

Support for sufferers of asbestos-related lung cancer: Joint briefing from the Association of Personal Injury Lawyers and the Asbestos Victims Support Groups Forum – March 2023

Executive Summary

- People who prove they have lung cancer caused by exposure to asbestos at work often go under-compensated because some of their former employers have disappeared and insurance records have been lost or cannot be traced.
- The number of people affected is small, but the impact on their lives and the lives of their families can be devastating.
- The precedent for change already exists in section three of the Compensation Act 2006, which allows people suffering from the terminal cancer mesothelioma to recover full compensation in these circumstances.
- Asbestos-related lung cancer and mesothelioma are strikingly similar, and often difficult to distinguish, even with expert medical evidence.
- To reflect section three of the Compensation Act 2006, the law should allow people suffering from asbestos-related lung cancer in these circumstances to recover full compensation from any one employer responsible. That employer can then seek a contribution to the damages awarded from other responsible employers.

Introduction: a justice gap

People who are exposed to asbestos negligently by their employers are entitled to compensation if they later contract asbestos-related lung cancer. If they were exposed to asbestos at several different places of work, compensation is apportioned between the different employers, and victims must claim compensation from each individual employer responsible, or their insurers, if they are to receive full compensation.

It is usually decades after exposure to asbestos that people become ill, and tracing an employer after all those years can be impossible and extremely stressful at what is already a difficult time. Defendant employers typically include factories, shipyards, and power stations which have often closed because of the decline in certain industries over the years. If former employers who are responsible for causing illness through their own negligence cannot be traced, injured people are denied full compensation because each employer only has to compensate for the relative part his negligence played in causing the disease.

These injured people can effectively be penalised financially, sometimes very heavily, just because they are unable to trace all those who caused their lung cancer, which is usually a terminal disease. This is not only grossly unfair, but it also affects the level of care and support they receive to help them cope with their illness.

Those living with asbestos-related lung cancer struggle to breathe, are in pain, suffer with a persistent cough, and experience weight loss. The importance of full compensation, and the need for it to be provided quickly, cannot be overstated. The Government recognised this in 2006 when it changed the law to allow sufferers of mesothelioma (a similar fatal asbestos-related cancer) to receive full and fair compensation, even when not all negligent employers could be traced.

The two types of cancer are strikingly similar and often difficult to distinguish even with expert pathology evidence, yet the difference in how victims are treated in the law, is conspicuous.

The time for sufferers of asbestos-related lung cancer to have the same recognition as mesothelioma, and for this 'financial penalty' on terminally ill people to be removed, is long overdue. Furthermore, a straightforward and affordable solution already exists.

Scale of the problem

Inevitably, those most affected by this situation are people in later life, as asbestos-related lung cancer can take decades to develop in the body after exposure. These are often people who have worked hard all their lives and who are looking forward to their retirement, which is effectively then cut short, simply because they turned up for work and were exposed wrongfully to asbestos many years earlier.

Lawyers have provided examples of people who have lost tens of thousands of pounds in compensation because they have been unable to trace all negligent former employers.

In one case in England and Wales, compensation was calculated at £112,000 but more than £76,000 was lost in this way. In another case, £52,170 went unpaid from what should have been compensation of £76,722 – a reduction of almost 70 per cent. In a case in Scotland, £135,819 went unpaid from a claim.

Evidence has been provided of reductions in 33 cases which have concluded in the past seven years. For each of these individuals and their families, the loss of compensation would have been felt keenly and would have made a significant difference to their lives. Yet the combined reductions in all 33 cases amounted to less than £900,000.

The responsibility for meeting this relatively modest shortfall would lie with the insurance industry, which collects premiums from employers precisely for the purpose of paying compensation when the negligence of the employers they insure causes injury and illness. Under current arrangements for lung cancer claims, insurers of untraced employers enjoy something of a windfall, since they have recouped premiums over the years without ultimately having to compensate injured employees.

Full and fair compensation is what people should be able to expect in 21st century Britain, and the balance of justice in these circumstances should always favour the innocent victim who has the disease, rather than the insurers of the employers who exposed them to asbestos.

When people are struggling physically or psychologically with the consequences of a terrifying, terminal disease, compensation helps to ensure that, at least, they do not have to worry about their finances and the financial impact of their illness on their families.

It helps pay for private care at home, so that people do not have to rely for their care on an already over-stretched social care system, or on family members, who may be elderly or infirm themselves. It can also pay for medical treatment, which may be unavailable on the NHS, or which may not be available immediately, particularly given the unprecedented challenges currently faced by the NHS.

Legislative model for a straightforward, affordable solution

The Government recognised the need to improve support for mesothelioma sufferers in this situation in the past. In 2006, Parliament passed the Compensation Act, which allows sufferers of work-related mesothelioma to receive full compensation, even if not all former employers can be traced. The negligent employers who can be traced pay the compensation, and it is for them to attempt to trace other employers responsible and recoup a contribution from them.

The provisions in section three of the Compensation Act had unanimous support from MPs. They recognised the need to help people with mesothelioma, and for that help and support to be provided quickly because of the short life expectancy after diagnosis¹. This aspect of the Act was a very welcome development, but the same support is needed, and needed quickly, for sufferers of asbestos-related lung cancer, sixty per cent of whom die within a year of diagnosis². This is actually a higher rate than those diagnosed with mesothelioma, where fifty-five per cent die within a year³.

There is absolutely no justification for treating sufferers of asbestos-related lung cancer any differently from sufferers of mesothelioma. The two diseases are strikingly similar, to the point that it is not unusual for medical experts initially to diagnose asbestos-related lung cancer, only for them to confirm later that a case is actually mesothelioma, and vice versa. The symptoms can be the same and they are both as deadly for those people who contract them. Around 2,500 deaths a year are caused by each disease⁴.

¹ <https://publications.parliament.uk/pa/cm200506/cmhansrd/vo060717/debtext/60717-0006.htm#06071715000679>

² <https://www.cancerresearchuk.org/health-professional/cancer-statistics/statistics-by-cancer-type/lung-cancer#heading-Two>

³ <https://www.cancerresearchuk.org/health-professional/cancer-statistics/statistics-by-cancer-type/mesothelioma#heading-Two>

⁴ <https://www.hse.gov.uk/statistics/causdis/asbestos-related-disease.pdf>

Of course, only a fraction of these result in a compensation claim for lung cancer. Although no statistics about the number of lung cancer claims are kept as part of the Royal Courts of Justice's specialist 'Asbestos List', it is believed that probably less than ten per cent, and perhaps less than five per cent, of cases issued there are for lung cancer. This also reflects the experience of specialist APIL practitioners that lung cancer claims represent considerably less than ten per cent of their asbestos-related cases, equating to fewer than 100 cases a year, and not all of those will be subject to deductions.

The judiciary has commented that mesothelioma and lung cancer cannot be distinguished legally⁵. When the Compensation Act was passed, however, Parliament only changed the law on mesothelioma claims in a direct response to a House of Lords judgment on mesothelioma claims. Lung cancer claims were not considered at the time and the law now needs to address that inconsistency.

Case study: James Heneghan

James Leo Heneghan was born in March 1938 and died from lung cancer, aged 74, in January 2013, having been heavily exposed to asbestos dust during his working life. His son, Professor Carl Heneghan, brought a claim after his death for compensation for the lung cancer against six of the former employers.

There were other employers who exposed him to asbestos but, crucially, they could not be traced and their insurers were also untraceable. All six of the employers who could be traced admitted liability. Professor Heneghan received only £61,100 out of the full value of the claim of £175,000.

"Imagine there are two claimants, both of whom have asbestos-related lung cancer and both of whom have been subjected to the same level of exposure to asbestos," explained Patrick Walsh, Professor Heneghan's solicitor.

"One only worked for six employers who were responsible for all his exposure to asbestos. The other (ie Mr Heneghan) worked for more than those six employers, all of which exposed him to asbestos but only six of which can be traced.

⁵ Heneghan v Manchester Dry Docks Ltd & Ors England and Wales High Court (Queens Bench Division) December 11, 2014, par 81

“Both cases would be successful but the first would receive full compensation while the second (ie Mr Heneghan’s family) would receive a fraction of the full compensation. That cannot be right.

“Mr Heneghan was exposed by all his former employers to asbestos at more than five times the minimum threshold dose needed to cause asbestos-related cancer. Each and every one of them failed to take the precautions they should have taken to protect him from exposure to asbestos dust – not just the six who could be traced.

“By contrast, all that Mr Heneghan did was go to work, do his job and rely on his employers to obey the law and keep him safe at work. They failed to do this.

“The victim suffers the full effect of the disease, as does his family. The cost of nursing care isn’t reduced just because the victim only gets part of his compensation; the cost of living for the victim’s widow isn’t reduced just because only part of his income is repaid by the insurers of the employers who exposed him wrongfully to asbestos.

“The system of ‘apportionment’ creates a random injustice for victims of asbestos-related lung cancer.”

Time for change

The same year that Mr Heneghan died, during a separate debate about mesothelioma, work and pensions minister Lord Freud told the House of Lords that “the issue of individuals who have developed other asbestos-related diseases through negligence or breach of statutory duty who are unable to bring a civil claim for damages of course needs to be addressed”.⁶

It is now ten years later and change is long overdue.

The Government needs to introduce legislation based on section three of the Compensation Act to provide parity in the law for sufferers of asbestos-related lung cancer.

⁶ Mesothelioma Bill, second reading, House of Lords, 20 May 2013, column 690
[https://hansard.parliament.uk/lords/2013-05-20/debates/13052038000233/MesotheliomaBill\(HL\)](https://hansard.parliament.uk/lords/2013-05-20/debates/13052038000233/MesotheliomaBill(HL))

As is the case in mesothelioma claims, insurers of the former employers which can be traced would pay full compensation on behalf of the untraced employers, and then attempt to recoup a contribution from those other employers or their insurers after the compensation has been paid. This places the burden of providing compensation squarely on the representatives of wrongdoers and not the people whose lives have been shattered by the negligence of employers.

The thresholds which claims have to meet are very high and the onus would still be on the victim to prove there was negligence and that asbestos caused the cancer.

About APIL

The Association of Personal Injury Lawyers is a not-for-profit organisation, formed by claimant lawyers, with a 30-year history of campaigning for changes in the law to help injured people gain the access to justice they need. Our vision is of a society without needless injury but, when people are injured, they receive the justice they need to rebuild their lives. Members include solicitors, barristers, legal executives and academics, all of whom are signed up to APIL's code of conduct.

About the Asbestos Victims Support Group Forum (AVSGF)

The Asbestos Victims Support Groups' Forum is a collective of victims' support groups around the country. We meet as the Forum to share information and best practice and to campaign nationally for justice for all asbestos victims.

Together we act as a voice for patients of mesothelioma and their families.

The Forum is open to all groups who provide free and independent support to people with asbestos-related diseases.

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