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Asymptomatic Silicosis Update Feeney v Tarmac Sandstone Limited and one other

15th June 2017, Gateshead County Court

Darrell Smith acted for Tarmac Sandstone Limited ('Tarmac'), on the instructions of their insurers AGF (now owned by Catalina), in a claim for asymptomatic silicosis. The judgment of DJ Searle reminds parties that in order to recover damages a claimant must have sustained a material injury, which is not just something trivial or *'de minimis'*.

The background

The claimant was employed by Tarmac from 1979 to 1983/84 as a stonemason. It was the claimant's case that he was exposed to silica dust during his employment, which caused his silicosis.

The claimant relied on the medical evidence of Dr Stenton. In his report, Dr Stenton was of the view that the lung fibrosis (silicosis) had developed as a consequence of the claimant's exposure to silica dust but the condition was not presently causing any respiratory disability. Dr Stenton reported:

- It was possible that the silicosis was responsible for an intermittent cough.
- There was a 10% chance the condition would worsen causing breathlessness and a respiratory disability of 10% or more;
- There was an increased risk of lung cancer of 1%; and
- A risk of tuberculosis in the region of 1 in 10,000.

It was also the claimant's case his pre-existing psychiatric problems had worsened as a result of the diagnosis of silicosis and he suffered from anxiety.

The claimant relied on the psychiatric evidence of Dr Scott who reported the diagnosis of silicosis had caused stress on the claimant, although his mental health had deteriorated in 2013 as a result of a number of other factors which included a relationship breakdown, the death of an uncle and other health concerns.

Dr Scott stated the silicosis diagnosis on its own would not increase the risk of the claimant's mental health deteriorating but if his health were to deteriorate further, this deterioration would likely increase his present symptoms by 10-20%, but this was speculation.

In relation to the evidence of Dr Scott, the defendant argued the claimant had suffered from a mild depressive illness for many years and there was no evidence (but for the diagnosis of silicosis) that the claimant would not have suffered the deterioration of symptoms in 2013, in any event.

Application for Summary Judgment

Keoghs issued an application for summary judgment and argued that in order for the claimant to have a complete cause of action, he must prove he had sustained an injury which had caused damage and the evidence of Dr Stenton did not satisfy that test.

This principle is in line with the judgment of Lord Hoffman in the pleural plaques test litigation *Grieves v F T Everard & Sons and Others [2007] UKHL 39*. This has been applied in asymptomatic cases of asbestosis and pleural thickening.

There was no evidence of any respiratory symptoms and only a possibility (rather than a probability) that this contributed to an intermittent cough.

Symptomless bodily changes with no foreseeable consequences which may cause some anxiety are not, individually or collectively, sufficient to give rise to a cause of action.

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The judgment

The defendants' application succeeded and DJ Searle held the claimant's condition was not compensatable in damages.

On the claimant's own case there was no evidence of actual respiratory disability. The condition complained of was asymptomatic with no evidence of reduced lung capacity. The possibility of damage is insufficient to create a cause of action.

Furthermore, in relation to the issue of mental health – the claimant had a history of pre-existing problems and they remain – any anxiety was *de minimis*.

Keoghs' view

The Health & Safety Executive identified 11 deaths as a result of silicosis in 2012 and 45 new cases of silicosis assessed for Industrial Disease Benefit in 2013.

The HSE considers this figure is underestimated and the number of deaths as a result of exposure to silica dust is more in the region of 800 a year.

Insurers and companies should remain alert to this disease - which is often seen as rare.

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