

# Fatal Asbestos Claims

A guide to compensation

Autumn 2008

We are solicitors who specialise in fatal asbestos claims. Over the past 20 years we have helped hundreds of families recover compensation.

What our clients say about us:

Gloria Adams wrote in respect of her claim for compensation for her husband's illness:

“To have the case brought to a mutual agreement out of Court is a great relief and I feel I can now put a close to the fight for justice. You have throughout handled the situation in a most professional manner whilst at the same time taking into consideration my personal feelings of grief. Rest assured I will have no doubt in personally recommending you and the company to anyone I may encounter requiring similar assistance in the future.”



## With over 20 years of assisting sufferers of asbestos disease, we are leaders in asbestos disease claims

Our team is renowned for their experience in dealing with asbestos disease claims. In total, we have recovered £100 million in over 1,800 successful cases.

We have been involved in two of the most recent important court cases involving fatal asbestos disease.

### Fairchild, Fox & Matthews

In the Court of Appeal, the insurance industry successfully argued that where a mesothelioma sufferer had worked with asbestos for two or more employers, he could not recover compensation because he could not show in which employment the fatal fibre(s) had been inhaled. This could have effectively barred the right to compensation for the majority of mesothelioma patients.

In January 2002, FFW Partner Rodney Nelson-Jones was invited to join the legal team acting on behalf of Mrs Fox and Mr Matthews to appeal to the House of Lords. Rodney worked intensively for four months, producing five major briefing papers for Sir Sydney Kentridge QC, and happily the Court of Appeal decision was overturned by the House of Lords thus restoring the rights to patients to claim for compensation.

### APIL Award

In October 2002, Rodney Nelson-Jones was presented with the APIL (Association of Personal Injury Lawyers) award for outstanding achievement at the House of Commons in recognition for the tremendous work done by him over the past 25 years for sufferers of asbestos disease.



Rodney Nelson-Jones being presented with his award by Andrew Dismore M.P.

## Fund raising event for mesothelioma research

We at Field Fisher Waterhouse were pleased to support St Barts research to find a cure for mesothelioma.

The event raised £22,000 for the Barts Mesothelioma Research Fund. The research directors are Dr Jeremy Steele and Dr Robin Rudd.

The event took place on 25th November 2006 in the Great Hall at St Bartholomew's Hospital and the guests were entertained by Siren, one of Europe's most versatile string quartets.

The event was organised by a committee, co-chaired by Harminder Bains of Field Fisher Waterhouse. Harminder is only too aware of the need to find a cure for mesothelioma as her own father died from it.



Photo shows Dr Jeremy Steele, Astero Klabasta, Mark Langley, Adam Dawson, Harminder Bains and Harry Steinberg

## Mesothelioma Research

In addition to raising funds for Bart's Mesothelioma Research, Field Fisher Waterhouse has designed and set up their website. This can be accessed at [www.mesothelioma.co.uk](http://www.mesothelioma.co.uk).

In September 2005, we sponsored the 1st Bart's International Mesothelioma Symposium. This was a one-day event focusing on the clinical and research aspects of malignant mesothelioma. Speakers from the USA, Belgium, Northern Ireland and England gave presentations about their research. Over 120 specialist doctors and nurses attended.



## Asbestosis

Occasionally men still die due to asbestosis, i.e. scarring of the lungs, which in severe cases causes extreme breathlessness and makes them more vulnerable to death from other conditions such as pneumonia. Much more often, however, sufferers die from lung cancer or mesothelioma.

## Lung Cancer

Lung cancer can be caused by a variety of agents, the most well known of which is, of course, smoking. The link between asbestos inhalation and lung cancer is also well known. If a sufferer had lung fibrosis and a history of substantial exposure to asbestos dust, this is readily diagnosed as asbestosis even if he had also been a smoker. The DSS also awards disablement benefit if lung cancer is accompanied by asbestosis.

Lung cancer with asbestosis is regarded as an “all or nothing” disease in the same way as mesothelioma. The approach which the courts have adopted in multi-defendant cases has been the same as that with mesothelioma, namely to find that each defendant which unlawfully exposed the deceased to asbestos dust is liable to pay his compensation in full.

If the deceased had lung cancer, had been a smoker, and had been exposed to asbestos but did not have asbestosis, some courts have held that the lung cancer is attributable to smoking rather than to exposure to asbestos. The decided cases on this issue are about ten years old, and medical knowledge since then has strengthened the link between exposure to asbestos dust and lung cancer. We have achieved out-of-court settlements in lung cancer cases where there is no asbestosis. There is a good chance of success where the deceased continually breathed substantial quantities of asbestos over periods of two years or more.

## Mesothelioma

Malignant mesothelioma is a type of cancer which arises in the lining around the lung, or less commonly in the abdomen. Most sufferers die within a year of diagnosis. Most cases of mesothelioma are caused by exposure to asbestos fibres many years previously, although in about 10% of cases no exposure can be identified and the tumour appears to occur spontaneously. The incidence of mesothelioma is rising rapidly. Currently there are about 1,800 new cases a year in the UK and our death toll is expected to reach more than 2,450 a year between 2011 and 2015.

Field Fisher Waterhouse has recovered compensation in mesothelioma cases of asbestos exposure arising out of numerous occupations, such as:

- Factory workers
- Shipyard workers
- Ladders
- Boiler platers
- Plumbers
- Maintenance workers
- Welders
- Builders' labourers
- Fitters
- Dockers
- Electricians
- Carpenters

In addition, we have sometimes succeeded on behalf of neighbours living near asbestos factories as well as wives and children of men who have breathed asbestos at home from dust on their husband's or father's working clothes.

## Types of claim

When someone dies due to asbestosis, lung cancer or mesothelioma, this gives rise to two types of claim.

The first is for the victim's pain and suffering and financial loss and expense during his terminal illness. If he left a will, this part of the compensation passes according to the terms of the will. If there was no will, there are laws governing how family members will inherit.

The second is for dependency on the deceased's earnings and pensions and on his services around the house and garden etc. This part of the compensation goes to the family members, typically the widow and children, who were dependent on him. Although most victims of asbestos are men, sometimes the positions are reversed and a widower recovers compensation for the death of his wife.

The two types of compensation are added to each other. Court action must be commenced in the name of the executor or administrator of the victim's estate.

## 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 the injured person, by the party who exposed him to asbestos.

If he had been exposed to asbestos as an employee in the course of his employment by an employer, there is usually no difficulty in showing that he was owed a duty of care in those circumstances.

Sometimes there is exposure to members of an employee's family, for example as a result of dust carried home on clothing and tools. Or someone 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 show breaches of statutory duties.

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

### Damage

This is the physical injury and death that he suffered. You will need to prove that the deceased suffered from an asbestos disease and a medical report will be obtained to confirm this. Compensation will be awarded for the deceased's pain and suffering and the financial losses and expenses that resulted from his disease and death.

## Causation

You must prove that his asbestos disease was at least 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 asbestos exposure with the defendant has made a significant contribution to his disease and death.

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

## When you should claim

There is a statutory limitation period of 3 years within which court action should be commenced. In a fatal case, the 3-year limit starts at the date of death or the date when the person bringing the claim on the part of the deceased first knew of the asbestos disease. If the deceased had known of the disease for more than 3 years before his death and had failed to claim, this operates to statute bar the claim as well.

However, the court has discretionary power to override this 3-year time limit, so it is worth discussing a possible claim even if you think that you may be outside the limit.

We will advise you if we think that limitation is likely to be a problem, and if appropriate we will take action immediately 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 indicate 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 who have been successfully sued in the past.

## No win, no fee agreements

Most cases are now funded by “no win no fee” agreements. If we think your case has reasonable chance of success, we will act for you under a “no win no fee” agreement. This means we are able to deal with most cases with **no financial risk** to clients.

The way in which we are able to do this is fairly complex, but it does give our clients financial protection and peace of mind.

For more details, please see our guide to no win, no fee agreements.

## Preliminary investigations

Initially, we will concentrate on gathering evidence to prove the essential elements mentioned at 2 above.

- If you are suing an employer, we will write to the HM Revenue & Customs to obtain proof of the deceased employment history. Any documents that you have to prove this will also help.

- We will contact any witnesses. These are particularly helpful in fatal cases. However, sometimes our knowledge of working practices in different industries enables us to win a case without them.
- We will obtain the inquest notes of evidence, medical records and a report from a medical expert.
- 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.
- If court action is appropriate, we will make sure that there is a grant of probate or letter of administration.

## Inquests

Coroners are obliged to hold inquests where there is reason to suspect that a death was due to industrial disease. Usually the coroner opens the inquest and adjourns it for further post-mortem (e.g. histological analysis), and fixes a final date of hearing for the inquest when this is available. Coroners are skilled and sympathetic in conducting inquests, so it is seldom necessary for the family to be legally represented at these hearings.

Coroners verdicts are not binding on High Court judges. Therefore, even if a verdict of death due to natural causes is eventually returned at the inquest, it is possible to obtain and rely on other medical expert evidence in subsequent civil proceedings.

## 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 proceedings. In a complex case, further work may be necessary before this can be done.

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

In many cases we will not seriously consider quantum of damages until the preliminary medical issues have been investigated, but we will always be able to give a broad outline advice giving you the "heads of damage" at the beginning of the case.

The investigation into the amount of compensation may take some time and can involve expert accountants' evidence in complicated cases including self-employed people.

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.

## Commencing court action

In a simple case, we aim to issue proceedings within 6-12 months of your instructing us. In a complex case, it may take 1-2 years before the court action can be started.

Almost all fatal claims are issued in the High Court. With the help of a barrister and the medical experts, we 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 duty which we intend to pursue in court on your behalf
- schedule of damages — this will set out the losses which have been incurred to date as a result of the asbestot disease and death. It will also include a broad outline of any likely future losses.
- a medical report on the progression of the asbestos disease and the cause of death.

It is usual for the schedule of damages 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 realistic defence to your claim it will probably not be possible to apply for an interim payment.

## Timetable of events

Once proceedings have been served, a timetable of events begins in order to progress your case to trial. A High Court Master will stipulate the steps to be taken before any hearing.

There is usually at least one meeting 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 on the deceased.
- Collect evidence about any financial losses and/or expenses.
- Take a full statement from you.
- Obtain proof of the deceased's employment (in a claim against employers).
- Contact witnesses who worked with him.
- Notify your claim to the other side and allow them 3 months to investigate.
- Advise you of any offer in settlement.
- Prepare the court documents to issue court proceedings if no acceptable offer is made.
- Obtain a grant of probate or letters of administration.

### What you must do

- Sign forms giving access to his medical records.
- Keep all receipts, P60s, accounts, etc. Sign consent for information about earnings and pensions.
- Check this carefully and tell us if it is not correct, sign the statement of truth (only) if it is correct.
- Keep any documents proving his employment history. Sign forms of consent for the Inland Revenue and/or DSS.
- Provide names and addresses to us.
- Answer any requests for further information.
- Give us your instructions reasonably promptly.
- Read the claim form and particulars of claim carefully to check the facts (we will check the legal breaches of statute, etc.).
- Supply the necessary information to our private client department or your local solicitors.

## During court action

### What we must do

- Advise you on any specific allegations or requests for further information.
- Prepare a formal list of all documents in your (or 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 other matter relevant to the content of the report.
- 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, it is often the case that a potential defendant company has been dissolved. This means that the company no longer exists and cannot be sued.

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 with many companies. Unfortunately, if the insurers cannot be traced, it will not be possible to bring any proceedings against that company to recover damages for your asbestos disease.

If the insurers as well as the company are insolvent, compensation can nevertheless be recovered under the Financial Services Compensation Scheme. If the deceased's asbestos exposure ended before 1972, however, this will only be 90% of the value of the claim.

## **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 has been made before payment can be made under this Act.

Payments are made for diffuse pleural thickening, asbestosis, lung cancer accompanied by asbestosis or diffuse pleural thickening and mesothelioma.

The amounts are determined by reference to fixed scales according to the 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.

## **Industrial Injuries Disablement Benefit**

A surviving spouse can claim for this benefit within 12 months from the date of issue of the final death certificate. The benefit is paid for a maximum of 3 months disablement up to the date of death.

## **War widow(er)'s pension**

If the sufferer died due to asbestos disease caused by military service, whether in peace or wartime, you should claim a war widow(er)'s pension from the Veterans' Agency.

The surviving spouse may also be eligible for certain further benefits from the Agency: for example, help with funeral costs or rent allowance.

## Notes

## 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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Peter has specialised in asbestos-related disease claims since he joined the team in 1993. He gives annual talks to solicitors on asbestos claims for Central Law training. He is a member of the Law Society Personal Injury Panel.

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Andrew has specialised in cases involving industrial diseases including asbestos diseases since 1993. He is Coordinator of the Occupational Health Group of the Association of Personal Injury Lawyers and an APIL Fellow. He advises the Parliamentary Sub-Committee on Asbestos.

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Michael has acted solely on behalf of sufferers of asbestos diseases and their families since joining the firm in March 1996. He is a member of the Steering Group for the British Lung Foundation's mesothelioma awareness campaign and an APIL Fellow.

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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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