?

13. The appellants' argument is based upon the common law rule that if a claimant has suffered actionable personal injury as a result of the defendant's breach of duty, he can and must claim damages in the same action for all the damage which he has suffered or will suffer in consequence of that breach of duty. As Bowen LJ said in *Brunsden v Humphrey* (1884) 14 QBD 141, 148:

> "Nobody can doubt that if the plaintiff had recovered any damages for injury to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently."

14. This "single action rule" is very old and for the protection of defendants. Coke said that it was based upon the maxim interest rei publicae ut sit finis litium, "otherwise great oppression might be done under colour and pretence of law": see Bowen LJ at p 147. A defendant should not have to answer more than once for the consequences of the same act. A corollary of the rule is that if a claimant does have a cause

of action, he may recover damages for the risk that he may suffer further injury in consequence of the same act of negligence, even though (under the principle in *Gregg v Scott)*, such risk would not be independently actionable. There are also cases which suggest that he may be able to recover damages for anxiety consequent upon an actionable injury. But recovery is predicated upon the existence of actionable injury. There is nothing to suggest that a claimant can rely upon the single action rule to sue in circumstances in which he does not have a cause of action in the first place.

15. The rule was modified for personal injury actions by section 32A of the Supreme Court Act 1981, inserted by section 6(1) of the Administration of Justice Act 1982:

> "32A. — (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some … time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
>
> (2) …as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person
>
> (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
>
> (b) further damages at a future date if he develops the disease or suffers the deterioration."

16. This provision allows a claimant to elect for an award of provisional damages for the injury which he has already suffered and enables him to avoid having to quantify his damages for the chance of developing further injury in the future; a calculation which is likely to result in his being either undercompensated (if the injury occurs) or overcompensated (if it does not). Most (though not all) of the claimants in these proceedings elected for provisional damages. But the statute does not support the aggregation theory. On the contrary, its insistence that provisional damages can be obtained only when there is a chance that a serious disease will develop "as a result of the act or omission

which gave rise to the cause of action" makes it clear that it applies only where the claimant has a cause of action.

The judgment of the Court of Appeal

17. For these reasons I would reject the aggregation theory. The majority in the Court of Appeal, who also rejected it, placed some emphasis upon policy arguments of a consequentialist nature, based upon predictions of how people would behave if they could sue for pleural plaques. I am bound to say that some of these seemed to me rather speculative and I am inclined to agree with Smith LJ who said in her dissenting judgment ([2006] ICR 1458, 1492, para 112) that "the question can and should be answered by the application of established legal principle to a new factual situation". But I respectfully disagree with Smith LJ about that principle, which is, in my opinion, that in order to sue for personal injury you need a cause of action and that symptomless bodily changes with no foreseeable consequences, the risk of a disease which is not consequent upon those changes and anxiety about that risk are not, individually or collectively, damage giving rise to a cause of action.

18. Smith LJ said that pleural plaques amounted to "an injury". She gave two reasons: first, in rare cases plaques might (on account of the position in which they developed) cause symptoms. In such a case the symptoms are not the injury. It is the plaque. That shows that the plaque is an injury and it must be an injury whether it causes symptoms or not. Similarly, the plaque is a lesion to the pleura. A lesion to the body, for example, a disfiguring scar, would be a compensatable injury. That shows that a lesion is an injury.

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

20. Smith LJ also found support for the aggregation theory in section 32A of the Supreme Court Act 1981, to which I have already referred. She said (at p 1497, para 133):

> "In my view, the wording of section 32A is consistent only with the proposition that a claimant has only one cause of action for all personal injury consequences of a wrongful act or omission. The wording of the section is not consistent with the notion that the same exposure to asbestos can and does give rise to separate torts in respect of each consequence. Because he has only one cause of action, as soon as the claimant knows that he has one personal injury consequence, he must sue for all such possible consequences. Under section 32A, he is able to defer the assessment of that part of his damages which relate to future risks, instead of having to accept them now, imperfectly assessed, as he was required to do at common law. Whether he chooses a provisional or final award is a matter for him".

21. That seems to me undoubtedly correct. But she then went on to say:

> "The important point is that, because he has only one cause of action, his damage 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 the judge is considering whether the damage is more than minimal."

22. It is the last "therefore" that seems to me, with respect, to precede a non sequitur. It is true that *if* he has a cause of action, his damage must include the risks that other serious conditions might eventuate. But that does not mean that such risks are taken into account in deciding whether he has a cause of action, that is to say, whether he has suffered (and not merely may suffer) more than minimal damage.

Psychiatric illness

23. I would, for the reasons so far discussed, dismiss the appeals of all the claimants except Mr Grieves. His case is different because he suffered not merely anxiety but clinical depression, a recognised psychiatric illness, in consequence of being told that his pleural plaques indicated a significant exposure to asbestos and the risk of future disease. Unlike the kind of anxiety considered in *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, psychiatric illness does constitute damage for the purpose of founding an action in negligence. So the question in Mr Grieves's case is a different one: not whether he suffered damage, but whether the defendants owed him a duty of care in respect of psychiatric illness caused by his anxiety at the risk of a future illness.

24. Mr Grieves is suing two defendants: a company by whom he was employed as a maintenance engineer between 1961 and 1964 and another by which he was employed between 1964 and 1969. Both admit that they negligently exposed him to asbestos dust. He developed his psychiatric illness as a result of an X-ray examination in 2000. The question of whether he was owed a duty of care in respect of that illness must in my opinion by answered by reference to the principles stated by Hale LJ in her lucid and comprehensive judgment in *Hatton v Sutherland* [2002] ICR 613, which were approved by this House in *Barber v Somerset County Council* [2004] 1 WLR 1089. The judgment was concerned with psychiatric injury caused by subjecting an employee to occupational stress, but the general principles are in my opinion applicable to psychiatric injury caused by any breach of duty on the part of the employer.

25. Hale LJ said (at p 624, para 23) that "the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable." She rejected the general applicability of the test of whether psychiatric injury was foreseeable in a person of "ordinary fortitude" because an employer's duty was owed to each individual employee and not an undifferentiated member of the public. An employer may know (or it may be that he should know) of a particular vulnerability in an employee. In that case, he has a duty to treat him with appropriate care. On the other hand, in the absence of some particular problem or vulnerability, the employer was entitled to assume (in a case of occupational stress) that the employee is "up to the normal pressures of the job". Applied to the broader question of psychiatric illness, that means that in the absence of contrary information, the

employer is entitled to assume that his employees are persons of ordinary fortitude.

26. In the present case, the employer would be unlikely to have any specific knowledge of how a particular employee was likely to react to the risk of asbestos-related illness more than 30 years after he had left his employment. An assumption of ordinary fortitude is therefore inevitable.

27. The Court of Appeal noted (at p 1482, para 76) that the judge had made no finding that Mr Grieves's psychiatric injury was reasonably foreseeable and said that "there is no material which would enable us to make such a finding." Dr Menon, one of the expert witnesses, said that over 6 years he had assessed nearly 80 men with asbestos-related diseases and suspected mental health problems. Of these, about half were suffering from diagnosable mental disorders. But his evidence did not distinguish between mental problems suffered by actual victims of asbestos-related diseases and those caused simply by the fear of developing such diseases. Nor did he say what proportion of actual or potential victims suffered such problems. As the Court of Appeal said (at p 1483, para 76) it was impossible to deduce from his report:

> "whether employees of reasonable fortitude are liable to suffer psychiatric injury on learning, whether as a result of developing pleural plaques or otherwise, that their exposure to asbestos carries with it a risk of developing mesothelioma, lung cancer or other serious disorder."

28. Of course the test of whether it is foreseeable that the employee of reasonable fortitude would suffer psychiatric injury does not depend entirely upon the statistical evidence. In *McLoughlin v O'Brian* [1983] 1 AC 410, 432 Lord Bridge of Harwich pointed out that foreseeability did not depend on "the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect" but on whether the judge "as fairly representative of…the educated layman…[formed the]… view from the primary facts [that]…the proven chain of cause and effect was reasonably foreseeable." But this test restricts rather than enlarges the foreseeability of psychiatric illness. It allows for the fact that expert knowledge of cause and effect may not be available to the educated layman. It does not mean that the judge should give effect to speculation or urban legends unsupported by evidence.

29. The answers to a test of foreseeability will vary according to, first, the precise description of what should have been foreseen and, secondly, the degree of probability which makes it foreseeable. Lord Reid's opinion in *Hughes v Lord Advocate* [1963] AC 387 shows how much depends upon the level of generality at which you describe the event which must have been foreseen. (See also *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082). And Lord Reid's well-known dictum in *Overseas Tankship (UK) Ltd v Miller Steamship Co (The Wagon Mound (No 2))* [1967] 1 AC 617, 643-644 shows that the degree of probability which counts as foreseeability may vary according to other factors in the case:

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

30. In the case of psychiatric illness, the standard description of what should have been foreseen, namely that *the event which actually happened* would have caused psychiatric illness to a person of "sufficient fortitude" or "customary phlegm", has been part of the law since the speech of Lord Porter in *Bourhill v Young* [1943] AC 92, 117. It was plainly intended to make the test more difficult to satisfy than whether it was foreseeable that something might happen which would cause someone (or even a person of reasonable fortitude) to suffer psychiatric injury. The latter test would not be hard to satisfy, as is evidenced by the opinion of the majority of the House in *Page v Smith* [1996] AC 155. But in my opinion the latter test was applicable only in the special circumstances of that case, to which I shall in due course return. The general rule still requires one to decide whether it was reasonably foreseeable that the event which actually happened (in this case, the creation of a risk of an asbestos-related disease) would cause psychiatric illness to a person of reasonable fortitude. I think that the Court of Appeal was right to say that there was no basis for such a finding.

Page v Smith

31. Counsel for Mr Grieves submits that even if his psychiatric illness was not foreseeable, the decision of the majority of the House in *Page v Smith* [1996] AC 155 makes such foreseeability unnecessary. It is enough that his employer ought to have foreseen that exposure to asbestos might cause him physical injury, namely, an asbestos-related disease. In *Page v Smith* it was held to be sufficient that the defendant should have foreseen that his negligent driving might cause some physical injury. It did not matter that he could not have foreseen that the event which actually happened, namely a minor collision, would cause psychiatric injury.

32. Counsel for the defendant invited the House to depart from the decision in *Page v Smith* on the ground that it was wrongly decided. It has certainly had no shortage of critics, chief of whom was Lord Goff of Chieveley in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, supported by a host of academic writers. But I do not think that it would be right to depart from *Page v Smith.* It does not appear to have caused any practical difficulties and is not, I think, likely to do so if confined to the kind of situation which the majority in that case had in mind. That was a foreseeable event (a collision) which, viewed in prospect, was such as might cause physical injury or psychiatric injury or both. Where such an event has in fact happened and caused psychiatric injury, the House decided that it is unnecessary to ask whether it was foreseeable that what actually happened would have that consequence. Either form of injury is recoverable.

33. In the present case, the foreseeable event was that the claimant would contract an asbestos-related disease. If that event occurred, it could no doubt cause psychiatric as well as physical injury. But the event has not occurred. The psychiatric illness has been caused by apprehension that the event may occur. The creation of such a risk is, as I have said, not in itself actionable. I think it would be an unwarranted extension of the principle in *Page v Smith* to apply it to psychiatric illness caused by apprehension of the possibility of an unfavourable event which had not actually happened.

34. In *Creuzfeldt-Jakob Disease Litigation Group B Plaintiffs v Medical Research Council* [2000] Lloyd's Rep Med 161, 165 Morland J observed that if *Page v Smith* were given the wide interpretation for which counsel for Mr Grieves argues, psychiatric injury caused by the

apprehension of illness related to exposure to asbestos, radiation, or contaminated food would become actionable, even though the claimants had actually suffered no physical injury. Whether such liability would have the disastrous consequences for society which the judge predicted may be debatable, but it would involve an extension of the principle to cases which I do not think were contemplated by the House. I do not think it would be right to do so and I would therefore also dismiss Mr Grieves's appeal.

35. The defendants cross-appealed against the quantum of damages which the Court of Appeal said they would have awarded if the claimants had been successful. As the appeals are to be dismissed, the cross-appeal does not arise and I say nothing about it.

LORD HOPE OF CRAIGHEAD

My Lords,

36. No action lies for a wrong which has not resulted in some element of loss, injury or damage of a kind that was reasonably foreseeable and for which the claimant can sue. It is the limits of this, most basic, principle of the law of negligence that are under scrutiny in these appeals.

37. The first question is what we mean when we refer in this context to "injury". In *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, 778, Lord Pearce said that there was no case that had sought to define the borders of actionable injury. The issue in that case was whether an injury which had been sustained before the claimant knew that he had been injured could nevertheless be said to be actionable. As Lord Pearce explained, it was impossible to hold that a person who has no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it cannot have suffered any actionable harm. But the evidence in that case was that a person who is susceptible to pneumoconiosis, and who inhales the noxious dust over a period of years, will have suffered substantial injury to his lungs before his injury can be discovered: Lord Reid at p 772.

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

39. The question then is whether an alteration in a claimant's physical condition of this kind is actionable. If the alteration is taken by itself there can be only one answer to this question. As Lord Reid put it in *Cartledge v E Jopling & Sons Ltd* at p 771-772, a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible. I do not think that it is an abuse of language to describe pleural plaques as an injury. The question whether they can also be described as a disease is less easy to answer. But the use of these descriptions does not address the question of law, which is whether a physical change of this kind is actionable. There must be real damage, as distinct from damage which is purely minimal: Lord Evershed at p 774. Where that element is lacking, as it plainly is in the case of pleural plaques, the physical change which they represent is not by itself actionable.

40. The claimants have an alternative argument. They maintain that the physical change ought not to be looked at in isolation from other consequences of their exposure to asbestos. In each case there was medical evidence that the presence of pleural plaques indicated that the claimants were at significantly increased risk of developing an asbestos-related disease which would be actionable – of developing asbestosis, mesothelioma or lung cancer. There was also evidence from the claimants themselves, which the judge accepted, that they had suffered from anxiety on being told that they had pleural plaques and of the increased risks of developing these diseases due to the amount of asbestos fibres in their lungs which the presence of pleural plaques indicated.

41. The claimants accept that they have no free-standing claim for those increased risks, as it is not the pleural plaques themselves that gave rise to them: *Gregg v Scott* [2005] 2 AC 176. They also accept that they have no free-standing claim for their anxiety, which is mainly about their state of health in the future. Emotional reactions of that kind do not, on their own, sound in damages. But taken in combination, they say, these various elements when added together do add up to an injury caused by the wrongful exposure to asbestos which is more than negligible. Even when the risk is discounted for the purpose of an award of provisional damages under section 32A of the Supreme Court Act 1981, an award can, it is submitted, be given for an amount that is more than negligible for the anxiety when it is added to the physical alteration which gave rise to it. The physical change resulting from the presence in their lungs of asbestos fibres is the control mechanism or "hook", to adopt Professor Jane Stapleton's graphic metaphor ("Cause-in-Fact and the Scope of Liability for Consequences" (2003) LQR 388, 424), on which they wish to hang their argument.

42. It would be easy to dismiss this argument by applying the simplest of all mathematical formulae: two or even three zeros, when added together, equal no more than zero. It is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at something which is actionable. It would be easy to say that, as the element of anxiety is simply parasitical on another element which on its own is not actionable, it cannot in combination create something which is actionable. But I do not think that this would do justice to what, on the evidence, is a genuine problem of legal analysis. The claimants may never develop any of the harmful diseases which they are now at an increased risk of developing. But they have already developed pleural plaques and it has been established that they are suffering from anxiety due to an awareness of what the pleural plaques indicate. The respondents accept that if the claimants were to develop any of the harmful diseases they would then have a claim that was actionable. But the award which that cause of action would produce would give them nothing for any anxiety which preceded the development of the disease. And those who did not develop any of the harmful diseases would not ever, if the respondents are right, be able to recover anything for their anxiety.

43. The need to examine the problem more closely is indicated by the fact that, prior to this litigation, it was accepted by both lawyers and insurers working in this field that claimants who had developed pleural plaques were entitled to damages. As Smith LJ noted in the Court of Appeal [2006] ICR 1458, para 128, this was the result of a trilogy of

cases in the 1980s involving the Ministry of Defence: *Church v Ministry of Defence* (unreported, 23 February 1984); *Sykes v Ministry of Defence* (unreported, 19 March 1984); *Patterson v Ministry of Defence* (unreported, 29 July 1986). In *Patterson* Simon Brown J said that he had no doubt that the plaintiff had suffered material damage. This consisted of the symptom-free pleural changes, the risk of the development of diseases that were harmful and what he described as the understandable worry attendant upon those various matters. In the present cases Lord Phillips of Worth Matravers CJ, speaking for the majority in the Court of Appeal, accepted that, if the claimants had sustained actionable physical injury, an award of provisional damages could properly reflect anxiety at the risk of sustaining a harmful disease consequent upon the breach of duty that caused the physical injury and that compensation for significant anxiety would normally be expected to fall within a bracket of £4,000 to £6,000: [2006] ICR 1458, para 107. The problem then is not due to the fact that it would not be possible, on this hypothesis, to arrive at an award which crossed the minimal threshold that the maxim *de minimis non curat lex* stipulates. It is due to the fact that, on their own, the pleural plaques do not amount to an injury, or a disease, which is actionable.

44. Why should this be? The respondents say that the answer lies in an application of the *de minimis* test: the law ought not to concern itself with pleural plaques which in themselves are, at best for the claimants, a trivial injury. But the wording of the test itself is liable to mislead. It is not right to say that the law does not concern itself with matters of small moment or which are trivial in amount. The dishonest taking of an item of trivial value – a bun from the bakery, for example – is just as much theft as it is when the item taken is of high value. And in strict legal theory every wrong, however slight, attracts a remedy. Every right, of whatever value, may be enforced.

45. Two Scottish authorities illustrate this point. In *Meikle v Sneddon* (1862) 24 D 720 the pursuers claimed damages for the wrongful arrestment of their ship. They claimed £500 as solatium for injury to their feelings. But the only loss that had been actually sustained was the sum required to relieve the vessel from the arrestment, which was less than £10. Lord Justice-Clerk Inglis said at p 723:

> "It is of no consequence whether the pursuers have sustained any substantial damage. Suppose the damage to be such that one farthing is recovered, that will show that a

> wrong has been done by the defenders to the pursuers; and, consequently, that this action is well founded."

In *Strang v Steuart* (1864) 2 M 1015 the same judge lamented the amount of court time that had been taken by what he described at p 1029 as a foolish and absurd litigation about a hedge and ditch that separated the parties' properties. But he held nevertheless that it was the duty of the court to deal with the case.

> "We are not indeed bound to adjudicate *de lana caprina*; but if there be a pecuniary or patrimonial interest, however small, depending on the determination of the question, the parties have a right to invoke the aid of a court of law to decide their differences."

46. On the other hand, in *Wood v Carwardine* [1923] 2 KB185 McCardie J held that trivial services, the amount of which could be measured, did not amount to "attendance" within the meaning of section 12(2)(i) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. At p 192 he said that the rule had to be applied with robust vigour in favour of the tenant unless the protective object of the Act was to be substantially defeated. He referred to observations on the maxim in the same context by Bankes LJ in *Wilkes v Goodwin* [1923] 2 KB 86, 93-94, and said that the question of substantiality was an important matter in dealing with the rule.

47. Whatever its strict meaning may be, the maxim in its less literal sense can be appealed to in the present context as an expression of legal policy. It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an

award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless.

48. In her dissenting judgment, to which I should like to pay tribute, Smith LJ said that the tissue change resulting from the development of the pleural plaques was a physical injury or a disease and that the cause of action was complete when account was taken of the risks of a harmful disease caused by the same exposure. This was on the view that time began to run against the claimant for the purposes of limitation when the plaques were discovered and he was told about the risks: para 134. She did not think that it was necessary to include any element of anxiety when deciding whether the cause of action was complete. But anxiety could be brought into account in the award of damages. In summary, she said, the sum of the very minor physical damage and the much more serious damage comprising the risks amounted to material, actionable damage.

49. This approach does not seem to me, however, to address the fundamental point that, while the pleural plaques can be said to amount to an injury or a disease, neither the injury nor the disease was in itself harmful. This is not a case where a claim of low value requires the support of other elements to make it actionable. It is a claim which has no value at all. Pleural plaques are a form of injury. But they are not harmful. They do not give rise to any symptoms, nor do they lead to anything else which constitutes damage. Furthermore it is not possible to bring the risks of developing a harmful disease into account by applying the ordinary rules of causation. The risks are no doubt due to the same exposure to asbestos. But they are not created by, or in any way contributed to, by the pleural plaques. That can also be said of the anxiety. It is the risk of developing a harmful disease in the future that gives rise to it. So also where the claimant is required to attend for periodical medical examination and is worried about the results. Pleural plaques themselves do not require periodical medical attention. The need for this is due to what the pleural plaques indicate about the extent of the exposure to asbestos.

50. I am not attracted by the other reasons of policy that led the majority in the Court of Appeal to the conclusion that it was undesirable that the development of pleural plaques should give rise to a cause of action: para 67. I would hold however that there is no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage, and because of the absence of a direct causative link between them and the

risks and the anxiety which, on their own, are not actionable. I would apply the same proposition for the purposes of the limitation rules. Time has not yet begun to run against any of the claimants who may have the misfortune of developing an asbestos-related disease in the future which is actionable.

Mr Grieves's case

51. Mr Grieves is in a different position, because he developed psychological symptoms and was diagnosed as suffering from a depressive illness. He also developed irritable bowel syndrome as a result of his clinical depression. So he claims damages for his depressive illness and his irritable bowel syndrome as well as for his contraction of pleural plaques. He claims that all these consequences should be aggregated to give him a cause of action. He also claims, in the alternative, that as he was exposed to a foreseeable risk of injury by exposure to asbestos dust he is entitled to recover damages for psychiatric injury suffered in consequence of that breach of duty.

52. On his first argument Mr Grieves seeks to bring his case within the ratio of *Page v Smith* [1996] AC 155. He maintains that he was a primary victim of the respondents' negligence in exposing him to asbestos dust. So it was not necessary in his case to ask whether the respondents should have foreseen that he, as person of normally robust constitution, would suffer psychiatric injury. The respondents advanced various criticisms of that case which, as is well known, has given rise to much controversy. They invited the House to depart from that decision and to hold that, as in the case where damages are sought for physical injury, foreseeability of psychiatric injury should be the test for the recovery of damages by those who suffer psychiatric injury. The effect would be to restore to this branch of the law the principle that was laid down by the Privy Council in *Overseas Tankship (UK) ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388, 426, that the essential factor in determining liability for the consequences of an act of negligence is foreseeability of the damage that is complained of. Attractive though that argument is, I would prefer to leave it for another day. On the facts of Mr Grieves's case, *Page v Smith* is distinguishable.

53. There are two reasons for taking this view. First, the factor that precipitated Mr Grieves's psychiatric illness was not a stressful event caused by the breach of duty, such as the accident which gave rise to Mr

Page's nervous shock. As Dr Rajiv Menon, a consultant psychiatrist, records in his report, Mr Grieves had a long-standing, anticipatory fear of developing an asbestos related disease. But he did not become ill until he was told that slight pleural thickening had been detected when his chest was X-rayed in August 2000, more than 20 years after the date when he was last exposed to asbestos dust.

54. In *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455, 500, Lord Steyn said that, in view of the difficulties that they gave rise to, the only prudent course was to treat the categories as reflected in authoritative decisions such as *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Page v Smith* [1996] AC 155 as settled for the time being but to leave any expansion of this corner of the law to Parliament. In *Frost* it was argued unsuccessfully that the plaintiffs were entitled to succeed as rescuers. Although the issue in that case was whether they could be classified as secondary victims, I would apply Lord Steyn's cautionary advice to the present case too. The labels that were identified in *Page v Smith* should not be extended beyond what was in contemplation in that case. The category of primary victim should be confined to persons who suffer psychiatric injury caused by fear or distress resulting from involvement in an accident caused by the defendant's negligence or its immediate aftermath. A person like Mr Grieves who suffers psychiatric injury because of something that he may experience in the future as a result of the defendant's past negligence is in an entirely different category. The immediacy that is characteristic of the situation that applies to primary victims as contemplated in *Page v Smith* [1996] AC 155 is lacking in his case.

55. Secondly, the causal chain between his inhalation of the asbestos dust and the psychiatric injury is stretched far beyond that which was envisaged in *Page v Smith* [1996] AC 155. That case was concerned with an immediate response to a sudden and alarming accident, for the consequences of which the plaintiff had no opportunity to prepare himself. In this case Mr Grieves inhaled asbestos dust for about eight years. It was not until the end of that period that he became worried. This was because of the risk that he or his wife or daughter might contract a disease in the future. And his depression did not occur until he was told twenty years later about the results of his chest X-ray. He believed then that his worst fears were being realised. But this was because of the information that he had now been given by his doctor, not because of anything that happened or was done to him by his employers while he was inhaling the asbestos. His exposure at work was not to stress, but to risk: Sarah Green, "Risk Exposure and Negligence" [2006] 122 LQR 386, 389.

56. It was submitted that Mr Grieves's case fell within the scope of the decision of this House in *Simmons v British Steel plc* [2004] ICR 585. It was held that the pursuer in that case was in the position of a primary victim of the defendant's negligence: paras 21, 55. But in that case the pursuer suffered a severe blow to his head in the same accident which gave rise to a number of significant physical symptoms that lasted for several weeks. His psychiatric illness was the result of a dermatological condition that he developed because he was angry. That anger had several causes, one of which was the fact that the accident had happened. So the pursuer was within the category of persons who suffer psychiatric injury caused by fear or distress resulting from involvement in an accident caused by the defendant's negligence or in its immediate aftermath. His situation was very different from that of Mr Grieves, whose case falls well outside that category.

57. The alternative argument is that Mr Grieves's psychiatric injury was not arbitrarily related to the finding of pleural plaques but was reasonably foreseeable. The judge, Holland J, was not persuaded that it was a foreseeable consequence of the defendants' breach of duty. The majority in the Court of Appeal were unanimous in their view that there was no material that would enable them to make such a finding: [2006] ICR 1458, paras 76. On the view that she took of the case Smith LJ did not need to deal with this point. I agree with the majority that the evidence in this case does not support a finding that Mr Grieves's psychiatric illness was reasonably foreseeable. That complication arose in his case because he had had long-standing, anticipatory fears of developing an asbestos-related disease ever since he had learnt about the dangers of exposure some decades previously. His case was said to be relatively unique in this respect by Dr Menon, who had assessed a cohort of about 80 men with asbestos-related diseases and related mental health problems. This was, of course, a very small sample of the many workmen who have been exposed to asbestos dust.

58. Furthermore, all the factors which take Mr Grieves's case beyond the category of cases that was envisaged in *Page v Smith* [1996] AC 155 are relevant to this argument also. It is not suggested that his psychiatric illness was due to anything that was stressful or alarming about the conditions in which he was working when he inhaled the asbestos. The circumstances that led up to its development were far removed from anything that happened or could reasonably have been foreseen at that time. The question of what was reasonably foreseeable is approached with the benefit of hindsight, in the light of what actually happened: *Page v Smith* [1994] 4 All ER 522, 549, per Hoffmann LJ. But that does not mean that everything that happened afterwards can be taken, with

the benefit of hindsight, to be reasonably foreseeable. In *The Creutzfeldt-Jacob Disease Litigation Group B Plaintiffs v The Medical Research Council* [2000] Lloyd's Rep Med 161, 166 Morland J held that the circumstances were such that the defendants should have reasonably foreseen the risk of a patient developing psychiatric injury as a result of receiving news and information about the consequences and effects of CJD by 1 July 1977, prior to the date when the patients received the treatment that proved to be harmful. No findings of the kind that he was able to make are available in this case.

Conclusion

59. I share the regret expressed by Smith LJ that the claimants, who are at risk of developing a harmful disease and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy. But they have not yet sustained an injury for which the law can give them a remedy in damages. The question whether employees might have a remedy against their employers in contract has not been explored in the present context, as my noble and learned friend Lord Scott of Foscote points out. There may be room for development of the common law in this area. In that connection it is worth noting a recent assessment of the potential for the development of contractual remedies for employees against their employers by Matthew Boyle, "Contractual Remedies of Employees at Common Law: Exploring the Boundaries" [2007] JR 145. But, for the reasons Lord Scott gives, it would not be appropriate to attempt such a difficult and uncertain exercise in these cases.

60. For the reasons given by my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry whose speeches I have had the opportunity of reading in draft, and for these further reasons of my own, I would dismiss these appeals.

LORD SCOTT OF FOSCOTE

My Lords,

61. These conjoined appeals arise out of litigation brought by the appellants against their respective former employers. Each appellant complains that during his employment he was exposed by his employer

to asbestos dust and that, as a consequence of the exposure, he inhaled asbestos fibres which remain in his lungs. Asbestos fibres in the lungs can lead to mesothelioma or asbestosis. These are very serious life threatening diseases that can emerge many years after the exposure to asbestos dust has ceased. Medical science has not found any means of forestalling the onset of these diseases once the asbestos fibres have been inhaled. The unfortunate individual who has inhaled the fibres must simply wait and hope for the best.

62. None of the appellants has yet contracted any asbestos related disease. It is to be hoped that none will do so. But each of them, ever since his exposure to asbestos dust, has had to live with the risk, a risk estimated by the medical experts who have given evidence in these cases to be in the region of a five per cent chance, and will have to continue to live with that risk until he dies. The effect of the shadow cast by this risk on those who must live under it varies from individual to individual. Some people are more prone to worry than others. One of the appellants, Mr Grieves, has worried about the risk to the point where he has developed psychological symptoms and a depressive illness.

63. Medical examinations of each of the appellants have revealed that inhaled asbestos fibres have made their way to the pleural membrane which surrounds the lungs and have there formed themselves into plaques. Pleural plaques are characteristic of asbestos exposure but are in themselves asymptomatic. Their presence, and their size and number, provide an indication of the extent to which the individual has inhaled asbestos fibres but are not themselves causative of asbestos related disease. They cause neither impairment of lung function nor disablement. But because they are proof of the presence in the lungs of asbestos fibres they are an indicator of the extent to which the individual is at risk of developing in the future some such disease. The diagnosis of the presence of pleural plaques may, therefore, contribute to or heighten the anxiety of the individual that he may develop a life-threatening asbestos related disease.

64. Each of the appellants has sued the employer, or in some cases employers, who exposed him to asbestos dust. Damages in negligence are claimed. And it is accepted by each of the employers, respondents before your Lordships, that the exposure represented a breach of the duty each owed to its employees. The appellants' claims, however, are tortious claims based on breach of a tortious duty of care or breach of statutory duty – no distinction between these duties has been, or need be, drawn – and the employers have resisted the claims on the ground that

as yet none of the appellants has suffered actionable damage. It is accepted that if and when an appellant contracts an asbestos related disease, when, that is to say, the risk under which he is living actually materialises, his employers will be liable to him in damages. But that point has not yet been reached. The present actions are premature, so the respondents, or more accurately their insurers, contend. The issue for your Lordships is whether that is right. Holland J, who tried the case, thought it was not. In the Court of Appeal Smith LJ agreed with him, but the majority, Lord Phillips of Worth Matravers and Longmore LJ, disagreed. They allowed the appeal. The issues now for your Lordships to decide, are, first, whether the presence in the lungs of pleural plaques, a result of the inhalation of asbestos fibres brought about by the exposure of the appellants to asbestos dust, an exposure admitted to constitute a breach of the respondents' duty to them, entitles the appellants to bring an action in tort for damages. The second issue, if the answer to the first is that the presence of pleural plaques is not enough, is whether that presence coupled with the anxiety, produced by knowledge of the risks attendant upon a past exposure to asbestos dust and accentuated by knowledge of the presence in the lungs of pleural plaques, will suffice to create a cause of action in tort for damages. And there is a third issue relating only to Mr Grieves, namely, whether, if the answers to the first and second issues are in the negative, he has a tortious cause of action for the psychiatric injury produced by his worry about the possibility that he may contract an asbestos related disease.

65. In considering these issues a number of well established principles of law, not in dispute before your Lordships nor I believe at any stage in this litigation, need to be kept firmly in mind. First, a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the claimant's cause of action. In *Page v Smith* [1996] 1 AC 155, a case about a psychiatric illness caused by a motorcar accident and of which more must be said later, Lord Lloyd of Berwick said at p 190 that

> "'Personal' injuries includes any disease and any impairment of a person's physical or mental condition …"

It was not in dispute in *Page v Smith* that to sustain a damages claim for personal injury caused by a negligent breach of a tortious duty of care some such "disease or impairment …" was necessary. In *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 this House held that a physical

condition caused by a negligent act or omission had to reach a certain threshold "beyond the minimal" in order for it to constitute an injury for which damages in tort could be claimed. Lord Evershed at 773/4 said that :

> "It cannot … be in doubt … that the cause of action from such a wrong accrues when the damage – that is, real damage as distinct from purely minimal damage – is suffered."

And Lord Pearce at 779 said that

> "Evidence that those [physical] changes are not felt by [the claimant] and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex."

As I have said, these principles are not in dispute.

66. Second, it is accepted that a state of anxiety produced by some negligent act or omission but falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action. This has been the law for a long time. Lord Wensleydale in *Lynch v Knight* (1861) 9 HLC 577, 598 said that

> "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone …"

He went on, however, to comment that

> "… where a material damage occurs, and is connected with [the mental pain or anxiety], it is impossible a jury, in estimating it [i.e. the material damage], should altogether overlook the feelings of the party interested."

So, anxiety simpliciter cannot constitute the damage necessary to complete the tortious cause of action; but if there is some such damage the fact of the anxiety can enhance the amount of damages recoverable.

67. Third, it is accepted that a risk, produced by a negligent act or omission, of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a tortious cause of action (see *Gregg v Scott* [2005] 2 AC 176 and *Law Society v Sephton & Co* [2006] 2 AC 543). The victim of the negligence must await events. Here, too, however, it is common ground that if some physical injury *has* been caused by the negligence, so that a tortious cause of action *has* accrued to the victim, the victim can recover damages not simply for his injury in its present state but also for the risk that the injury may worsen in the future and for his present and ongoing anxiety that that may happen.

Are pleural plaques an "injury" for the purposes of the tort of negligence?

68. Holland J held that they were not: [2005] EWHC 88 (QB). He held, first, in para.71, that

> "… permanent penetration by asbestos fibres cannot, simpliciter, constitute injury or damage so as to found a cause of action. Penetration that is permanent (that is, such that has defeated the body's natural defences) raises a potential for damage, but no more."

and, secondly, in para 80a that pleural plaques per se could not found a cause of action. He said

> "I am not satisfied that for forensic purposes they can be categorised as a 'disease' nor as an 'impairment of physical condition'."

The judge's conclusion, concurred in by all the members of the Court of Appeal, that pleural plaques could not be characterised as a disease or as an impairment of physical condition was in part a finding of fact but also a conclusion of law. The question whether the formation of pleural

plaques suffices to complete a tortious cause of action in negligence depends on what the law recognises as damage, not on how medical experts may classify the condition in question. The facts, however, lead inevitably in my opinion to the conclusion reached by the judge. Pleural plaques are not visible or disfiguring. None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos related disease. The inhalation of the fibres and the formation of the plaques involved no pain or physical discomfort. Those being the facts the conclusion that the presence of pleural plaques could not *per se* suffice to complete a tortious cause of action in negligence is, in my opinion, unassailable. Indeed both before Holland J and in the Court of Appeal the appellants conceded that that was so. They based their case on the so-called "aggregation" theory, namely, that the presence of pleural plaques plus the attendant anxiety and the risk of contracting a life threatening asbestos related disease in the future together constituted sufficient damage to complete the tortious cause of action.

The aggregation theory

69. Holland J accepted the aggregation theory (para.80(c) of his judgment). His reasoning had, I think, two limbs to it. First, he regarded the pleural plaques, although not sufficient *per se* to complete the tortious cause of action, as constituting nonetheless "physiological damage". Secondly, he held that

> "… when … anxiety is engendered by tortiously inflicted physiological damage it can properly contribute to 'damage' or 'injury' so as to complete the foundation of a cause of action"

70. In the Court of Appeal the majority, in the judgment delivered by Lord Phillips, pointed out the problem with Holland J's reasoning, namely, that the pleural plaques, the physiological damage, had "no potential causal nexus with the asbestos-related diseases that the claimants [might] develop in the future" ([2006] ICR 1458, para 35) and that it was the penetration of the chest by asbestos fibres, not the pleural plaques, that would have a causal nexus with the onset of any such disease. In paragraph 36 Lord Phillips posed the following highly pertinent question

> "Can physical changes to the body negligently caused, which are of themselves insufficiently serious to give rise to a cause of action, found a claim in negligence if they carry a risk of causing significant injury and give rise to consequent anxiety? … If the physical change is so insignificant that it cannot, of itself, found a claim, the question arises of why, as a matter of logic or principle, it should open the door to recovery for risk of future injury or for anxiety"

He held that the door should not be opened (para 68).

71. Smith LJ's dissenting opinion was based on her view that the pleural plaques did constitute an injury – because in rare cases, although in none of the cases of these appellants, pleural plaques could give rise to symptoms (para.116) and because they were comparable to a lesion on the skin caused by a cut or a burn. She said that she could not accept that a visible tissue change was different in nature from a tissue change hidden within the body. I think, with respect, that the comparison the Lady Justice was drawing was not a helpful one. A scar or lesion on the skin may constitute a tortiously relevant injury because it is disfiguring. A lesion hidden within the body is plainly not of that character. A cut or a burn, provided it is not so trivial as to fall in the *de minimis* category, is a tortiously relevant injury regardless of the scar it may leave. A cut or a burn hurts when inflicted and often hurts in the process of healing; but there is no point at which the formation of a pleural plaque causes any discomfort. The individual who has been exposed to asbestos dust will not know that the formation of plaques is taking or has taken place unless he or she undergoes an X-ray or other medical scan.

72. The learned Lady Justice, having formed the view that the formation of the plaques sufficed to complete the claimants' respective causes of action, did not need to consider the aggregation theory. She did, however, in para.134, say 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 whether the cause of action is complete".

73. My Lords in my view the aggregation theory cannot be accepted. Once it is accepted that neither the presence of pleural plaques nor the risk of future asbestos-related disease nor anxiety about the onset in the future of a life-threatening disease can by itself constitute damage so as to complete the cause of action in tort, there seems to me that neither logic nor principle can support the proposition that the three combined could do so. None of the three is ruled out on a *de minimis* basis. Asymptomatic pleural plaques do not constitute damage; nor does risk of damage in the future; nor does anxiety about the future. Contrast a mere scratch on the skin which can, conceptually, qualify but may be too trivial to constitute physical damage sufficient to complete a cause of action in tort. A hundred such scratches would be likely to suffice. Ten might do so. It would be a question of degree. The mere simple scratch would fail to suffice not because it was not, conceptually speaking, a physical injury but because it was too trivial to attract the attention of the law of tort. The law of tort is not concerned with trivia; nor should it be. The aggregation theory put forward in these appeals fails, in my opinion, not because the three elements, plaques, risk and anxiety, are in aggregation too trivial, but because none can sustain a tort action. Nought plus nought plus nought equals nought. It is not like an accumulation of scratches.

Contract

74. In my opinion, for the reasons I have tried to explain, and for the reasons given by my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Rodger of Earlsferry, whose opinions I have had the advantage of reading in draft and with which I am in full agreement, a cause of action in tort cannot be based on the presence of asymptomatic pleural plaques, the attendant anxiety about the risk of future illness and the risk itself. It cannot be so based because the gist of the tort of negligence is damage and none of these things, individually or collectively, constitutes the requisite damage. But the conclusion that none of the appellants (leaving out of account for the moment Mr Grieves' damages claim based on his psychiatric illness) has a cause of action against his negligent employer strikes, for me at least, a somewhat discordant note. Each of the appellants was employed under a contract of service. Each of the employers must surely have owed its employees a contractual duty of care, as well as and commensurate with the tortious duty on which the appellants based their claims. It is accepted that the tortious duty was broken by the exposure of the appellants to asbestos dust. I would have thought that it would follow that the employers were in breach also of their contractual duty. Damage is the gist of a negligence action in tort but damage does not

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

Mr Grieves' damages claim based on his psychiatric illness

75. In my opinion, Mr Grieves' claim fails for the forseeability reasons explained by Lord Phillips in the Court of Appeal. As Lord Phillips pointed out (para 76), Holland J had made no finding that Mr Grieves' psychiatric injury was a reasonably foreseeable consequence of his employers' breach of duty and (para 94) no evidence had been adduced to enable such a finding to have been made.

76. Mr Burton relied heavily on *Page v Smith* [1996] 1 AC 155. That was a case in which a collision between two motorcars, brought about by negligent driving, had not caused physical injury to either driver but had caused one of them to suffer a recurrence of a psychiatric condition. The Court of Appeal had held that the defendant was not liable because it had not been reasonable foreseeable that the accident would cause psychiatric injury. The House of Lords, by a majority, allowed the appeal on the ground, per Lord Lloyd of Berwick at 187, that:

> "Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury"

77. Mr Kent QC invited your Lordships to depart from *Page v Smith* and to hold that the recovery of damages in negligence for psychiatric injury depended upon the forseeability of psychiatric injury as a consequence of the negligence but submitted, in the alternative, that *Page v Smith* was distinguishable from Mr Grieves' case. It was distinguishable, he submitted, because the psychiatric illness had directly resulted from the motorcar collision. There had been no intervening causative event. By contrast, in Mr Grieves' case, his psychiatric illness had not been directly caused by his exposure to asbestos dust but had resulted from his worry about his liability to future illness and his reaction to the X-rays and medical reports which had disclosed the presence of pleural plaques in his lungs. I am in agreement with Mr Kent that *Page v Smith* is distinguishable on that basis and that a test of forseeability of psychiatric illness as a result of exposure to asbestos dust must be passed if Mr Grieves' damages action is to succeed. For the reasons given by Lord Phillips that test cannot, in my opinion, be passed. I would, therefore, dismiss Mr Grieves' appeal on this issue.

LORD RODGER OF EARLSFERRY

My Lords,

78. The claimants in these appeals were all exposed to asbestos dust while working for the relevant defendants. The defendants all admit that they were at fault in exposing them to the dust. As a result of the exposure, asbestos fibres entered the claimants' lungs and some of them worked their way through to the pleura. There they gave rise to plaques which were detected by x-rays and CT scans. It is common ground that the plaques are not symptomatic: they do not cause the claimants pain nor do they disable them in any way. But they do indicate that the quantity of fibres in the claimants' lungs is significant. According to the evidence, the risk that they may develop asbestosis or mesothelioma is significantly higher in men with plaques than in men who have been exposed to asbestos dust in the workplace but who have not developed plaques. For that reason, during the hearing before the House, the

plaques were said to function as a marker or litmus test for this increased risk.

79. For about twenty years pleural plaques have been regarded as actionable. Courts have awarded damages for them. Employers and their insurers have settled many claims for damages for them. Even though this has not resulted in an unmanageable flood of claims, in the present cases the defendants and their insurers have taken a stand. They wish to close the gates by establishing that asymptomatic plaques are not actionable. They failed before Holland J, but succeeded in the Court of Appeal: [2006] ICR 1458. With leave of the Court of Appeal, the claimants now appeal to this House.

80. It is important to emphasise that the injuries for which the claimants, apart from Mr Grieves, seek damages are the pleural plaques, associated risks of developing diseases and associated anxiety. For instance, in Mr Downey's case the particulars of injuries state:

> "The claimant has contracted pleural plaques as recited in the medical report of Dr Lawrence dated 26 October 2001.
>
> The claimant is at risk of future development of asbestosis (1%), diffuse pleural thickening (1%) and mesothelioma (5%) and as a result suffers anxiety for his future health and welfare."

In his submissions before the House Mr Burton QC put the claim in two ways: as a claim for the pleural plaques simpliciter, and as a claim for the pleural plaques with the associated risks and anxiety.

81. Mr Grieves gives as his details of injury:

> "The claimant, who was born on the 23rd February 1940, is 63 years of age and has developed asbestos related pleural plaques. The claimant relies on the report of Dr Robin Rudd, Consultant Physician, dated 23 July 2003 which is served herewith.
>
> There is a chance that at some future time the claimant will develop: (i) diffuse pleural thickening, (ii) asbestosis, (iii) malignant mesothelioma (iv) lung cancer.
>
> The claimant is anxious about the risks of malignancy."

Even though Mr Grieves refers only to his anxiety about the risks of malignancy, in fact, he became clinically depressed and developed irritable bowel syndrome after being told that he had pleural plaques. So, in this respect, his case is different. I deal first with the other claimants.

82. As Lord Scott of Foscote points out, the appellants base their claims on the law of tort, not on the law of contract. The significance, if any, of the distinction in the present context was not addressed by counsel and does not call for consideration on this occasion.

83. So far as the law of tort is concerned, it is trite that "the ground of any action based on negligence is the concurrence of breach of duty and damage" and that "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible": *Watson v Fram Reinforced Concrete Co (Scotland) Ltd and Winget Ltd* 1960 SC (HL) 92, 109 per Lord Reid, and *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, 771-772 per Lord Reid, respectively. These statements need to be refined slightly for the purposes of the present appeals.

84. The asbestos fibres cannot be removed from the claimants' lungs. In theory, the law might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis or mesothelioma. But the courts have not taken that line.

85. In *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, 779, Lord Pearce, with whom the other members of the House agreed, saw the relevant question as being "whether a man has suffered material damage by any physical changes in his body." The physical changes that Lord Pearce had in mind were those associated with the actual onset of pneumoconiosis. Indeed the whole question in the case revolved around the plaintiffs having that disease before they could know of it, not around the noxious dust having accumulated in their lungs during their employment between 1939 and 1950.

86. The point was focused in *Brown v North British Steel Foundry Ltd* 1968 SC 51 when the pursuer tried an argument that had not been run in *Cartledge*. The Law Reform (Limitation of Actions etc) Act 1954 was passed on 4 June 1954 but was not to affect any action or

proceeding if the cause of action arose before that date. The Lord Ordinary found that the pursuer did not begin to suffer from pneumoconiosis until 1955. But the pursuer contended that the injury had been done to his lungs by 1949 because he had been inhaling dangerous dust for some years before that and, as subsequent events showed, he was susceptible to pneumoconiosis in 1949. So the cause of action had arisen at that date. The First Division of the Court of Session rejected that argument. Lord President Clyde held that there was no cause of action in 1949 and added, at pp 64-65:

> "To create a cause of action, *injuria* and *damnum* are essential ingredients. In the present case there is no evidence of any injuries to the workman's lungs in 1949. He had then merely a deposit of dust in his lungs, which might or might not subsequently create an injury. But, in addition, he had then sustained no *damnum.* He could not then have been awarded damages for any loss, because at that stage he had sustained no loss of wages and had suffered none of the discomforts and disabilities which, he avers, followed upon the onset of pneumoconiosis and which in fact flowed from the outbreak of that disease in 1955."

As Lord Guthrie pointed out, at p 68, the problem considered by this House in *Cartledge v E Jopling & Sons Ltd* could not have arisen if the pursuer's contention had been sound.

87. In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.

88. In these cases the claimants do not suggest that the presence of the asbestos fibres in their lungs constitutes an injury. Rather, they argue that the plaques constitute an injury – the plaques are "a physical change" in their bodies, as envisaged by Lord Pearce in *Cartledge* [1963] AC 758, 779. Taken by themselves, however, the plaques are benign and asymptomatic. So, even assuming that the plaques could constitute a relevant 'injury' to the claimants' bodies, they do not cause them any material damage and so do not give rise to a cause of action.

There is a small risk that, if the number of plaques increases, they may then cause the claimants some discomfort. But the mere existence of that risk does not give rise to a present claim for damages: *Gregg v Scott* [2005] 2 AC 176. "The mere possibility of *damnum* will not found a claim to reparation": *Brown v North British Steel Foundry Ltd* 1968 SC 51, 68 per Lord Guthrie. If the risk were to eventuate, then at that stage the claimant concerned would have a claim for damages for the effects of the condition that he developed.

89. Under reference to *Gregg v Scott*, counsel for the claimants accepted that, by itself, the present risk that they might eventually develop asbestosis or mesothelioma does not give rise to a claim for damages. He also accepted, on the authority of *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65, 69d-f, that even extreme anxiety amounting to fear of impending death is not itself actionable. By itself, therefore, the anxiety felt by the claimants about the risks of developing a serious disease in the future is not actionable. But he argued that, if you aggregated the three elements of the non-actionable pleural plaques, the non-actionable risk of developing diseases and the non-actionable anxiety, you produced an actionable claim. The logical difficulties of such an approach are self-evident and, in my view, insurmountable.

90. Of course, if the plaques were an actionable injury, the risk that they might eventually result in a harmful condition would be an element in any claim. So, too, would the related anxiety. But the starting point for the claimants' alternative argument is that the plaques are not an actionable injury. In other words, the law treats them as a condition that is not serious enough to require its intervention. Very understandably, the claimants may be anxious about the plaques, just as they may be anxious about all sorts of other problems and potential problems in their lives. Such anxiety is a normal human emotion. But, if the plaques themselves are not a condition for which the law will intervene to give damages, it would make no sense for it to give damages for anxiety associated with the plaques.

91. There is a further, even more important, objection to the argument. The claimants' anxiety is not actually about any risk to their health caused by the plaques themselves. Rather, they are worried that at some time in the future they may develop asbestosis or mesothelioma as a result of the accumulation of fibres in their lungs. The plaques alert the claimants to a heightened risk of that happening, but they would not be a cause of the illness if it did develop. So, on the alternative approach, the claimants are seeking to make the plaques actionable by

adding in a risk that they may develop a disease that would not be caused by the plaques but by the accumulation of fibres in their lungs. Putting the point another way, a claimant with plaques would have a claim for damages for the risk that he would develop asbestosis or mesothelioma, when a claimant without plaques, but with exactly the same risk of developing those diseases, would have no claim. The plaques would be nothing more than a "hook" on which to hang a claim for damages for something which they did not cause. My noble and learned friend, Lord Hoffmann, rejected that approach in *Gregg v Scott* [2005] 2 AC 176, 288-289, paras 86-90, and, for the reasons he gave, I would reject it in this case too.

92. I would accordingly dismiss the appeals by the claimants other than Mr Grieves. I now turn to his appeal.

93. Like the other claimants, Mr Grieves puts his case in two ways. The first, based simply on the presence of the plaques, must fail for the reasons that the other claimants' cases must fail. Similarly, the mere risk that his plaques may become symptomatic or that he may develop asbestosis or mesothelioma in future does not give rise to a claim for damages. He says, however, that he can claim damages for the depression and associated irritable bowel syndrome that he developed as a result of being told about the plaques on his pleura.

94. Again, two possible approaches were mooted in submissions before the House. The first was to treat his claim as one for psychological harm suffered by a claimant who was at risk of suffering physical injury in the form of asbestosis or mesothelioma. Mr Grieves would be a primary victim of the defendant's wrongdoing and would be entitled to recover damages for his psychiatric injury, even if it had not been foreseeable: *Page v Smith* [1996] AC 155. Alternatively, Mr Grieves would have a free-standing claim for the reasonably foreseeable psychological harm that he suffered as a result of learning about the pleural plaques.

95. My Lords, in *Page v Smith* the plaintiff suffered psychiatric harm as a result of being exposed to, but escaping, instant physical harm. In other words, he developed his illness as an immediate response to a past event. Here, by contrast, Mr Grieves developed his illness on learning of a risk that he might possibly develop asbestosis or mesothelioma at some uncertain date in the future. In *Creutzfeldt Jakob Disease Litigation Group B Plaintiffs v Medical Research Council* [2000]

Lloyd's Rep Med 161 the plaintiffs had taken part in a clinical trial organised by the defendants. It included an injection carrying the risk of infecting them with a potentially lethal dose of the CJD agent. It was reasonably foreseeable, and the defendants foresaw, that, over a long period, the patients would suffer psychiatric injury as a result of learning of the risk that they would develop CJD. Morland J held that the defendants owed the plaintiffs a duty of care. Nevertheless, he rejected their argument that they were in the same position as the victim in *Page v Smith*. Their illness was not caused by the immediate effects of a past traumatic event: it was triggered by their awareness of the risk that they would develop CJD and the nature of that condition. In my view that was a valid distinction, which applies in the case of Mr Grieves also. Allowing his claim would constitute an expansion of the rule in *Page v Smith*, contrary to the 'thus far and no further' guidance of Lord Steyn in *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455, 500A-E.

96. Mr Kent drew attention to a further, associated, point of distinction. In *Page v Smith* the mechanism (the crash) which caused the onset of the plaintiff's psychiatric harm was the same mechanism as had been liable to result in physical harm to him. Here, by contrast, the mechanisms are different. The risk that Mr Grieves would develop asbestosis or mesothelioma was caused by the defendant's wrongdoing. On the other hand, his depression is due to his doctor intervening to tell him about the plaques and to the events following on that, including, possibly, some misinformation provided to him by other people. The distinction confirms that an award of damages for Mr Grieves' illness would go further than the award for the plaintiff's illness in *Page v Smith*.

97. Mr Allan QC submitted, however, that this distinction could not stand in the light of the application of *Page v Smith* in *Simmons v British Steel plc* [2004] ICR 585 where the pursuer's mental illness was a consequence, not of the injuries which he suffered in the accident, but of his anger at the defenders' negligence in allowing the accident to happen. But in *Simmons*, as in *Page v Smith*, the illness was prompted by the pursuer's reaction to a very unpleasant event that had actually occurred, not by his contemplation of the risk that something unpleasant might occur in the future. Moreover, his claim was for a psychiatric illness brought on by an accident in which he had suffered a far from trivial physical injury. In my view *Simmons* is not authority for the application of *Page v Smith* in this case.

98. For these reasons I would reject the first basis on which Mr Grieves' claim for psychiatric injury is put.

99. Mr Allan argued that, leaving aside *Page v Smith*, the defendant owed Mr Grieves a duty of care not to cause him foreseeable psychiatric harm. I have no doubt that the defendants owed him a duty of care not to cause him psychiatric harm as a result of developing asbestosis or mesothelioma. In practice, a claim for such harm would simply be an element in his overall claim for damages for the illness. But what he asserts is the very different duty to take reasonable care not to cause him psychiatric harm as a result of learning of the risk that he would develop these illnesses. Again, in my view, it would be anomalous to recognise such a duty when the law considers that the risk itself is not actionable. That can only be because the law proceeds on the view that ordinarily people in such a position can be expected to handle that information, very unpleasant though it is, without suffering any morbid effects. Moreover, as already pointed out, the mechanism which caused Mr Grieves' illness was not the defendants' act in exposing him to the asbestos dust, but the doctors' telling him of the heightened risk that he would develop asbestosis or mesothelioma in the future.

100. Mr Allan sought to rely on the *Creutzfeldt Jakob Disease* case. There, however, Morland J held that it was foreseeable that the victims would hear about their plight, not only from doctors and counsellors, but from angry, ill-informed, relatives and from sensational media reports which would tend to highlight or sensationalise the risk of the potential terrible outcome. On this basis he held that the psychiatric injury was foreseeable and that the defendants had foreseen it. They were accordingly under a duty of care to avoid it. None of those special circumstances was present in Mr Grieves' case. Indeed, Dr Menon considered that his case was 'relatively unique' because he had long-standing anticipatory fears of developing the disease, which had been present since he had learned about the dangers of exposure some decades before. On the evidence there were no particular circumstances which would have alerted the defendants to the possibility that Mr Grieves would react any differently, in this way, from other men who were told of the risks and who could be expected to deal with them without suffering any psychiatric injury. In these circumstances I am satisfied that his illness was unforeseeable and that he has no claim for damages in respect of the depression and associated irritable bowel syndrome from which he suffers.

101. For these reasons, as well as those given by my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead and Lord Scott of Foscote, I would also dismiss Mr Grieves' appeal.

LORD MANCE

My Lords,

102. I have had the benefit of reading in draft the opinions of all of your Lordships. In agreement with all of your Lordships and for reasons given in those opinions, I agree that these appeals fall to be dismissed.

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

104. On the application of *Page v Smith* [1996] AC 155 in the appeal by Mr Grieves, assuming that case to have been correctly decided, I agree that it can and should be distinguished on its facts for reasons given by all of your Lordships. As interpreted by the majority of the House in *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455, it concerned psychiatric injury arising as an immediate consequence of an obvious accident, in which the claimant could foreseeably have been physically injured at the time. However, like my noble and learned friend, Lord Hope, I would leave open the correctness of *Page v Smith* for another day. I see some force in the criticisms that have been levied against it, and I am not confident that it does not cause uncertainty and argument (the latter indeed in this case). On the one hand psychiatric illness resulting over time from the exacerbation of a physical condition contributed to by anger about the occurrence of a *past* accident (in which the claimant did, it is true, suffer a physical injury) was held recoverable irrespective of foreseeability in *Simmons v British Steel plc* [2004] ICR 585, in reliance on *Page v Smith*. On the other hand, the present case establishes that psychiatric illness arising from the stress of

belated discovery of a *continuing* risk of future physical illness arising from past exposure to asbestos dust is not actionable, in the absence of specific foreseeability. Some artificiality may be a necessary result of the controls on which the law insists in this area. But this distinction, although one that I endorse if necessary, is not, I think, particularly happy. However, it is unnecessary to say more about it in this case.

105. In agreement with both Lord Hope and Lord Scott, I also note that the scope of an employers' contractual liability might require examination in another case, but it has not and cannot be examined in this case.