

Asbestos Disease Claims

A client's guide

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Essential elements for a successful claim

Duty of care

As with all personal injury claims, it is necessary to show that a duty of care was owed to you, the injured person, by the party who exposed you to asbestos.

If you have been exposed to asbestos as an employee in the course of your employment by an employer, there is usually no difficulty in showing that you were owed a duty of care.

Sometimes there is exposure to members of employees' families, for example as a result of breathing dust carried home on clothing and tools. Or you may have lived near to a factory manufacturing asbestos products. It is possible to show a duty of care in many such cases, but not always.

Breach of duty of care

It is usually possible to show that there was a breach of duty (negligence) in allowing the exposure to occur and doing little or nothing to prevent this.

Often particular duties will be specified in Acts of Parliament such as the Factories Acts and failure to comply with these will establish breaches of statutory duties.

Everything that you can tell us about the circumstances in which you were exposed to asbestos will help to prove the nature of these breaches of duty.

Damage

This is the physical injury that you have suffered. You will need to show that you suffer from an asbestos disease, so we will obtain a medical report. You may also be able to claim for other losses and expenses resulting from the asbestos disease such as loss of earnings. These items can be included as other "heads of damage".

Causation

We must prove that your asbestos disease has probably been caused by the party being sued (the defendant). Usually there is no difficulty about this, but problems may arise where there has been significant exposure to asbestos elsewhere e.g. with another employer who cannot be sued. You must satisfy the Court that the defendant has made a material contribution to your asbestos disease.

If you wish to claim for financial loss, you will need to prove that the losses have probably resulted from the asbestos disease. For example, if you are unable to work because of another unrelated medical condition you will not be able to claim loss of earnings as a result of the asbestos disease.

Limitation

There is a statutory limitation period of 3 years in which court action should be commenced. Usually, in asbestos disease cases, the period will run from the date on which you first knew you had an asbestos disease. The court has discretionary power to override this 3 year limitation period so it is worth discussing a possible claim even if you think you may be outside the period.

In a fatal case, the 3 year limit starts at the date of death or the date when the person bringing the claim on behalf of the deceased first knew of the asbestos disease. It is still very important to see a solicitor as soon after the event as possible whilst memories are fresh.

We will give you advice, if we think that limitation is likely to present a problem, and we will take action immediately if necessary to protect your position as far as possible.

What we will do

In some cases, we cannot say initially whether or not there will be a successful claim but we will advise if your case warrants further investigation. Our considerable experience of asbestos claims means that we are familiar with most of the thermal insulation companies, asbestos manufacturers, shipping lines and other employers which have been successfully sued in the past.

Funding the case

We will check to see if you have the benefit of legal expenses insurance through your household, car or credit card insurance. If you do we will contact your insurers to ask them to fund the claim. Otherwise, if we consider your case has a good chance of success we will act on a “No win, no fee” basis. This means we will not charge you if you lose the case. We will take out an insurance policy to cover the other sides fees if you lose the case. If you win you will be primarily responsible for our fees but we can recover all or the greater majority of these fees from the losing defendants on top of the damages. In most of our winning cases we recover all our fees from them. Sometimes if we cannot enter into a “No win, no fee” agreement at an early stage in the case we will ask for a small payment on account to cover investigation costs.

How to fund the claim will be fully explained to you in more detail at our first meeting.

Preliminary investigations

Initially, we will concentrate on gathering evidence to prove the essential elements mentioned in Section 1 above.

- We will see you to obtain a detailed statement. This must include as much as you are able to remember about the circumstances in which you were exposed to asbestos. Often this will mean trying to recall events that happened many years ago. We understand this is difficult but the success of your claim will largely depend on what you can tell us. The statement will also include details of how you found out about your asbestos disease and the effect this has on you.
- If you are suing an employer, we will write to the HM Revenue & Customs to obtain proof of your employment history. Any documents that you have to prove this will also help.
- We will contact any witnesses.
- We will obtain a medical report.
- If the prospective defendant is a limited company, then unless it is already well known to us we will carry out a company search at the Companies Registry and/or in our own extensive records.

What happens next?

In a simple case, we may be able to advise you at an early stage whether to pursue your claim by court action. In a complex case, further work may be necessary before we can do this.

As well as investigating whether you have a claim for an asbestos disease, we will consider the likely amount of damages that a court would award (the amount).

In many cases we will not seriously consider the amount of damages until the preliminary medical issues have been investigated, but we will always be able to give a broad outline advice about the main categories of damages at the beginning of the case.

The investigation into the value of your case may take some time and may involve expert accountants' evidence in complicated cases.

Once a decision has been taken by you to issue proceedings, certain steps must be taken in order to comply with court rules. The rules also place certain duties on you as well as on us, especially regarding documents and statements of truth. The main steps and duties are set out at the end of this leaflet. Please take time to read these carefully.

Final or provisional damages

Unfortunately, exposure to asbestos dust can give rise not only to diseases in the present, but also to the risk of serious asbestos-related diseases in the future. These will be indicated in your medical report in appropriate cases. You are entitled to compensation both for your current condition and for those future risks. The law gives you a choice as to how you claim this.

Final damages

If you claim final damages, you will receive compensation both for your current condition (including any loss of earnings and other expenses) and for the future risks. If you are fortunate enough not to develop any other asbestos disease and/or your present condition does not worsen, you will still have received a modest amount for those risks.

If you do develop any of the specified conditions, however, you will not be able to claim any further damages. This means that you would ultimately be under-compensated in respect of any such future risks.

Provisional damages

If you choose this type of claim, you will receive compensation only for your current asbestos disease. You will be entitled to claim further damages in the future if you develop any of the specified future risks.

This means that you would receive a smaller amount for the same asbestos disease now than if you were to claim final damages (because you do not receive anything for the future risks). However, if you develop a more serious asbestos disease in the future, you will be able to claim further damages to compensate you fully in respect of that.

Choice

It is for you to choose which type of claim you wish to pursue. In general, the younger the claimant and the more minor the disease, the more reason there is to claim provisional damages. There are less compelling reasons to claim provisional damages for older claimants who are already suffering significant disease. FFW puts the choice to its clients and lets them decide.

Commencing court action

In a simple case, we aim to issue proceedings as soon as possible after the 3 month period allowed to the defendants to carry out investigations (sooner in a mesothelioma case). In a complex case, it may take 12 to 18 months before the court action can be started.

We will consider whether the case should be issued in the High Court or in the County Court. Whatever the venue we will, with the help of a barrister and the medical experts, draw up the following documents -

- Particulars of Claim - this will set out the facts upon which your claim is based and the allegations of negligence and breaches of statutory duty which we intend to pursue.
- Schedule of Damages - this will set out the financial losses which have been incurred to date as a result of the asbestos disease. It will also include a broad outline of any likely future losses.
- a medical report on your present condition and prognosis.

It is usual for both the schedule of damages and the medical report to be updated as your case proceeds towards trial.

Interim payments

Once a court action has begun, and in rare circumstances before then, it may be possible to apply for an interim payment. This is an early payment of part of the damages that the defendants will be liable to pay. It may be substantial in cases where the final damages are likely to be high.

It will only be appropriate in cases which are likely to succeed, so that if there is a proper defence to your claim it will probably not be possible to apply for an interim payment.

Timetable of events

Once proceedings have been served, procedural steps have to be followed in order to progress your case to trial. The court procedural judge sets dates for exchange of witness statements, documents and experts reports and, in many cases, fixes a date for the hearing.

You will probably be invited to attend at least one conference with your barrister and solicitor before the trial in order to discuss various aspects of the case and the best way to proceed.

The case may either settle because the defendants make an acceptable offer of compensation or it may proceed to trial. The trial length varies depending on the complexity of the case. Some cases are split so that one hearing deals with liability and another deals with the amount of damages.

Before court action

What we must do

- Get a medical report.
- Collect evidence about any financial losses and/or expenses.
- Take a full statement from you.
- Obtain proof of your employment in a claim against employers.
- Contact witnesses.
- Notify your claim to the defendant and allow them 3 months to investigate (often less in mesothelioma cases).
- Advise you of any offer in settlement.
- Prepare the necessary documents to issue court proceedings if no acceptable offer is made.

What you must do

- Sign forms giving access to your medical records.
- Keep all receipts, P60s, accounts, etc. Sign consents for information about earnings and pensions.
- Check it carefully and tell us if it is not correct. Sign the statement of truth only if it is accurate.
- Keep any documents proving your employment history. Sign forms of consent for the HM Revenue & Customs and/or DSS.
- Provide names and addresses of witnesses to us.
- Inform us of any changes in your medical condition or financial circumstances which might affect the value of your claim.
- Give us your instructions reasonably promptly.
- Read the Claim Form and Particulars of Claim carefully to check the facts.

During court action

What we must do

- Advise you on any specific allegations or requests for further information made by the defendant.
- Prepare a formal list of all documents in your and our possession relevant to your claim including the sort of documents mentioned above.
- Advise you on the contents of any expert's report.
- Advise you on any offer to settle or payment into court.
- Inform you of the trial date and place.

What you must do

- Let us have your instructions promptly
- Check the list and sign it (only) if it is true. Send us all relevant documents which you still have.
- Inform us of any change in your medical condition or other matter relevant to the content of the report.
- Inform us of any change in your circumstances which might affect the value of your claim (medical or financial). Give us your instructions reasonably promptly.
- Confirm that you will be able to attend.

Dissolved companies

As an asbestos disease is usually not apparent until many years after the exposure to asbestos took place, it is often the case that a potential defendant company has been dissolved by then.

If the relevant insurers of the company can be traced, it is possible to make an application to the Court to restore the company so that it can be sued. We have been successful in doing this for many companies. Unfortunately, if those insurers cannot be traced, it will not be possible to pursue your claim against that company.

Pneumoconiosis etc. (Workers' Compensation) Act 1979

The Department for Work and Pensions administers a scheme that pays fixed amounts of compensation in cases where the relevant employer has ceased to trade. It is a requirement that an application for industrial injuries disablement benefit is or has been made before payment can be made under this Act.

Payments are made for diffuse pleural thickening, asbestosis, lung cancer if accompanied by asbestosis or diffuse pleural thickening, and for mesothelioma. The amounts are determined by reference to fixed scales according to your age and level of disability.

It is possible for widows and other dependants of people who have died from asbestos diseases to claim under this scheme. If you are paid a means tested state benefit such as Income Support, the amount of benefit you or your partner get may be affected if you receive a payment under this Act. Most other benefits you get will not be affected.

Financial Services Compensation Scheme (FSCS)

Most successful claims are paid not by the defendants themselves but by their insurers. If the insurance company becomes insolvent, the defendant will be liable to pay. The FSCS was set up to deal with cases where both the defendant and the insurer have become insolvent and are unable to meet the claim. In such cases the FSCS will pay. Where the claim was covered by compulsory insurance (e.g. employers' liability since 1972), the Scheme will pay 100%. Where the insurance was non-compulsory (e.g. employers' liability before 1972), 90% or sometimes slightly more of the remaining amount will be paid.

Where the relevant period of employment was with a nationalised industry, payment will normally be met by the Government.

Industrial Injuries Disablement Benefit

Most sufferers with an asbestos-related disability caused by employment (but not self employment) after 4 July 1948 will qualify for this benefit. Application is made through the DWP. A medical examination by their Medical Board is required, except in the case of mesothelioma where it is no longer necessary.

Benefit will not be awarded for diffuse pleural thickening if the Medical Board assesses the level of disability at less than 14%. Such an assessment does not necessarily mean that you cannot issue proceedings for an asbestos disease, or that you will not qualify for a payment under the 1979 Act. If you are paid a means tested state benefit such as Income Support, the amount you or your partner get may be affected if you receive industrial injuries disablement benefit. However, most benefits will not be affected.

War disablement pension

If you have an asbestos disease caused by exposure to asbestos in military service, whether in peace or wartime, you should claim a war disablement pension instead of industrial injuries disablement benefit. You can also claim a war pension for an asbestos disease if you were a civilian in HM Armed Forces.

Contacts



Rodney is head of the group. He has specialised in asbestos disease claims for over 25 years. A leading legal directory commented that Rodney has "achieved a fantastic amount for people with occupational diseases". In 2002, he received the Association of Personal Injury Lawyers' annual Award for Outstanding Achievement.

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Harminder is a Fellow of ILEX and APIL with over 15 years' experience and specialises in acting for victims of asbestos diseases. She has extensive trial experience having been involved in a multi-party test case, which concluded after a 6 week trial. Her cases have featured in the Law Reports.

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