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Pleural Plaques

Scotland V England
The 2010 position

Presentation by
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Johnston: House of Lords: Oct 2007

- PP do not cause any symptoms (generally)
- Only detected by x-ray or CT scan
- Not precursors of malignant change
- “Marker” of previous exposure to asbestos
- Associated with a small increased risk of a more serious asbestos-related condition
- At most, PP Claimant suffers “Anxiety”

Johnston: House of Lords: Oct 2007

House of Lords held:-

- Negligence requires proof of damage
- “Damage” is not to be equated with mere bodily change
- Asymptomatic condition not leading to any other condition is de minimis
- Psychiatric injury not foreseeable

Scottish Legislation

- Damages (Asbestos-related Conditions) (Scotland) Act 2009
- The 2009 Act states that Plaques represent a “Personal Injury which is not negligible”
- Other asymptomatic conditions are included within the 2009 Act
- The 2009 Act has retrospective effect back to October 2007 (i.e. the date of the House of Lords decision in Johnston)
- Financial Consequences

Scottish Legislation

Judicial Review by insurers

- Insurers application to Stay commencement of the Act refused
- Pursuers application to lift stays on claims refused until such time as the Judicial Review determined.
- Case heard by Lord Emslie in the Outer House Court of Session
- Judgment given on 8 January 2010 in favour of the Scottish Government

Scottish Legislation

The Court held that:

- There is nothing intrinsically unreasonable or outrageous about legislation which seeks to alter or reverse the effects of a judicial ruling at any level
- PP did not deserve to be treated as a trivial consequence of asbestos exposure
- To make and shape law is a primary function of any legislature, especially where existing rules and principles are perceived as unsatisfactory or unfair

Scottish Legislation

- This Judicial Review has constitutional and political issues to overcome, in addition to the merits of the arguments based on the Convention and Common Law
- This is an extremely difficult hurdle to overcome, particularly given that the Judiciary will always be very slow to interfere with any government's legislative decision making
- The last attempt to overturn an Act of Parliament was in the case of Jackson v HM Attorney General (2005) – which was unsuccessful

Scottish Legislation

Lord Hope in the House of Lords case of *Jackson v HM Attorney General*:

“There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling “law” and for applying it accordingly. It must never be forgotten that this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard . The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve.”

Scottish Legislation

The Present position:

- An appeal to the Inner House Court of Session has been lodged: hearing likely to be late 2010/early 2011
- Possible appeal to the Supreme Court
- In the meantime, all Scottish PP claims remain stayed

England & Wales

Legislation for England and Wales?

- MOJ Consultation Paper 9 July 2008
- Cost of Scottish type legislation up to £28.6bn
- Difficulties with overturning the common law
- Alternative no-fault payment scheme could cost up to £4.8bn and would be difficult to administer
- Government announcement was promised by Summer 2009

England & Wales

Government announcement 25 February 2010

- On the basis of current medical evidence, the Johnston decision will not be overturned [So, no Scottish type legislation for England]
- No open-ended no-fault compensation scheme to be set up
- Government to provide “no fault” one-off compensation payments of £5,000 to all PP claimants who registered their claim before the Johnston decision in October 2007. These are “Payments for Disappointment”

England & Wales

- Consideration of an Employers' Liability Insurance Bureau (ELIB) as a "fund of last resort" for claimants who cannot trace their employer's insurers
- Creation of an Employers' Liability Tracing Office (ELTO) to enable claimants to trace their employer's insurer
- A compulsory ELIB and ELTO now to support people who develop a serious asbestos-related disease
- Insurers to provide a £3m donation to the British Lung Foundation for research towards research into asbestos-related disease

Questions



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