

**Ministry of Justice**

**Consultation Paper CP 14/08**

**Pleural Plaques**



**A response by the Association of Personal Injury Lawyers**

**September 2008**

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 4,500 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Martin Bare	Immediate Past President	APIL
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APIL would also like to also thank the members of the APIL Occupational Health Special Interest Group for their valued input.

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## **Executive Summary**

APIL welcomes any proposals to raise awareness of the nature of pleural plaques but questions to what extent the steps proposed in the consultation paper will allay concerns. A diagnosis of pleural plaques signifies significant exposure to asbestos, the diagnosis follows victims for the rest of their lives, and no amount of reassurance is likely to allay their concerns of dying from an asbestos-related disease, particularly where they have worked with many other individuals who they have seen developing, and probably dying from, asbestos related diseases, such as mesothelioma.

APIL believes that the consequences of the House of Lords decision on pleural plaques should be overturned by legislation. We submit that asbestos victims are a special category in highly exceptional circumstances and that it is right and proper that they should be able to obtain full and just compensation. The Scottish Parliament has proposed legislation to overturn the decision, insofar as it relates to the people of Scotland, and the Westminster Parliament should do the same for the people of England and Wales, otherwise this will be inherently unfair.

APIL is concerned about the idea of a 'no-fault' scheme in relation to pleural plaques as this is an inappropriate method of compensating pleural plaques sufferers. Nevertheless, for any scheme to work it must be extremely simple, with minimal administration, particularly to avoid the risk of exploitation from claims management companies and the use of 'scan vans'.

APIL believes that if a scheme is to be introduced it must be on the basis of a provisional award with no detriment whatsoever to the applicant at a later stage should he develop an actionable condition. The scheme must guarantee to provide

claimants with compensation equivalent to the level of damages that were being awarded to claimants before the decision in *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*<sup>1</sup>, whilst retaining the right to pursue a common law claim in the event of the development of an actionable asbestos condition, without limitation being affected.

APIL believes in the principle that the polluter must pay and it is fundamentally wrong for the state to be responsible where there is an identifiable wrongdoer. Insurance premiums have already been collected and it is entirely right and proper that the negligent party should make recompense for its negligence.

APIL believes that if a scheme is to be introduced there is no justification for the application of a limitation period within a scheme designed to be 'no fault'. This adds a legalistic aspect where none is required. A limitation period risks substantial prejudice to claimants. If, however, a limitation period is to be introduced, this should not be less advantageous than the common law with a similar discretion to disapply any limitation period.

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<sup>1</sup> [2005] EWHC 88 (QB)

## Introduction

APIL welcomes the opportunity to respond to this consultation paper on pleural plaques.

APIL's response concentrates on the first four questions in the consultation paper. We have not responded to questions 5, 6 or 7, as we are not able to provide any specific figures relating to estimates of numbers posed in those questions.

## Consultation Questions

### **Question 1: Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns?**

APIL welcomes any proposals to raise awareness of the nature of pleural plaques to those diagnosed with the condition and to the wider general public. APIL has concerns that the steps proposed in the consultation paper, such as a guidance note for doctors and/or leaflets being available in various outlets<sup>1</sup> are unlikely to allay any concerns.

A diagnosis of pleural plaques is only possible after an x-ray or a CT scan. This will only arise where the patient has been referred to hospital for investigation of other symptoms and the diagnosis is therefore incidental. On diagnosis a patient will undoubtedly want to know the cause. It is likely a doctor will confirm that the condition is due to exposure to asbestos and that there is evidence of asbestos fibres in the lungs. Whatever reassurance a doctor gives to a patient, the patient will be concerned that the exposure to asbestos could lead to other asbestos related conditions.

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<sup>1</sup> Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 24 page 16

Asbestos exposure traditionally occurred in 'pockets' around the country and so a single isolated exposure is rare. Thus, a patient receiving a diagnosis of pleural plaques is likely to have worked with many other individuals, who he has seen developing, and possibly dying from, asbestos related diseases, such as mesothelioma. No amount of reassurance is likely to allay such a patient's fears when he is told that he has asbestos in his lungs.

A diagnosis of pleural plaques follows a patient for the rest of his life and his concern is a genuine one. He has inhaled a sufficient amount of asbestos to cause a physical change in his body and he will have genuine feelings of fear and anxiety. This is echoed by Dr. Robin Rudd, a leading expert on asbestos related diseases, who provided opinion about the increased significant risk of the development of mesothelioma following a diagnosis of pleural plaques. In the pleural plaques debate held in parliament on the 4<sup>th</sup> June 2008, Michael Clapham MP quoted from a letter he had received from Dr Rudd (the letter being received by Mr Clapham in his role as chair of the all-party group on occupational safety and health and its asbestos sub-group):

"People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population."<sup>1</sup>

"People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. Despite reassurance offered by doctors that the condition is harmless often they know of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. For many the anxiety is ever present. Every ache or pain or feeling of shortness of

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<sup>1</sup> Hansard 4 June 2008: Column 251WH

breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life.”<sup>1</sup>

Therefore, whilst APIL supports the proposals to improve understanding of the nature of pleural plaques we question to what extent this will be effective, particularly in light of the fact that doctors, to date, do not appear to have allayed many concerns. Allaying concerns is no substitute for action on a different level.

**Question 2: What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques?**

APIL believes that the House of Lords decision on pleural plaques should be overturned through legislation in the same way that the effects of the House of Lords decision in *Barker v Corus*<sup>2</sup> was overturned by the Compensation Act 2006.

APIL does not believe that this would in any way interfere with the fundamental principles on which the Law Lords’ decision was based, as suggested in the consultation paper.<sup>3</sup> Indeed, it was the Court of Appeal, and, subsequently, the House of Lords that disturbed the status quo whereby, historically, claimants diagnosed with pleural plaques had been able to recover compensation.

There is some suggestion that constitutionally the Government would be wrong to overturn a unanimous House of Lords decision. Additionally, it has been argued that if the Government were to introduce legislation to overturn the House of Lords decision then the question of the retrospective nature of any provisions arises. The consultation paper suggests that issues may arise in relation to the European Convention on Human Rights on the basis that they interfere with settled arrangements.<sup>4</sup>

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<sup>1</sup> Hansard 4 June 2008: Column 252WH

<sup>2</sup> [2006] UKHL 20

<sup>3</sup> Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 38 page 19

<sup>4</sup> Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 36 page 18

APIL believes there are no constitutional issues of concern here. The purpose of the House of Lords, when sitting as an appellate court, is to determine what the law is. That is its role. The role of Parliament as a supreme legislative body is to decide what the law should be and the Government is perfectly entitled to do that by enacting legislation even if it conflicts with case law.

APIL believes that it is entirely justifiable and proportionate that the House of Lords judgment should be overturned. If the judgement is to be overturned by legislation it is essential that the provision is retrospective to ensure that there is no injustice between claimants who have become statute barred between the Court of Appeal decision and those who will have a right to bring a claim once legislation is enacted.

In the House of Lords there was no dispute that the claimants had been owed a duty of care and that their employers had been in breach of that duty; but the employers resisted the claims on the ground that none of the claimants had suffered actionable damage.<sup>1</sup>

Lord Hope of Craighead held that pleural plaques are a form of injury but they are not harmful.<sup>2</sup> The rest of their lordships held that pleural plaques are not an injury or disease in any event.<sup>3</sup>

APIL maintains that pleural plaques are a physiological change to the body signifying the permanent introduction of asbestos. There is a breach of bodily integrity amounting to a physical change in the body. In *Parkinson v St James and Seacroft University Hospital NHS Trust*<sup>4</sup> Hale LJ (as she then was) said:

"The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindsell on Torts*, 18th ed (2000), para 1-25. "The fundamental principle, plain and incontestable, is that every person's body is

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<sup>1</sup> [2007] UKHL 39, per Lord Scott of Foscote, paragraph 64

<sup>2</sup> *Ibid*, paragraph 49

<sup>3</sup> *Ibid*, per Lord Hoffman, paragraph 19; per Lord Scott of Foscote, paragraph 73; per Lord Rodger of Earlsferry, paragraph 88; per Lord Mance, paragraph 102

<sup>4</sup> [2002] QB 266 at 284

inviolable": see *Collins v Wilcock*[1984] 1 WLR 1172, 1177. Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them."

In *Chester v Afshar*,<sup>1</sup> the House of Lords had to address the difficult issue of causation following a failure to warn of a small but unavoidable risk of potentially serious adverse consequences of an operation. Two of their lordships made reference to the purpose of the law that applies equally to the issue of pleural plaques.

Lord Steyn said: '..... I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society'.<sup>2</sup>

Lord Hope of Craighead said: '..... The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content.....on policy grounds therefore I would hold that the test of causation is satisfied in this case'.<sup>3</sup>

APIL submits that asbestos victims are a special category in highly exceptional circumstances and that it is right and proper that they should be able to obtain full and just compensation.

The Scottish Government has taken the decision to change the law in Scotland by introduction of the Damages (Asbestos-related Conditions) (Scotland) Bill. It is

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<sup>1</sup> [2004] UKHL 41

<sup>2</sup> *Ibid*, paragraph 25

<sup>3</sup> *Ibid*, paragraph 87

inherently unfair for England and Wales not to follow suit and such an anomaly may well lead to 'forum shopping' if there are any cross-border issues. In Annex A to the Policy Memorandum accompanying the Scottish Bill, the Scottish Government said: '..... The Scottish Government's interest and duty is in doing what is best for the people of Scotland'. APIL contends that the Westminster Parliament should do exactly the same for the people of England and Wales.

APIL believes that if the House of Lords decision is not overturned and victims do not obtain some form of 'closure' through the courts then there is likely to be an ongoing significant cost to the Government. A pleural plaques sufferer will need to have regular check-ups, possibly annually, to ensure that his condition has not developed into a more serious asbestos-related condition.

**Question 3: Do you consider that no fault financial support for pleural plaques would be appropriate? If so, what would the rationale for this be? If not, please give your reasons.**

APIL is concerned about the idea of a 'no-fault' scheme in relation to pleural plaques as this is an inappropriate method of compensating pleural plaques sufferers. The House of Lords (and, indeed, the lower courts) accepted that all the claimants had been owed a duty of care and all of the defendants had breached that duty of care.

One problem with any type of no-fault scheme is how this will affect those pleural plaques sufferers who do go on to develop an asbestos-related disease, such as mesothelioma. Prior to the Court of Appeal's decision a successful claimant had the option of either seeking a provisional damages award or an award in full and final settlement. In either case, the question of liability would be fully investigated at this early stage thus avoiding the enormous potential difficulties of tracing employers and their insurers many years later, not to mention the difficulties of compiling evidence.

The difficulty in tracing insurers will be particularly profound if regulation 4(4) of the Employers' Liability (Compulsory Insurance) Regulations 1998 (ELCI) is repealed. A statutory central database of employers' liability insurance policies should be set up supported by an Employers' Liability Insurance Bureau (ELIB), providing a fund of last resort for workers suffering injury and occupational disease, and operating in a similar way to the Motor Insurers' Bureau (MIB). Employers should not be deprived of the benefit of insurance they have taken out, and paid the premium for, simply by the passage of time and people injured at work should not be treated any differently from those involved in traffic accidents.

Claimants choosing a provisional damages award have the considerable advantage of being able to reopen their claim very quickly, if necessary, and thus being able to secure a final award for their asbestos-related condition before they die. Alternatively, claimants choosing an award in full and final settlement accept the risk of developing future problems thus allowing them some 'closure' on the issue.

If any scheme is to work APIL considers that it has to be extremely simple, with the minimum of administration, and should not result in a fixed sum payment any less than that which would have been awarded prior to the High Court hearing. Any scheme that does not accord with this may mean complicated forms to fill in and difficult concepts to deal with. Victims, at a very vulnerable time, may need to seek help.

APIL is extremely concerned that victims, because they will no longer need to seek legal advice, will seek help elsewhere, where there is a risk that they could be exploited, possibly by claims management companies.

The consultation paper mentions concerns about the possible future use of 'scan vans'.<sup>1</sup> APIL strongly supports the enforcement of the regulations relating to the use of x-rays and CT scans, and totally abhors the idea of scan vans. APIL recommends that,

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<sup>1</sup> Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 65 page 23

should any type of scheme be implemented consideration should be given to strengthening the regulations to prevent, for instance, claims management companies taking advantage of the situation and introducing their own 'scan vans'.

**Question 4: If a no fault payment scheme were to be introduced:**

**a) which of the above two schemes should be introduced, and why?**

APIL believes that there are difficulties with both schemes suggested in the paper. If a scheme is to be introduced it must be an appropriate sum on a provisional basis and there must be no detriment to the applicant at a later date if they develop an actionable condition.

The essential difference between the two schemes detailed in the paper is the length of the period during which an individual could make an application to the scheme. APIL firmly believes that there should be no time constraints on making an application under a scheme of this type. Any scheme should relate to all pleural plaques cases, regardless of when the diagnosis is obtained.

A diagnosis of pleural plaques signifies significant exposure to asbestos many years previously. As pleural plaques are asymptomatic, the diagnosis is usually incidental to other medical investigations. Individuals exposed to asbestos over a similar period of time may therefore receive their diagnoses at widely different times – why should one individual be prevented from making a claim because of a time constraint under a scheme whereas the other cannot? APIL believes that this would be fundamentally wrong, particularly for a 'no fault' scheme.

**b) what level of payment would be appropriate?**

Previous court awards for pleural plaques have always been based on individual circumstances. Traditionally, awards have been for provisional damages although a claimant did have the option of seeking a full and final settlement award. The

consultation paper<sup>1</sup> reviews the High Court and Court of Appeal figures and uses a figure of £5,000 for the basis of the impact assessments.

The consultation paper suggests that a lower figure may be necessary '..... to make a no fault scheme affordable.....'<sup>2</sup> This brings us back to the rationale behind a scheme which we believe should be to fully compensate victims of pleural plaques. APIL strongly believes that there can be no moral justification for a lower compensation figure than that which provides full and just compensation, particularly where insurers have benefited over many years from the premiums payable for employers' liability insurance which will have included provision for pleural plaques victims.

### **c) how should the scheme be funded?**

Pleural plaques are largely present as a result of negligent exposure to asbestos and therefore it is our opinion that the polluter must pay. APIL believes that it is fundamentally wrong for the state to be responsible in these circumstances as it is not the wrongdoer and this imposes a substantial burden upon the taxpayer in circumstances where there is an identifiable wrongdoer. The reasonable expectations of the public in contemporary society demand that the wrongdoer pays, not the state.

### **d) what limitation period should apply for each option?**

APIL believes there is no justification for the application of a limitation period in respect of any no fault scheme – it adds a legalistic aspect where none is required.

The rationale for any limitation period is to avoid prejudice to a defendant. In a simple, no fault scheme, there is no question of evidence going 'stale' and thus no prejudice to the payer. However, there may be substantial prejudice to a claimant. The diagnosis of pleural plaques is generally incidental to other medical investigations and

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<sup>1</sup> Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 58 page 22

<sup>2</sup> Ibid

diagnoses and is thus a very vulnerable time for a victim. The last thing on their mind at that time may well be the need to complete a claim form.

The consultation paper suggests a limitation period of 12 months from the date the scheme comes into force (for outstanding cases) and 12 months from diagnosis (for future cases). For the reasons set out above, APIL does not believe a limitation period is necessary or desirable in a no fault scheme but, in any event, 12 months is too short as it is potentially prejudicial to a claimant.

If a limitation period is to apply this should not be less advantageous than the common law, together with a similar discretion to disapply any limitation period.