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Asbestos caused Lung Cancer: An issue ripe for review

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Abstract

Following the recent decision in the case of Heneghan v Manchester Dry Docks Ltd that a claimant succeeds in an asbestos related lung cancer claim where they can show defendants materially increased the risk of lung cancer occurring, this article considers the current state of the law and availability of compensation through statutory schemes, and looks at the different approach taken by Australian courts in developing the law in this area.

The latest available data from the HSE for mesothelioma deaths in the UK shows that in 2013 2,538 people succumbed to this invidious disease.² It is important however to appreciate that the curse of asbestos extends beyond mesothelioma, being responsible for other fatal conditions; as a primary example of this it has been estimated that the ratio for every asbestos related lung cancer death to every mesothelioma death is between two thirds and one, which means that in 2013 there may have been up to 2,500 lung cancer deaths in this country related to asbestos exposure.³ Whilst asbestos related lung cancer deaths might be equal in number to mesothelioma deaths annually, only limited attention has arguably ever been paid to such deaths, and as such it may be said that there is a substantial moral, scientific, and legal deficit.

The central reason for the paucity of attention has the obvious answer that where lung cancer is concerned the curse of smoking will always stand as the primary suspect, and as a consequence the impact of asbestos exposure is

either not a consideration at all or at best generally relegated to in most instances a secondary afterthought.

The longstanding failure to appropriately address asbestos caused lung cancer has led to an invidious position whereby it may be argued that large numbers of those who have been negligently exposed to asbestos and subsequently contracted lung cancer have not received the compensation that they should be entitled to.

In addition to the deep shadow that smoking has created over the potential identification of other possible causes of lung cancer, there lies a further compounding issue for lung cancer victims where asbestos exposure is a potential factor - the paltry levels of funding made available for research into asbestos and asbestos related diseases.⁴ Whilst it may understandably be argued that lung cancer as a disease has attracted meaningful levels of research funding, this cannot be said of the area of asbestos related diseases, which has been woefully underfunded, and in consequence of this in respect to asbestos caused lung cancer we have not reached the level of understanding that may have been achievable with appropriate support and resource provision.

The Legal Position

Consideration of where the law currently stands on asbestos related lung cancer is usefully begun by first making reference to the position regarding the more legally developed area surrounding mesothelioma, especially the situation of where a claimant has been exposed to asbestos by more than one

employer. In multiple employer situations, mesothelioma claimants had faced an evidential impossibility as regards establishing that any employer was a cause of their mesothelioma. Simply put, from a scientific perspective it could not be established whether any employer's negligence in exposing their employee to asbestos was directly implicated in causing the mesothelioma. As a consequence of this, the House of Lords in the case of *Fairchild v Glenhaven* (2003), ruled that a claimant would meet the requisite causation by showing that an employer had materially increased the risk of them contracting mesothelioma.⁵ By what has become known as the Fairchild Exception, it would then be possible for a claimant to need only sue one former employer in order to receive full compensation for their mesothelioma. However, a subsequent ruling by the House of Lords in *Barker v Corus* (2006), held that a claimant would need to sue each negligent employer on the basis that they had materially increased the risk of them contracting mesothelioma, as it was considered unfair that one employer could be financially responsible for the whole amount of the damages, as for example there could be situations where it was not possible for them to obtain financial contributions from other negligent former employers who may have negligently exposed the claimant to far greater quantities of asbestos, or as in *Barker* a claimant may have exposed themselves whilst working on a self-employed basis.⁶ The decision in *Barker* was swiftly overturned following an amendment to the law made within the Compensation Act 2006, returning the law to the position decided in *Fairchild*, but only crucially in respect to mesothelioma, and not as regards any other indivisible disease where asbestos is implicated, such as lung cancer.⁷

Unlike with mesothelioma, there exist only a few legal actions on asbestos related lung cancer cases that have been considered by UK courts. In the 2005 case of *Badger v Ministry of Defence*, the claimant's husband had worked as a

boiler maker for the Ministry of Defence for 33 years, and in that time he was negligently exposed to asbestos by the defendants who recognised they had been in breach of their statutory duty and this was causative of the lung cancer that killed Mr Badger.⁸ However, Mr Badger had also been a long term smoker, and it was contended by the defendant that the level of damages should as a consequence of this be reduced by a quarter as he had been contributorily negligent. The medical experts for both sides in their joint reports considered the lung cancer to be an indivisible disease and the death of Mr Badger had been due to both the tobacco and asbestos.⁹ In assessing the possible level of contributory negligence, Mr Justice Stanley Burnton, found that all of the deceased's lifetime smoking should not be taken into consideration, as Mr Badger had begun smoking in the 1950s but it wasn't however until the early 1970s that health warnings were placed on cigarette packets. The judge considered a prudent person in the position of the deceased would have given up smoking in the mid 1970s.¹⁰ After consideration of risk factor data of the deceased continuing to smoke, ultimately a 20% reduction in damages due to contributory negligence was decided upon.

In a further asbestos related lung cancer case coming in 2008, *Shortell v BICAL Construction Ltd*, in contrast to the Badger case the question of causation was a contended matter, along with again the issue of contributory negligence due to heavy smoking coming under consideration.¹¹ As in the Badger case, Mr Shortell was only exposed to asbestos by one employer. The parties agreed that causation would be established if it could be shown that there had been a doubling of the relative risk that Mr Shortell would contract lung cancer due to the defendant's breach of duty in exposing him to asbestos, however the precise level of exposure faced was contested. Engineering evidence from the claimant's expert suggested that Mr Shortell had been exposed to a level of 99

fibre/ ml years, which was above the Helsinki Criteria for Diagnosis and Attribution (1997) figure of 25 fibre/ ml years by which a causal connection in lung cancer is accepted to be made out, and clearly sufficient to meet the doubling of risk test. Mackey J accepted that a doubling of the relative risk had been made out, and on the issue of contributory negligence due to Mr Shortell's smoking post the time when he would be aware of the dangers of smoking, he considered that he was not bound solely in this regard by statistical analysis, but what in the case was just and equitable, assessing the contributory negligence at a level of 15%.

The Badger and Shortell cases both featured a single employer exposing their employee to asbestos, and thus the problematic factor of multiple negligent employers did not arise. This problem however was a central factor in the recent case of Heneghan v Manchester Dry Dock (2014), although smoking was not a further complicating factor, so no requirement to address possible contributory negligence was needed.¹²

In his judgment, Jay J, considered that legally mesothelioma and asbestos caused lung cancer were indistinguishable.¹³ Such a finding does not lead to the same legal outcome however, and the legal position for lung cancer victims who have been exposed to asbestos remains potentially far more challenging. The claimant it was decided must first establish that asbestos was a/the cause of their lung cancer, and this is to be achieved by reference to the doubling of the risk test. This was comfortably met by the combination of all the levels of exposure caused by the defendants and comparing this to the Helsinki Criteria figure by which it is considered that asbestos caused cancer can be triggered. Once a doubling of the risk is established, the claimant then needed to move to the who question, and this Jay J considered can be found by meeting the

material increase in the risk causation test as utilised in mesothelioma actions. Unlike in mesothelioma actions however, because of the still applicable House of Lords ruling in *Barker v Corus*, a claimant needs to show that each party who exposed them negligently to asbestos did materially increase the risk of them contracting lung cancer. Failure to do so, or specifically as in *Heneghan* where only some of the potential defendants were being sued, will result in less than full compensation being obtained for the harm suffered.

The outcome in *Heneghan* appeared to heavily rest on which expert's evidence was ultimately favoured by the court. The claimant had sought to argue causation on the basis that each of the defendant's had materially contributed to the contracting of lung cancer, whilst the defendants argued that causation on that basis could not be shown, and only causation on the material increase in the risk basis was applicable. As defendants representing only 35.2% of the overall level of exposure to asbestos during the claimant's working life were being sued, it meant that if the defendants argument was accepted then only 35.2% of damages for the lung cancer would be awarded, in contrast to 100% damages if the material contribution test causation were accepted as being applicable.

The defendants expert witness, Dr Moore-Gillon, considered that it was impossible to say that asbestos fibres from each of the negligent defendants causally contributed to the carcinogenic process that led to the claimant's lung cancer. For him, it could only be argued that fibres from each defendant had contributed to the risk of lung cancer.¹⁴ The claimant's expert, Dr Rudd, considered that if establishing causation in such cases depended upon establishing the precise molecular and cellular events which led to a disease, then any particular cause of a cancer could never be established. In

consequence of this he argued that medical science adopts an approach based upon epidemiological observations, and where exposure is above *de minimis* levels, then it can be inferred that each exposure has made a material contribution to the disease. Dr Rudd was asked if the lung cancer might still have occurred if the defendant who had exposed the claimant the least, the level being 2.5% of the overall total, was removed. He responded affirmatively, and went on to say this would be the case if any of the negligent defendants were hypothetically removed.¹⁵ Whilst this may have been quite telling and persuasive for both the court of first instance, and the subsequent appeal heard in the Court of Appeal, the fact must remain that there was negligent exposure and hypothetical removal of a party cannot arguably be seen as negating that they may have materially contributed to the cancer, as clearly their asbestos fibres were inhaled into the body of Mr Heneghan. However, Jay J, considered that the possibility of a defendant party who had for example only been responsible for 2.5% of the overall exposure to asbestos being potentially liable for 100% of the damages would in his mind be unfair.¹⁶ He followed in this regard comments made by Mrs Justice Swift in the non-asbestos lung cancer case, *Jones and others v Secretary of State for Climate Change* (2012) (case is sometimes referred to as *Phurnacite*), who also felt it would be unfair to defendants who may only be responsible for a small part of the carcinogens in the overall levels of exposure to be liable for full damages.¹⁷

Dr Rudd was also an expert witness for the claimants in the *Phurnacite* case, and there he was asked about his view that every exposure to a carcinogen materially contributed to the carcinogenic process, and as such why there would be a need for the Fairchild exception. His response was that since the time of the evidence given in the Fairchild case, the understanding of the molecular basis of carcinogens had measurably improved, and if he were asked

the same question now as he was in Fairchild, his response would be that it was probable that asbestos fibres from each source had contributed to the carcinogenic process.¹⁸

In the appeal of Heneghan, the Court of Appeal accepted the reasoning of Jay J, with Lord Dyson considering that the judge had been correct to reject the opinion of Dr Rudd that every exposure had contributed to the development of the lung cancer. Lord Dyson considered the expert's view not to be a medical opinion but rather, *'It was an opinion that an inference of causation could be drawn from the epidemiological evidence.'*¹⁹ Furthermore, Lord Dyson believed that Jay J was correct in being able to find support for his conclusion from the Australian case of *Amaca Pty Ltd v Ellis (2010)*²⁰, in which a claimant had been exposed to asbestos by two employers, but who had also been a heavy smoker.²¹ Where there was no medical evidence that could provide the basis for the cause of the lung cancer, the High Court of Australia rejected the claimants argument that an inference could be drawn that the lung cancer was caused by both the negligent employers in exposing the claimant to asbestos, as the epidemiological evidence pointed to a far higher probability that smoking had been the cause of the cancer rather than asbestos.

The support adduced in the Heneghan case by the finding in *Amaca v Ellis* takes us to a troubling aspect of the current state of the law in this country regarding indivisible asbestos conditions. As explained in regards to mesothelioma claims, there was an immediate parliamentary response to the decision in *Barker v Corus* to ensure that claimants would receive full compensation, but in regards to lung cancer linked to asbestos the law remains on the basis of the judgment in *Barker*. However, in contrast to the approach in this country, the Australian approach has been somewhat different. Australian

courts have chosen not to allow the material increase in risk causation test, requiring that causation be established either on the traditional but for basis or that a defendant's negligent conduct makes a material contribution to the harm suffered by the claimant.

Unlike the position adopted in this country, Australia's most senior court, the High Court of Australia, have accepted that it is possible to bring a successful mesothelioma action where there are multiple negligent parties on a conventional causation basis. In the case of *Booth v Amaca Pty Ltd* (2010), the claimant a retired motor mechanic brought an action against two companies, Amaca and Amaba, who manufactured brake lining products which it was found had been responsible for 70% of his exposure to asbestos.²² At first instance in the Dust Diseases Tribunal of New South Wales, Curtis J, had found that the asbestos from the brake linings of both defendants had materially contributed to the claimant's contraction of mesothelioma. The basis of this finding was acceptance of the evidence provided by the claimant's expert, Professor Henderson, who stated, *'When there are multiple episodes of asbestos exposure, and the individual concerned inhales increasing number of fibres on different occasions, that contributes to the total burden of asbestos fibres deposited in the lung, and translocated to the pleura and [it] is thought that mesothelioma develops because of an inter-action between the asbestos fibres and the mesothelial cells by way of secondary chemical messages.'*²³ Professor Henderson whilst accepting that the science remained incomplete and some uncertainty remained regarding causative links at the cellular level, argued, *'It is, I think, almost universally accepted that all asbestos exposure, both recalled and unrecalled, will contribute causally towards the ultimate development of a mesothelioma.'*²⁴

On appeal of Booth giving lead judgment in the Australian High Court, French CJ, considered, *'a finding that a defendant's conduct has increased the risk of injury to the plaintiff must rest upon more than a mere statistical correlation between that kind of conduct and that kind of injury. It requires the existence of a causal connection between the conduct and the injury, albeit other causative factors may be in play. As demonstrated by medical evidence in this case and in particular by Professor Henderson's evidence, a causal connection may be inferred by somebody expert in the relevant field considering the nature and incidents of the correlation.'*²⁵ French CJ concluded that, *'It is enough for present purposes to say that an inference of factual causation as against both Amaca and Amaba, was open on the evidence before the primary judge. The cumulative effect mechanism involving all asbestos exposure in causal contribution to the ultimate development of a mesothelioma had been propounded and was accepted by his Honour. It depended upon an understanding of physiological mechanisms. It did not depend upon epidemiology.'*²⁶

Given the way the law on mesothelioma has developed in the UK in regards to the question of causation, there is limited necessity as such to revisit this matter, but we do have to consider the question of causation as regards asbestos caused lung cancer. The decision in the Heneghan case points firmly to the position that all that currently is available to a lung cancer claimant in a multi-employer situation is to establish causation on a material increase in the risk basis, and potentially not receive full damages. However, useful reference can again be made to the legal position that has been developed by the Australian courts. In the case of *Allianz Australia Ltd v Sim (2012)*, the New South Wales Court of Appeal had to consider a claim in which the estate of the deceased were suing in a multi-employer situation after the deceased had

contracted asbestosis and lung cancer.²⁷ At first instance, the Dust Diseases Tribunal of New South Wales, accepted the claimant's expert evidence, including evidence provided by Professor Henderson, that all of the defendants had materially contributed to the deceased's lung cancer by negligently exposing him to asbestos.²⁸ On appeal, the defendants sought to argue that use of material contribution could only be made by reference to the but for causation test. This was rejected by the New South Wales Court of Appeal, who found that the but for test is not the sole exclusive causation test available, and as such establishing causation on a material contribution basis had established causal liability of the defendants.²⁹

Statutory Compensation Schemes

Not only does the currently established law in the UK provide significantly greater challenges for lung cancer asbestos exposed claimants in comparison to mesothelioma claimants, but the potential to obtain compensation via statutory schemes is also far more narrowly defined. Currently there exist three civil based compensation schemes by which it may be possible for those suffering from mesothelioma to obtain lump sum compensation. These being the 1979 Pneumoconiosis (Workers Compensation) Act Scheme, the 2008 Diffuse Mesothelioma Scheme, and the 2014 Diffuse Mesothelioma Payment Scheme. Only the 1979 Scheme is open to those suffering asbestos caused lung cancer.

A further lump sum compensation measure has recently been announced by the Government with the expansion of the Military Veterans Compensation Scheme following a successful campaign led by the British Royal Legion, enabling those ex-military personnel who were exposed to asbestos whilst

serving in the Armed Forces before 2005 and who have contracted mesothelioma to receive a lump sum compensation of £140,000.³⁰ The new lump sum payment arguably reflects very roughly the average level of compensation that mesothelioma victims in general receive, so in essence on an overall average basis it can be seen as providing full compensation. Whilst a welcome move it does lead to the inevitable question about the position of ex-military lung cancer victims?

The Government recognise through the so-called Armed Forces Covenant that the nation must ensure that those who have served their country are treated fairly.³¹ But on the basis of the underpinnings of the Covenant can it be right that the revised Military Compensation Scheme is only restricted to mesothelioma victims?³² Have not those exposed to asbestos whilst serving in the Forces and who contract lung cancer an equal right to such compensation? The argument that there is no justification under the Armed Forces Covenant why lung cancer victims of asbestos exposure should alongside mesothelioma victims not be entitled to the new full enhanced lump sum compensation, would however if recognised by Government, lead to a legal dilemma regarding the current state of the law in respect to civilian lung cancer victims of asbestos exposure.

The regulatory order amendment providing for the £140,000 compensatory award appears not to include any provision reducing the award where for example a claimant has also been exposed to asbestos outside of their military employment.³³ This would therefore effectively mirror the outcome of the law found in the Compensation Act 2006 and thus a military claimant would be able to receive 'full' compensation from the Government even though they may have also been exposed elsewhere.

However, if as I have argued that the Government should include other asbestos caused conditions within the scope of their revised Military Compensation Scheme and in effect pay full compensation, then the implications of such a move would lead to the inevitable conclusion that there could be no justifiable reason why as a matter of urgency an amendment should not be brought forward to the Compensation Act, by which indivisible conditions such as lung cancer where asbestos is involved, enable full compensation to be received where a material increase in the risk can be shown to have occurred when a claimant was exposed negligently.

Conclusion

The significant evidential burden imposed on those diagnosed with lung cancer related to asbestos has been reviewed, and despite Mr Justice Jay's opinion in the Heneghan case that legally mesothelioma and lung cancer are the same, the ultimate outcome for claimants in similar cases can be radically different.

The disquieting fact that expert opinion on precisely what may be accepted as regards causal links between asbestos exposure and lung cancer has led to a significant divergence in approach between the UK and Australia, and points at least in part to the long term failure as regards research into asbestos related diseases.

The positive news that military veterans exposed to asbestos pre 2005 and who have contracted mesothelioma will receive statutory compensation is tempered by a failure to include lung cancer within the compensation scheme, and this should be considered as discriminatory and unfair, and as such simply cannot be justified. However, by its inclusion this would then lead to a

situation whereby the general law would arguably be out of kilter with the effective impact of the compensatory scheme, and without modification of the law would present a discriminatory two tier compensatory structure in regards to asbestos induced lung cancer.

In his recent JPIL article that analyses the Heneghan case, David Allan QC, argues that it is difficult to see a basis for distinguishing between mesothelioma and lung cancer victims, and that the extension of section 3 of the Compensation Act is for him compelling.³⁴ If the government are persuaded to include within the revised Military Veterans Scheme lung cancer, there can be no justification whatsoever in not amending section 3.

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² Health and Safety Executive, Mesothelioma in Great Britain 2014 (October 2015).

³ A.J.Darnton, D.M. McElvenny & J.T.Hodgson, "Estimating the Number of Asbestos-related Lung Cancer Deaths in Great Britain from 1980 to 2000." (2006) 50(1) Ann. Occup. Hyg. 29-38.

⁴ A. Mckenna, "Research funding data highlights weak level of Mesothelioma funding." Mesothelioma UK Newsletter (Summer 2015), page 8. <http://www.mesothelioma.uk.com/news-and-events/newsletters/newsletters-2015/newsletter-summer-2015/> Accessed 27th June 2016.

This article although focussed on mesothelioma does highlight the issue of lack of funding.

⁵ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32.

⁶ *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572.

⁷ Compensation Act 2006 s.3.

⁸ *Badger v Ministry of Defence* [2005] EWHC 2941 (QB); [2006] 3 All ER 173.

⁹ *Badger v Ministry of Defence* [2005] EWHC 2941 (QB); [2006] 3 All ER 173 at [17] and [18].

¹⁰ *Badger v Ministry of Defence* [2005] EWHC 2941 (QB); [2006] 3 All ER 173 at [49].

¹¹ *Shortell v BICAL Construction Ltd*, unreported, 16 May 2008 QBD (Liverpool).

¹² *Heneghan v Manchester Dry Dock Ltd and others* [2014] EWHC 4190 (QB).

¹³ *Heneghan v Manchester Dry Dock Ltd and others* [2014] EWHC 4190 (QB) at [81].

¹⁴ *Heneghan v Manchester Dry Dock Ltd and others* [2014] EWHC 4190 (QB) at [18] and [22].

¹⁵ *Heneghan v Manchester Dry Dock Ltd and others* [2014] EWHC 4190 (QB) at [20].

¹⁶ *Heneghan v Manchester Dry Dock Ltd and others* [2014] EWHC 4190 (QB) at [83].

¹⁷ *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) at [8.61].

¹⁸ *Jones v Secretary of State for Energy and Climate Change* [2012] EWHC 2936 (QB) at [8.21].

¹⁹ *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA CIV 86 at [42].

²⁰ *Amaca Pty Ltd v Ellis* [2010] HCA 5.

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- ²¹ *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA CIV 86 at [32] and [33].
- ²² *Booth v Amaca Pty Ltd and Amaba Pty Ltd* [2010] NSWDDT 8.
- ²³ *Booth v Amaca Pty Ltd and Amaba Pty Ltd* [2010] NSWDDT 8 at [25].
- ²⁴ *Booth v Amaca Pty Ltd and Amaba Pty Ltd* [2010] NSWDDT 8 at [26].
- ²⁵ *Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth* [2011] HCA 53 at [49].
- ²⁶ *Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth* [2011] HCA 53 at [51].
- ²⁷ *Allianz Australia Ltd v Sim; WorkCover Authority (NSW) v Sim; Wallaby Grip (BAE) Pty Ltd (in liq) v Sim* [2012] NSWCA 68.
- ²⁸ *Sim v Allianz Australia Ltd and ors* [2010] NSWDDT 19.
- ²⁹ *Allianz Australia Ltd v Sim; WorkCover Authority (NSW) v Sim; Wallaby Grip (BAE) Pty Ltd (in liq) v Sim* [2012] NSWCA 68 at [49] and [145].
- ³⁰ GOV.UK – ‘Fair compensation for veterans with cancer caused by asbestos’. 29th February 2016.
<https://www.gov.uk/government/news/fair-compensation-for-veterans-with-cancer-caused-by-asbestos>
Accessed 22nd June 2016.
- ³¹ Ministry of Defence, ‘The Armed Forces Covenant’.
- ³² It was confirmed to me in an email dated 17th June 2016 from Lisa Chilvers, Team Leader at DBS Veterans UK, that the new lump sum compensation for military veterans is only available for those suffering from mesothelioma, not asbestos induced lung cancer.
- ³³ The Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2016. No. 374.
- ³⁴ D. Allan, “The extension of Fairchild to lung cancer.” (2016) 2 Journal of Personal Injury Law 65.