

Communication Workers Union

“Pleural Plaques”

**Response of
The Communication Workers Union
To the Consultative Document
issued by
the Ministry of Justice seeking views on the
Government response to the House Of Lords
Judgement on 17 October 2007 that the presence of
Pleural plaques caused by Asbestos exposure does
not constitute actionable or compensatable personal
injury damages.**

Submitted by

Dave Joyce

**CWU National Health, Safety & Environment Officer
Communication Workers Union
150 The Broadway, Wimbledon, London SW19. 1RX.
Tel: 0208-971-7200
Fax: 0208-971-7300
e-mail: healthandsafety@cwu.org**

(In Memory of all CWU members who have died of Asbestos related industrial diseases)

"Pleural Plaques" – Ministry of Justice Consultation – CWU Response **CWU**

This is the response of the Communication Workers Union to the Ministry of Justice consultation document on "Pleural Plaques" which seeks views on the government response to the House of Lords decision.

The CWU represents 250,000 people employed in the communications industry. The CWU welcomes the Government's willingness to consider this matter and welcomes the opportunity to input our views.

The CWU has campaigned tirelessly over the last 5 years to both prevent workers exposure to asbestos and for the best medical treatment and fair compensation for those who are made ill or killed as a result of contact with Asbestos fibres, alongside our colleagues in other Trade Unions, the CWU and Asbestos Campaigning organisations, often in the face of fierce opposition from Asbestos producers, employers' organisations and governments.

Many of our own CWU members have over the years become victims of Pleural Plaques, many of whom have sadly gone on to develop and die from full blown Asbestos related diseases, Mesothelioma, Asbestosis and Lung Cancer and others who now have the "time-bomb" ticking away inside them. CWU has over the last 5 years done the following:-

- *Supported and been involved in Asbestos Campaigning lobbies at Westminster,*
- *We are involved and affiliated with OEDA and ELMS - two Asbestos Campaigning groups,*
- *We support the Manchester Asbestos Victims Support Group,*
- *We support the London Hazards Centre & CSC Asbestos Support Group,*
- *We are long standing supporters of the Spodden Valley Asbestos Campaign Group,*
- *We were involved with others campaigning for changes which led to the revised 2006 Control of Asbestos Regulations,*
- *We were involved in the Campaign to get Mesothelioma drug Alimta licensed for use by NICE,*
- *We've been involved in pushing for the Scottish Pleural Plaques legislation which looks as if it will be successful and reverse the House of Lords November 2007 decision.*
- *We support "Action Mesothelioma Day",*
- *We fought for more stringent controls "Asbestos Samples in the Post" operated by cowboy companies,*
- *We campaigned to get British Gas to stop sending Asbestos Bag returns via the post,*
- *We were involved in a revision of BT's Asbestos Policy affecting our BT Engineers,*
- *We were involved in revised procedures on Asbestos controls and policies in Royal Mail,*
- *We have circulated thousands of the "Asbestos in Your Home" guidance leaflets and Pocket Cards to CWU Branches and members,*
- *We supported the introduction of the government's Mesothelioma treatment framework to speed up treatment for victims,*
- *We were involved in the campaign to get rid of the "occupational link" giving all mesothelioma sufferers the right to claim under the Pneumoconiosis (Workers' Compensation) Act 1979.*
- *We supported the campaign which led to the Government overturning a controversial court ruling which stopped widows from receiving full compensation for their husbands' Asbestos deaths.*
- *We were involved in the successful lobbying which led to the Government introducing an amendment to the Compensation Bill which overturned the House of Lords judgment in *Barker v Corus(UK)* which said that where an individual worked for several companies and could not identify which one had caused the asbestos disease, damages should be divided between all employers who possibly exposed the victim to asbestos and the ruling meant that victims would be stopped from claiming full compensation from just one of several negligent employers.*
- *We've supported a number of Early Day Motions (EDMs) on Asbestos related diseases and Pleural Plaques.*

- *We've supported and promoted No 10 Downing Street Petitions on Asbestos related diseases and Pleural Plaques.*

Pleural plaques are small localised areas of fibrosis or areas of thick scar tissue which are found within the pleura of the lungs, forming in the chest lining and diaphragm and are caused by Asbestos exposure and are directly associated with an increased risk of developing fatal lung conditions like Mesothelioma, or Asbestosis. Over time, this thickening of the pleural membrane, which lines the lungs, can make breathing difficult. Diagnosis of pleural plaques often leads to extreme distress for the victims, as they fear they may develop fatal Asbestos related diseases which can often lead to a slow and painful death. Many sufferers with pleural plaques tell of the worry and uncertainty it can cause, knowing that one day they may develop into devastating and lung cancer or mesothelioma, a cancer for which there is no cure.

On 28 January 2006 the controversial judgement of the Court of Appeal in London stopped thousands of industrial disease sufferers from claiming personal injury compensation for "Pleural Plaques", the scars that form around the lungs from exposure to asbestos fibres. On 17 October 2007 the Law Lords rejected an appeal by the Trade Unions against that earlier ruling by the Court of Appeal. In a 'shocking' unanimous decision the Law Lords upheld the Court of Appeal decision in *Johnston v NEI International Combustion Ltd* and conjoined cases known as *Rothwell & Others v Chemical & Insulating Co Ltd*, that the presence of pleural plaques does not constitute actionable or compensatable damage.

For the past 22 years anyone able to prove they had developed 'Pleural Plaques' due to negligent exposure to asbestos by employers has been able to claim industrial disease compensation on either a provisional or final settlement basis. The decision by the Court of Appeal and subsequently the House of Lords brought that to an end, removing the right to any compensation whatsoever.

In effect that meant that anyone who discovers they have 'Pleural Plaques' has to live with the knowledge that they have a time bomb ticking away inside them. Whilst it is quite possible they may go on to live, they are unwell and they are equally aware that the scarring is there and a more serious condition could develop at any time and kill them as in almost every case it was caused by workers being exposed to asbestos due to negligence of their employers. This was yet another blow for people who suffer from asbestos related diseases which includes a number of CWU members who were exposed to Asbestos years ago.

Up until 2006, anyone with 'Pleural Plaques' could claim asbestos compensation up to £20,000 as a final settlement for their condition or £7,000 on a provisional basis where it was left open for the claimant to come back for more if a serious condition developed later. In 2004, in the case of *Rothwell & Others v Chemical & Insulating Co Ltd* and others, this changed to £7,000 as a final settlement or £4,000 as a provisional settlement figure. Insurers led by the Norwich Union and British Shipbuilders had argued that no compensation should be paid because the men had suffered no actual injury. The Judge Mr Justice Holland rejected that argument but he cut the levels of compensation payouts. The Insurance companies successfully appealed when the Court of Appeal overturned the decision and a subsequent appeal by the Trade Union "UNITE" was unsuccessful when the House of Lords upheld the Court of Appeal decision in *Johnston v NEI International Combustion Ltd* and conjoined *Rothwell & Others v Chemical & Insulating Co Ltd*.

The Court of Appeal and House of Lords decision means that people will now get absolutely no industrial disease compensation for 'Pleural Plaques' despite the fact that their lungs are permanently scarred. The mental anguish of knowing they have 'Pleural Plaques' is immense and deserves the sympathy and support of the law. The House of Lords decision prevents sufferers of pleural plaques from claiming compensation on the grounds of negligence. The House of Lords rejected claims of asbestos victims deeming that they had not suffered a "compensatable" injury if affected by pleural plaques and will not be permitted to claim compensation. It was our hope that the House of Lords would overturn the Court of Appeal decision, alas it did not.

The House of Lords decision was a harsh decision which will disadvantage many Trade Union members and means thousands of people who have been exposed to Asbestos in their work and diagnosed with pleural plaques across the UK will no longer be entitled to compensation by denying them the right to sue their former employers for developing pleural plaques. It will also affect thousands of people with pleural plaques in the future. It means massive savings for the Insurers of companies who knowingly exposed their employees to asbestos in the workplace.

The CWU represents individuals and families who will be affected by the news. Workers exposed to asbestos have been let down by the House of Lords, who have ended compensation for the asbestos related condition pleural plaques. This decision will impact upon thousands of people who have faced emotional anguish since their diagnosis and who are living with the worry of knowing that their lungs have been scarred by asbestos. They will be baffled and offended that the House of Lords has decided that pleural plaques is not worthy of any compensation. 'Pleural Plaques' is a consequence of negligent exposure to asbestos. This exposure physically scars victims and is often a precursor to very serious, and sometimes fatal, disease. This is yet more disappointing news for victims and great news for the Insurers who could now deprive pleural plaques sufferers of £25 million a year. We feel that this judgement represents a real injustice. Pleural plaques may not be a seriously debilitating disease but it does represent irreversible damage to the lining of the lungs and this, in itself, can be difficult to live with. Many sufferers also face a future of depression and anxiety once diagnosed with the condition. It is plainly wrong to say that this is not a compensable condition. This ruling sets a dangerous precedent as it will be seen as a green light for employers to take risks in future with peoples' health when using dangerous chemicals or substances at work.

Government must now act positively to reverse a decision of the Law Lords as they did for the first time in living memory in July 2006, to restore justice following the discredited judgment issued in May 2006 in the case of *Barker v. Corus*. In that case the House of Commons approved legislation to reimpose the concept of joint and several liability on defendants in asbestos related mesothelioma cases. The bill received Royal Assent and became UK law, the whole process taking a mere 12 weeks.

Asbestos has been the main cause of occupational death from about 1950 onwards and is still the greatest single work-related cause of death from ill health. Past exposure is now responsible for about 4,000 people dying from asbestos-related cancers every year. This figure is expected to rise over the next ten years and then decline. Before the death rate declines, up to a quarter of a million people in Britain may have died from asbestos exposures.

These deaths are tragic for the people involved, causing immense pain and suffering to them and their relatives, friends and colleagues. However, in addition to these deaths caused by asbestos, many thousands of workers are also suffering from chronic lung conditions caused by exposure to the fibres, while tens of thousands who know they were exposed have the constant fear that they may, in the future, develop an asbestos related disease.

The CWU believes it is wrong the employers should evade responsibility in this way. Those who are diagnosed with pleural plaques should be entitled to compensation and that the payments for this should be funded by those employers who negligently exposed their employees or their insurers.

The Law Lords themselves indicated their strong sympathy for the plight of the victims in their ruling. It is hoped that the government will consider translating that sympathy into action.

In respect of the specific questions asked in the consultation the CWU would wish to respond as follows:

Q1: Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns.

The CWU welcomes increased support and help to those with pleural plaques, but it would be wrong to simply try to address the issue through an information campaign. We are deeply concerned that the intention of any such campaign would be to assure people with a diagnosis of pleural plaques that the condition poses no health risk and that they have no more risk of developing a disease as a result of the development of pleural plaques. This approach would be misleading. More medical research is required into the long term effects of pleural plaques and their relationship with the development of asbestos related diseases as the key conclusions of the House of Lords were based on a lack of evidence rather than factual research.

Pleural plaques are not always asymptomatic and therefore harmless. In their 2005 report into asbestos-related diseases, the Industrial Injuries Advisory Council reviewed the evidence and recognised that

symptomatic pleural plaques did exist, however they did comment on the lack of evidence on impairment and the need to continue to monitor research into this area.

The Law Lords also acknowledged that patients did sometimes experience symptoms, and many of those with the condition have complained about the uncomfortableness of the symptoms, breathing difficulties and the negative effect it has on their well-being.

It is also not the case that people with pleural plaques have no more risk of developing a disease. There may be a lack of evidence that the development of pleural plaques is more likely to lead to the development of other asbestos-related diseases and pleural plaques by themselves are benign and cannot change into cancer, but anyone with pleural plaques has been exposed to asbestos and, as such, is far more likely to develop another condition than those without pleural plaques. What pleural plaques illustrate is that a person has been exposed to asbestos either occupationally or environmentally and that the penetration of asbestos fibres has led to a physical change in the lining of the lungs. It is therefore an indicator that the person has a greater chance of developing an asbestos related disease, in particular mesothelioma, which is invariably fatal.

The consultation paper states that there is a "low risk" of developing an asbestos-related disease amongst those with pleural plaques. Even the most conservative estimates show that 5% will go on to develop a further disease, usually mesothelioma, and many in the field believe the real figure is much higher. However Pleural plaques are recognised by medical experts as a sign of irreversible damage to the lining of the lung caused by a history of exposure to asbestos which carries an increased risk of malignant diseases such as the deadly cancer mesothelioma. Even a 1 in 20 chance of developing a fatal disease can hardly be considered "low risk".

Q2: What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques.

The Law Lords were deciding on the case as the law stands and not on the justice of the claim. In their comments several of the Law Lords expressed their sympathy for the claimants. Those with Pleural Plaques have been negligently exposed to asbestos. Their body has undergone a physical change with the development of plaques in the pleura and some will experience physical symptoms. All however will have to live with the knowledge that they face the possibility of developing a fatal disease as a result of their exposure.

For the past 20 years there has been an expectation amongst those who worked with asbestos that they would be entitled to some form of compensation should they be diagnosed with pleural plaques, and insurance premiums and the costings of the insurance industry have been based on the assumption that they would continue to pay out.

The CWU notes the arguments advanced in the consultation paper against changing the law but does not accept that they cannot be overcome. In fact the Scottish Executive has already indicated that they are doing exactly that and there appears to be no legal impediment to a change per se. It would be inequitable should claimants in Scotland be able to claim for compensation while those in England and Wales will not. Separate laws would also cause difficulties for those workers who have been exposed through working in both Scotland and either England or Wales.

Q3: 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 give your reasons.

In the event of the government deciding that there is to be no change in the current law of negligence to overturn the House of Lords ruling, the CWU believes that the government must introduce a scheme to give financial compensation to those who are diagnosed with pleural plaques.

The rationale of this is given in the reply to the previous question. Which is basically there has been pathological damage and occupational exposure as a result of negligence. In addition a diagnosis of pleural plaques can be a matter of grave concern and stress to those with the condition.

We do however agree with the concerns expressed in the consultation paper that any scheme should not encourage anyone previously exposed to asbestos to routinely be subjected to a CT scan or X-ray in order to see if they have a claim. Any diagnosis should be a result of an examination carried out because of suspicion of a chest-related condition for which a CT scan or X-ray would normally be used.

Government would need to ensure that any scheme has low administrative costs. Were the payments to be made to any person with a medical diagnosis of pleural plaques automatically then there should be no routine medical and legal costs although there would need to be an appeals process at which the claimant would be entitled to Trade Union and legal representation.

As with recent changes to the mesothelioma compensation scheme claimants should not have to claim directly from their employer, show their employer is still trading or was insured, or prove an appropriate employment history. This would greatly reduce the administration costs.

Q4: If a no fault payment scheme were to be introduced:

a) Which of the above two schemes should be introduced?

We do not accept there is any rationale for restricting the application of any scheme to those diagnosed prior to 17 October 2007. Any scheme should cover all those exposed to asbestos who has a diagnosis of pleural plaques. To restrict claims to either those with a claim, or a diagnosis prior to 17th October 2007, would be unfair. Progression of the condition is very variable and two people may have been exposed at the same time but one could be diagnosed some ten or twenty years prior to the other.

Restricting claims to those with a claim or diagnosis of prior to 17th October would also benefit those who were aware of the availability of compensation.

b) What level of payment would be appropriate?

Up until 2006, anyone with 'Pleural Plaques' could claim asbestos compensation of up to £20,000 as a final settlement for their condition or £7,000 on a provisional basis. The CWU therefore believes that £5,000 should be a minimum payment paid under the scheme with higher awards for those with symptoms such as breathing difficulties and negative effects on their well-being or psychological distress. The compensation rates should be updated annually.

c) How should the scheme be funded?

Asbestos does not occur naturally in the UK and Pleural Plaques develop as a result of negligent exposure by employers. As such the cost should be borne by the employers directly or through their insurers.

d) What limitation period should apply for each option?

There should be no limitation period.

Impact Assessment.

The CWU believes that the figures used are 'highly' speculative, not based on substantial evidence and draw unrealistic conclusions based on inflated figures banded about by insurers with a vested interest. We believe as does the TUC that a much lower number of claims are likely. Pleural Plaques will be more common amongst those with higher and longer exposure to Asbestos. TUC research estimates at most between 100,000 and 200,000 cases are likely of which many will be undiagnosed. Figures of between 200,000 and 1.25 million have no basis in fact. Current recorded cases are around 900 per year. The Insurance Industry

argue that the cost would be around £25m a year whilst the TUC estimate the cost to more realistically be no more than £5.5m a year.

End.

September 2008

Dave Joyce

CWU National Health, Safety & Environment Officer

Communication Workers Union

150 The Broadway, Wimbledon, London SW19. 1RX.

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