



Health & Safety

# MATTERS

Health & Safety Information for GMB Safety Reps

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## Mesothelioma: Employers Liability “Trigger Issue” Litigation

### Introduction

On 21 November, there was a ruling made against the insurers of some six asbestos exposure cases in the High Court, these were seen as very important test cases and should determine the true meaning, and effect, of insurance policies which were sold to employers at a time when workers were being negligently exposed to asbestos. The trial on these cases finished on 31 July and there was a stressful period from the trial closure for those who might have been denied rightful compensation, including many cases which were “stayed” pending the outcome of this hearing.

### Background

Up until 2006, insurers had always accepted that their policies meant that an insurer covering a company at the time of exposure to asbestos would pay any claim for workers developing mesothelioma, even though the disease did not manifest until many decades later.

However, following a Court of Appeal decision on a Public Liability Insurance claim in 2006, a number of employer’s insurance companies decided to refuse to pay out on claims for mesothelioma. They argued, despite universal acceptance and legal custom and practice up until then of paying out on Employers Liability Insurance, that they were not now liable if the disease (in this case mesothelioma) developed long after the exposure, and after the insurance cover from that particular company had ended.

### What was the effect of that?

The main effect of this decision was that the Court of Appeal had to decide if the policy “trigger” was -

- (a) at the time of inhalation, and thus exposure, to the asbestos fibres, or
- (b) at the development of the mesothelioma tumour, some 30 or 40 years later.

The issue arising from this is that if it was point (b) that “triggered” the claim this would mean that in many cases sufferers would have no existing insurance company, or cover, against whom they could claim at the present time. The medical evidence at the trial

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suggested that '*at the time*' of inhalation and exposure to asbestos there is no injury, no disease, and that even if there was it was not actionable for a compensation claim (similar to the pleural plaques decision).

## **Interpretation of Insurance Policies**

The Court had to look at the interpretation of the policies, as a matter of law, which must be consistent with the factual background, the ordinary meaning of the words used in the policies and the commercial purpose of the insurance. The court also considered what Parliament had intended when it introduced the original Employers Liability Compulsory Insurance Act in 1969. This had required employers to insure and maintain insurance in relation to employee's bodily injury, disease and death and their ability to claim against this.

## **The Outcome**

The technical legal arguments the insurers used to avoid paying mesothelioma claims have been defeated for the time being. The court decided that injury is sustained when it is caused and disease contracted when it is caused and that employers are liable on the basis of the inhalation/exposure at the time the policy existed. It should not be forgotten in all of this that it is the health of human beings and their death that is the ultimate outcome from the exposure to the deadly disease. Two of the families concerned suffered the painful death of a relative in 2003 and the compensation has not yet been paid.

## **What happens now?**

Unfortunately, the insurance companies were granted leave to appeal against the judgement. This in itself is hardly surprising when it was revealed at the hearing by the director of one insurance company's that he was due a large bonus if the appeal succeeded, and that the company had set aside £90 million, which would have been "saved" by not paying out compensation to victims.

Ian McFall, head of asbestos litigation at Thompsons solicitors said, "The outcome is a good one for many asbestos victims and their families and a victory for fairness, justice and common sense". He is of course right, but not just yet! As we have seen in the case of the House of Lords and their decision not to grant compensation for pleural plaques, nothing within our legal system can be anticipated until we get the final judgement. Hopefully as the decision appears to be quite strongly argued, the final outcome will reinforce the decision of 21 November. In the meantime, the wait by the families for both justice and compensation goes on. If you want further information on this, please contact [tristan.chard@gmb.org.uk](mailto:tristan.chard@gmb.org.uk)

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