



## BRIEFING PAPER

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# Legal claims for pleural plaques

By Terry McGuinness

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## Summary

Pleural plaques are thickenings of the lining of the lung. They are caused by inhalation of asbestos fibres, most commonly in an occupational setting. Pleural plaques are benign and do not themselves lead to other asbestos-related diseases. However discovery of the plaques often results in much stress and anxiety given that they are evidence of the presence of asbestos fibres which may subsequently cause mesothelioma or asbestosis.

The occurrence of pleural plaques is no longer a compensatable condition in England and Wales. Previously those with plaques could claim damages for the condition and the anxiety caused by its discovery. However in 2007 the Appellate Committee of the House of Lords (now the Supreme Court) ruled that there is no cause of action under which damages may be claimed for pleural plaques. As the plaques cause no symptoms there is no damage - an essential element in any claim in negligence.

Whilst the Scottish Government and Northern Ireland Executive legislated to ensure those in their jurisdictions with pleural plaques are not affected by the judgment, successive Governments in Westminster have declined to legislate to change the law in England and Wales. The Government has acknowledged an 'apparent unfairness' caused by the differing approaches in the UK's different jurisdictions but confirmed that it will not change the law for those with pleural plaques in England and Wales.

# 1. What are pleural plaques?

Pleural plaques are areas of fibrous thickening of the pleural membrane which lines the lungs. They are caused by exposure to asbestos fibres, most commonly in an occupational setting. The degree of exposure sufficient to cause pleural plaques is much lower than that required to cause asbestos-related disease such as asbestosis. Plaques evolve slowly over time and become large enough to see only many years after first exposure.<sup>1</sup> They are usually visible on CT scans or chest X-rays, through which they are often first detected.<sup>2</sup>

Pleural plaques are the commonest manifestation of previous exposure to asbestos, though they can be associated with previous chest trauma or pleural infection.

Pleural plaques are a benign condition; unless the plaques become very thickened and widespread they usually cause no symptoms and are not of themselves thought to lead to any of other asbestos-related lung disease.

However studies of groups of patients with pleural plaques show they have an increased risk of developing more serious asbestos-related diseases such as mesothelioma and asbestosis.<sup>3</sup> It is not the plaques themselves but the presence in the lungs and pleura of asbestos fibres that may cause such life-threatening or fatal diseases. A diagnosis of pleural plaques can therefore be a source of considerable anxiety for patients.

Pleural plaques are asymptomatic but evidence of the presence of asbestos fibres that can cause mesothelioma and asbestosis

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<sup>1</sup> The Industrial Injuries Advisory Council, '[Position Paper 23: Pleural Plaques](#)', June 2009, page 3

<sup>2</sup> According to the British Thoracic Society, the detection of pleural plaques varies according to the imaging method used (a CT scan detects more plaques than a chest X-ray); the time since first asbestos exposure (plaques become calcified over time and are then more readily detectable); and the population studied (those with asbestos exposure have more plaques detected). See '[Pleural Plaques, Information for Health Care Professionals](#)', 2011, page 4.

<sup>3</sup> Rudd RM, 'New developments in asbestos-related pleural disease', *Thorax*, 1996; 51(2): 210-216. Rudd also indicated that: "Of 155 dockyard workers who were re-examined 10 years after detection of benign pleural changes, 10.3% had radiographic small parenchymal opacities suggestive of asbestosis and 4.5% had both clinical and radiological signs of asbestosis. The attack rate was substantially higher than among men with no initial pleural abnormality." He also stated: "A recent review of evidence from several studies concluded that studies which supported an increased risk of lung cancer in those with plaques were the most subject to selection bias. It was concluded that there is no convincing evidence that the presence of pleural plaques is predictive of an increased risk of lung cancer. However, each of the studies available for review was unsatisfactory in one or more respects; they concerned populations with unknown or low level exposure to asbestos and/or a low incidence of asbestos-related lung cancer, control for the effects of smoking was often unsatisfactory, latency was often ignored, and follow up was often incomplete. On a priori grounds it seems likely that the risk of lung cancer will be a function of the dose of asbestos inhaled rather than the presence or absence of plaques." (p 211)

## 2. The courts' removal of the right to compensation

### 2.1 Entitlement to damages

The condition had been compensated by the courts since 1984. Three High Court decisions in the mid-1980s set a precedent for compensation payments in cases of pleural plaques. In three cases involving the Ministry of Defence the court found that the diagnosis of asbestos-related pleural plaques (asymptomatic fibrosis on the pleura lining the lungs) constituted an injury enabling damages to be recovered.<sup>4</sup> Typical pay outs amounted to around £1,500 (in the 1980s). These cases were not taken to appeal.

A series of judgments in the mid-1980s allowed those with pleural plaques to seek compensation

### 2.2 Industrial Injuries Advisory Council

In its report of July 2005 the Industrial Injuries Advisory Council (IIAC) considered that pleural plaques should not be prescribed as an industrial disease:

There is a lack of evidence that pleural plaques cause impairment of lung function sufficient to cause disability. IIAC does not recommend adding pleural plaques to the list of prescribed diseases, but will continue to monitor new research.<sup>5</sup>

As a consequence pleural plaques is not included in the list of prescribed diseases in Schedule 1 of the *Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985* so those with pleural plaques are not eligible for support via the Industrial Injuries Disablement Benefit.

Those with pleural plaques cannot get the Industrial Injuries Disablement Benefit

### 2.3 Rothwell v Chemical & Insulating Co Ltd (High Court and Court of Appeal)

In 2004 insurance companies brought ten test cases before the High Court of England and Wales. In February 2005 Mr Justice Holland gave judgment in favour of the claimants. He held that the presence of pleural plaques was sufficient to found a cause of action and an award of damages because it indicated the permanent penetration of the chest by asbestos fibres, bringing with it anxiety and the risk of the future onset of symptomatic diseases.

In 2006 the Court of Appeal overturned Holland J's judgment, holding that pleural plaques do not amount to a compensatable injury, nor does the penetration of the lungs by asbestos fibres.<sup>6</sup>

The Court of Appeal found that pleural plaques are not a compensatable injury

<sup>4</sup> *Church v Ministry of Defence* (1984) 134 NLJ 623, *Sykes v Ministry of Defence* (19 March 1984, unreported) and *Patterson v Ministry of Defence* (29 July 1986, unreported).

<sup>5</sup> Department for Work and Pensions, [Report by the Industrial Injuries Advisory Council in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of the asbestos-related diseases](#), Cm 6553, July 2005, para 84.

<sup>6</sup> *Rothwell v Chemical & Insulating Co Ltd* [2006] EWCA Civ 27

## 6 Legal claims for pleural plaques

The Lord Chief Justice, Lord Phillips and Lord Justice Longmore noted that:

[2] Each of the claimants was negligently exposed by his defendant employer to asbestos dust. That exposure has had three foreseeable consequences. The claimant has developed pleural plaques. The claimant is at risk of developing one or more long-term asbestos-related diseases. The claimant has suffered anxiety at the prospect that he may suffer such disease. It is common ground, for reasons that we shall explain, that none of these consequences, if experienced on its own, would constitute damage capable of founding a cause of action in negligence. The common issue is whether, by aggregating with pleural plaques one or both of the other consequences, sufficient damage can be demonstrated to found a cause of action.

The court identified the issue at the heart of the test litigation

At paragraph 11 of the judgment, they cited from Dr Robin Rudd's 'Occupational Disorders of the Lung', published in 2002:

Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos related conditions may differ widely between different populations and individuals with plaques.

The Court considered there were strong public policy reasons why pleural plaques should not give rise to claims for compensation:

[67] ... If pleural plaques give rise to a cause of action: (i) on discovery of the existence of pleural plaques a claimant will be advised that he should bring a claim in order to protect his position, even if he would not otherwise wish to do so unless and until he developed symptomatic disease; (ii) bringing legal proceedings is stressful. It will result in the claimant's attention being drawn to all the possible consequences of exposure to asbestos and may well create or augment the anxiety for which compensation will be claimed; (iii) there is a danger that those, such as claims managers, who make a business out of litigation, will encourage workers who have been exposed to asbestos to have CT scans in order to see whether they have pleural plaques for the sole purpose of bringing claims for compensation. Such a practice will tend to create stress and anxiety where none exists; (iv) some claimants will be tempted to claim a final award, thereby, in effect, gambling, to the possible prejudice of themselves and their families, that they will not contract an asbestos-related disease; (v) the costs of litigation in cases such as those before us tend to be disproportionate to the damages recoverable; (vi) it is unjust that the right to recover damages should depend upon the

The court was critical of claims companies whose encouragement of litigation caused or aggravated stress and anxiety for those with pleural plaques

fortuity of whether or not the particular claimant has developed pleural plaques.<sup>7</sup>

The Court of Appeal gave leave to appeal to the Appellate Committee of the House of Lords,<sup>8</sup> which heard the case between 25 June and 2 July 2007.

## 2.4 Johnston v NEI International Combustion Ltd (House of Lords)<sup>9</sup>

In a judgment of 17 October 2007, the Law Lords upheld the Court of Appeal ruling that the occurrence of pleural plaques is not a compensatable disease.

Lord Hoffman's judgment explained, *inter alia*, that:

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.

As pleural plaques are symptomless, the Law Lords found that they did not amount to damage - an essential element in a claim in negligence

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<sup>7</sup> NB - Not all persons exposed to asbestos will develop pleural plaques, but they remain at risk of contracting an asbestos related disease.

<sup>8</sup> The precursor of the Supreme Court

<sup>9</sup> The judgment is usually referred to as [Rothwell v Chemical & Insulating Co Ltd \[2007\] UKHL 39](#), although it was known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*.

### 3. The response at Westminster

The Law Lords' decision was met with anger and disappointment. Campaigners lobbied their MPs to use the *Child Maintenance and Other Payments Bill*, then passing through Parliament, as a vehicle for changing the law. Attempts to amend the Bill at report stage and third reading in the House of Commons were unsuccessful. There was no support in the House of Lords to amend the Bill for this purpose.

Initial legislative efforts at reversing the effect of the *Johnson* judgment proved unsuccessful

#### 3.1 The Labour Government

The last Labour Government declined to legislate in response to the House of Lords' judgment:

**Jim Sheridan:** To ask the Secretary of State for Justice if he will bring forward legislative proposals to provide compensation to people who have experienced asbestos-related diseases, including pleural plaque, and their families.

**Bridget Prentice:** It is already possible for people suffering from a range of asbestos related diseases to claim compensation under the common law of negligence where they have suffered damage. In its judgment of 17 October in the case of *Rothwell v. Chemical & Insulating Co. Ltd.* the House of Lords held that pleural plaques do not constitute actionable or compensatable damage. The House of Lords considered the issues very thoroughly on the basis of all the evidence put before them and reached a unanimous decision. Having considered the judgment very carefully, the Government have decided that it would not be appropriate to legislate on the issue.<sup>10</sup>

Its response to a further Parliamentary Question elaborated on its reasoning why legislation would not be appropriate:

**Mr. Pope:** To ask the Secretary of State for Justice with reference to the answer of 29 October 2007 to the hon. Member for Paisley and Renfrewshire, North (Jim Sheridan), Official Report, column 798W, on compensation for industrial diseases, if he will reconsider his decision not to bring forward legislative proposals to provide for compensation to people who have contracted pleural plaque as a result of exposure to asbestos in the workplace.

**Bridget Prentice:** In my answer of 29 October 2007, Official Report, column 798W, to the hon. Member for Paisley and Renfrewshire, North (Jim Sheridan), I indicated that the Government had decided that it would not be appropriate to legislate on this issue. That remains the Government's view. The House of Lords reached a unanimous decision that pleural plaques do not constitute actionable or compensatable damage. The decision is based on fundamental principles of the law of negligence—firstly, that compensation can only be payable where there is actual damage, and secondly that compensation is not payable simply for the risk or the worry that something might happen in the future. Overturning these fundamental principles in the case of pleural plaques would create uncertainty in the law and could raise the possibility of

The Government feared uncertainty in the law and the possible increase in spurious claims

<sup>10</sup> HC Deb 29 October 2007 c798W

claims being made much more widely for the risk of an illness occurring or for worry that something might happen. This would considerably increase the level of litigation and the possibility of weak or spurious claims, and could have damaging effects on business and the economy.<sup>11</sup>

However at Prime Minister's Questions on 12 March 2008 Gordon Brown indicated that a consultation document on pleural plaques would be published and that the Government would take action.<sup>12</sup>

### 3.2 Consultation and delay

On 9 July 2008 the Government announced that the consultation would seek to identify what the "most appropriate way of supporting people diagnosed with pleural plaques would be, following the Law Lords' decision on 17 October 2007 that pleural plaques are not actionable or compensatable damage." The consultation closed on 1 October 2008. After an extended delay, a Written Ministerial Statement was issued in February 2010. It said:

On the basis of medical evidence received during the course of this review, including authoritative reports from the CMO and the IIAC, we are unable to conclude that the Law Lords' decision should be overturned at this time or that an open-ended no-fault compensation scheme should be set up. While the current medical evidence is clear that pleural plaques are a marker of exposure to asbestos, and that exposure to asbestos significantly increases the risk of asbestos-related disease, any increased risk of a person with pleural plaques developing an asbestos-related disease arises because of that person's exposure to asbestos rather than because of the plaques themselves. However, if new medical or other significant evidence were to emerge, the Government would obviously reassess the situation.<sup>13</sup>

Following a lengthy delay the Government confirmed it would not move to make pleural plaques a compensatable disease

The Government did, however, acknowledge the "unique position of those individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling in October 2007." As such people would have had an understandable expectation that their claim would result in compensation the Government decided to make payments of £5,000 to individuals in this limited category under an extra-statutory scheme.

Whilst the press response to the statement was not generally positive,<sup>14</sup> the Association of British Insurers was reported to have "welcomed" the move, stating:

The Government's decision not to reverse the House of Lords ruling is the right one. The House of Lords judgement reflects medical evidence that plaques are symptomless, have no impact on health, and do not develop into asbestos-related diseases, like mesothelioma. It also upholds the fundamental

The Government's decision was greeted by the insurance industry

<sup>11</sup> HC Deb 10 December 2007 c176W

<sup>12</sup> HC Deb 12 March 2008 c 276

<sup>13</sup> [HC Deb 25 February 2010 c79WS](#)

<sup>14</sup> See for example: "[Asbestos workers "left abandoned" as government caves in to insurance pressure](#)", *The Mirror*, 26 February 2010; "[Anger at government announcement on asbestos compensation](#)", *Liverpool Echo*, 26 February 2010; "[Asbestos victims abandoned](#)", *Press Association*, 26 February 2010.

legal principle that compensation is payable when someone suffers symptoms following negligence, but not for exposure to a risk alone.<sup>15</sup>

### 3.3 The Coalition Government

Following the 2010 election the new Coalition Government was pressed as to whether it was going to adopt a different approach to the issue of pleural plaques. Jonathon Djanogly, responding for the Government to a series of Parliamentary Questions, said no action would be taken:

The issue was considered extensively in the last Parliament. A public consultation was carried out, and authoritative medical reports were prepared by the chief medical officer and the Industrial Injuries Advisory Council. The Government consider that in the light of that evidence, it would not be appropriate to overturn the House of Lords 2007 judgment that the condition is not compensatable under the civil law of tort. However, of course, if the situation were to change, we would look at it again. If new medical evidence emerges that suggests that the existence of pleural plaques is an actionable cause and that the condition counts as compensatable damage, it will be open to claimants to pursue an action under the law of tort.<sup>16</sup>

The Government will proceed with the implementation of the previously announced limited extra-statutory scheme to provide one-off payments to individuals who had begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the House of Lords judgment. We hope that the scheme will be in a position to start accepting claims from the end of June.<sup>17</sup>

In its decision to take no action the new Coalition Government also stressed plaques' lack of symptoms

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<sup>15</sup> ['ABI supports Government initiatives to help those with asbestos-related diseases'](#), *Politics.co.uk*, 25 February 2010

<sup>16</sup> HC Deb 15 June 2010 c731

<sup>17</sup> HC Deb 3 June 2010 c61W

## 4. The response in Scotland and Northern Ireland

In the spring of 2009 the Scottish Parliament passed (by 98 votes to 16) the *Damages (Asbestos-related Conditions) (Scotland) Act 2009*. The Act's accompanying Explanatory Notes made clear the legislative intention was to ensure the House of Lords' decision in *Johnston v NEI International Combustion Ltd* did not impact on Scotland:

4. The purpose of the Act is to ensure that the HoL judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to *Johnston* as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Act also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Scotland. The Act does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person's condition deteriorating in the future.

The insurance industry responded to the Act with what was described as an "unprecedented" legal action in the Court of Session seeking to overturn the Act. On 23 April 2009 *the Times* reported:

If their interim interdict in the Court of Session is successful, it will be the first time that the courts have intervened to prevent legislation passed by Holyrood being put into practice.

At the heart of the argument is whether pleural plaques on the lung cause suffering. Also at stake is the longstanding legal principle of delict, which decrees that if someone suffers an injury they are entitled to compensation.

The insurance industry argues that the new Act [...] contravenes the European Convention on Human Rights and insurers' economic rights. It argues that the decision at Holyrood to approve the Act overturned a fundamental UK legal principle that compensation is payable only where physical harm has been suffered through negligent exposure to a risk.<sup>18</sup>

The action was unsuccessful at first instance and on appeal. Despite the 2007 judgment in *Johnson v NEI International Combustion Ltd*, in October 2011 the Supreme Court dismissed the insurers' appeal ruling that Edinburgh was entitled to legislate on social policy issues as long as its actions were reasonable and fair.<sup>19</sup>

Following this ruling, equivalent legislation passed by the Northern Ireland assembly ([\*The Damages \(Asbestos - related Conditions\) Act \(Northern Ireland\) 2011\*](#)) came into force in Northern Ireland.

The Scottish Executive moved quickly to ensure the Law Lord's decision in *Johnson* did not preclude claims for compensation in Scotland

The insurance industry unsuccessfully sought to prevent the Act coming into force

Following the dismissal of the insurers' appeal pleural plaques also became compensatable in Northern Ireland

<sup>18</sup> 'Insurers try to overturn Holyrood asbestos Act', *the Times*, 23 April 2009

<sup>19</sup> *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46. See '[Scotland's right to compensate asbestos victims upheld](#)', *Guardian*, 12 October 2011

## 5. An unfair divergence?

By 2012 the Government publically recognised there was an apparent unfairness created by differences in the laws of the separate legal systems:

**Mr Hepburn:** Now that the devolved assemblies of Scotland and Northern Ireland have seen sense and are going to compensate pleural plaques victims, will the Minister follow suit? If not, why not?

**Mr Djanogly:** The Government understand that it could be seen as unfair for compensation to be available in one part of the UK but not in another, but the civil legal systems in Scotland and Northern Ireland and that in England and Wales are separate and there will inevitably be differences in the law.<sup>20</sup>

Steve Murphy, General Secretary of the Union of Construction, Allied Trades and Technicians (UCATT), accused the Government of 'washing their hands of pleural plaques victims' and of creating a 'postcode lottery for asbestos victims'.<sup>21</sup>

In 2014 the Government confirmed that despite the Scottish and Northern Irish legislation, it would not legislate to change the law in England and Wales:

**Mr Hepburn:** Does the Minister agree that the current system of compensation for pleural plaques is grossly unfair? People with pleural plaques living in Scotland or Northern Ireland qualify for compensation, but those living in England or Wales do not. Does he think that is unfair, and is he going to do anything about it?

**Mr Vara:** The hon. Gentleman will appreciate that there are different legal jurisdictions, which means that there will occasionally be differences. In the light of the current medical evidence, the Government do not consider it appropriate to overturn the House of Lords judgment that the condition of pleural plaques is not compensatable under the civil law.<sup>22</sup>

The Government acknowledged an apparent unfairness due to the different approaches to compensation

However it confirmed that pleural plaques will remain non-compensatable in England and Wales

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<sup>20</sup> HC Deb 15 May 2012 c406

<sup>21</sup> UCATT, '[Government washes their hands of pleural plaques victims](#)', 16 May 2012

<sup>22</sup> HC Deb 18 March 2014 c636

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