



Unite the Union response to Ministry of Justice Consultation Paper 14/08

PLEURAL PLAQUES

To: pleuralplaquesconsultation@justice.gsi.gov.uk

This response is submitted by Unite the Union. Unite is the UK's largest trade union with 2 million members across the private and public sectors. Our members work in a range of sectors including manufacturing, financial services, print, media, construction, transport, local government, education and not for profit.

A substantial proportion of Unite's current membership has been exposed to asbestos and past members of our predecessor unions have been exposed in large numbers. Many have suffered and died as a result.

Unite the union has pursued many claims for damages, including a number of ground breaking cases.

Unite supported Kenneth Johnston throughout the challenge by the insurance industry before the House of Lords decision on 17 October 2007 lead to this consultation. The effect on him and hundreds of other members whose cases were stayed was devastating and it has left the union facing a potential liability for the insurance industry's legal costs of several million pounds.

Executive Summary

1. Unite the union believes the real cause of pleural plaques is the widespread and indiscriminate use of asbestos in many industries until the early 1980s, and the continued use of chrysotile until its EU ban in 1999, coupled with the failure by employers to protect workers negligently and in breach of legislation going back to 1901. Those in society unfortunate enough to suffer from occupational-inflicted diseases caused the actions and failures of their employers' others' negligence or breach of duty should receive compensation.

2. The "fundamental integrity of the law of negligence" is not sacrosanct. Further explanation is provided below. Even their Lordships have developed and restricted the law of negligence, often for "policy" reasons.

3. For almost 20 years insurers did not perceive there was an issue that the appeal courts needed to address in relation to compensation claims by those with pleural plaques, during which time the entitlement to compensation for pleural plaques was generally accepted and paid.

4. The sums of money referred to in relation to the impact assessment of overturning the effect of the House of Lords decision are not a cost, but amount to the saving to the insurance industry from 17 October 2007.

5. Pleural plaques, which are dose related, constitute a "long tail disease" of limited duration. By 2020 the number of cases is expected to begin to decline over time to almost zero.

6. Even a 1 in 20 chance of developing a fatal disease can hardly be considered "low risk".

7. Unite has 200,000 members in Scotland. The union respects the recognition that "The Scottish Government's interest and duty is in doing what is the best for the people of Scotland" and supports its intention to ensure that those with pleural

plaques continue to receive adequate compensation. Unite expects no less from the Government in Westminster.

8. Unite strongly believes that justice demands there should be legislation to overturn the effect of the House of Lords decision. Failing that, there should be provision for a no-fault scheme for compensation for pleural plaques in addition to legislation requiring the insurance industry to fund a satisfactory scheme to mirror the Motor Insurance Bureau covering any failure in relation to employers' liability compulsory insurance.

The Questionnaire

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

9. Yes. However, this is certainly not the solution to the problem caused by their Lordships' judgment. Raising awareness is action that should be taken in any event.

10. Unite the union expects its' lawyers and our members physicians to use their endeavours to reduce the distress caused by a diagnosis of pleural plaques. A measure of our members' anxiety for the future is that, when compensation was available, substantially more of them elected to accept provisional damages awards than final settlements.

11. Our members with pleural plaques and their families continue to have very real anxiety. Often they know of friends whose funerals they have attended who have suffered a rapid and dramatic decline to an inevitable death. Our members with pleural plaques are on borrowed time. This is unique to asbestos disease. A leaflet will not prevent this.

12. Dr Robin Rudd, the foremost expert in this field, advised the Scottish Justice Committee on 11 September 2008 that whilst "It has been suggested that the anxiety is a result of lack of information about the true nature of plaques and that all that is needed to dispel anxiety is a full explanation" in his view this lack of information is "not responsible for all or even most of the anxiety." He explains "Explanation that the future risks arise from the asbestos exposure which caused the plaques and not from the plaques themselves is a fine distinction that means little to the person without scientific training. It is the discovery of the plaques that has lead to the situation in which an explanation of the future risks is necessary."

13. Unite has historically been heavily involved in initiatives to raise awareness on asbestos issues, and the union is currently running a joint campaign with the Health & Safety Executive on prevention from exposure. Therefore, Unite would expect to be part of any development of this initiative and would be prepared to require its' lawyers to comply.

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

14. Unite the union believes that it is appropriate to overturn the effect of the House of Lords decision. This is not a question of challenging the “fundamental integrity of the law of negligence”. It is not a question of challenging the rights of – often defunct – employers and other potential defendants to a fair trial.

15. Preserving the position since 17 October 2007, is in reality a matter of protecting the subrogated rights of insurers exercised in the interests of their current shareholders and against the interests of those who worked in industry and who were negligently or recklessly exposed to substantial quantities of airborne asbestos fibres, when they should not have been exposed to inhalation of asbestos fibres at all.

16. Unite the union favours new legislation that provides that those who have been exposed to asbestos negligently or in breach of the raft of relevant statutory duties going back to 1901 with the result that they have developed pleural plaques should have the opportunity to receive appropriate representation at no cost to them to establish a right to compensation and the option to make a further claim if they suffer significant deterioration due to asbestos related disease.

17. No-one could have predicted the outcome of the Lords decision in Johnston with certainty. Simon Brown J decided in *Patterson v MoD* [(1987) CLY 1194] that pleural plaques should be compensated based on the “aggregation theory” which the law Lords rejected. Simon Brown was subsequently elevated to be a Law Lord. Had he been the arbiter in the House of Lords would he have decided differently?

18. Real people are not interested in Judges “dancing on the head of a pin” to preserve their precious principles. Principles that it seems the judiciary can depart from when it suits. In the Judgment of 17 October 2007 their Lordships were obliged to consider the approach of the law of negligence in relation to mental injury. This is an example of an area in relation to which the Lords have adopted arbitrary limits and other concepts as a matter of “policy”, which diverge from the basic principles of the law of negligence.

19. In the Law Commission Report on Liability for Psychiatric Illness ([http://www.lawcom.gov.uk/docs/lc249\(1\).pdf](http://www.lawcom.gov.uk/docs/lc249(1).pdf)), the Commission recommends - and indeed drafts - legislation to counter problems created by decisions of the House of Lords.

20. Reversing the effect of their Lordships Judgments is not unknown in other areas of law. One recent example springs to mind – that relating to the anonymity of witnesses (see http://news.bbc.co.uk/1/hi/uk_politics/7487870.stm).

21. Even a 1 in 20 chance of developing a fatal disease can hardly be considered “low risk”. It is not a “disproportionate” response – as the insurance industry would have it and the consultation paper accepts – to act to recognise the seriousness of the condition by permitting payment of proper compensation, or creating a register.

22. Indeed the insurance industry operates the Motor Insurance Database and justifies the need for the database to deal with precisely that 1 in 20 chance. They “estimated one in every twenty cars on the road being driven without insurance”. (See <http://www.miic.org.uk/index.html>).

23. Further, in relation to pleural plaques we are concerned with damage to bodily integrity caused by exposure to quantities of airborne asbestos fibres sufficient for those with plaques to know that they have a chance – significant to those with being diagnosed – of developing serious and deadly disease. Being diagnosed with the physical damage that plaques represent is entirely different from a person who does not have pleural plaques being aware that they were exposed to asbestos in the past.

24. People born in the 1940's who were heavily exposed to asbestos have less of a chance of developing a more serious asbestos related disease than those diagnosed with pleural plaques.

25. Anxiety aside, we are already seeing how that measure of damage can preclude people from obtaining employment (see paragraph 36 below) and preclude people from obtaining certain types of insurance, or result in a higher premium. This “blight” has the potential to affect many diagnosed with plaques. The 1 in 20 chance is clearly seen as significant by the insurance industry in this context.

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, please give your reasons.

26. The response is constrained as the consultation paper is very short on detail.

27. “No fault” systems of compensation have failed victims throughout the world and in the UK. In the UK from the Industrial Injuries Disablement Benefit system implemented in 1948 to the Criminal Injuries Compensation Scheme have been undermined since their inception. “No fault” systems of compensation, for example, in Australia and in New Zealand have also collapsed or otherwise failed victims. Political decisions under pressure to save money are the causes of such failures.

28. However, if the effect of the House of Lords decision is not to be overturned and it is intended to create a system for recovery of independently assessed and inflation proofed “compensation” for those who diagnosed with pleural plaques without the need to establish liability or identify the tortfeasor, at no cost to the victim, then Unite would be in favour of such a scheme in the interests of its members and their families. Unite would be more than willing to contribute its views to the development and success of such a scheme.

29. Any scheme must be retrospective at least to the extent that no-one loses out as a consequence of the cases of Johnston et al.

30. Such a scheme should include settlements for those employed by Federal-Mogul and others in a similar position. Adrian Cowley is one such member. In April 2000 he approached the union for support and a claim was made in July 2000 to Federal-Mogul. In July 2001, those representing Federal-Mogul said they would pay damages. In October 2001, Federal Mogul went into administration. In 2006 an employers’ liability scheme was approved by the court that Adrian and others could apply to. By then payments in plaques cases were being refused pending the outcome of Johnston and others.

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

a) which of the above two schemes should be introduced, and why?

31. A scheme which is limited to cover only those who have been diagnosed with pleural plaques, or made a claim prior to the 17 October 2007 is illogical and is not supported by Unite.

32. Such a proposal fails to appreciate that the decision by the Lords on the 17 October 2007 was to the effect that it was always wrong – in law – to award anyone with pleural plaques one penny. The thousands of those whose claims were settled and the subject of judicial determination since 7 March 1984 (Church v MOD) should not have succeeded according to the Judgment of 17 October 2007. Those who have a provisional damages award before the House of Lords decision can still claim further damages if they develop serious deterioration, which, in the case of mesothelioma will certainly kill them.

b) what level of payment would be appropriate?

33. The level of damages for personal injury generally is too low. The Law Commission agrees (see Law Commission Report 257 <http://www.lawcom.gov.uk/docs/lc257.pdf>). The Judicial Studies Board has assessed a level of damages. The courts have expressed a view in the context of Johnston et al as to an appropriate level of compensation.

34. Unite believes that society should consider these issues. Perhaps the representative of FOIL (Federation of Insurance Lawyers) who declared that plaques were “a good thing” may be asked how much she would pay not to have pleural plaques.(See http://www.theherald.co.uk/news/news/display.var.2439199.0.MSPs_attack_lawyer_on_claim_asbestos_plaques_are_good.php).

35. At least £5,000 would be likely to be acceptable as a standard interim award without medical evidence, if the award is index linked and adequate provision is made

for higher awards to reflect suffering supported by medical verification including for anxiety and other mental injury.

36. Adequate provision should be made for those who suffer financial loss. Unite has experience of members who were to work abroad under lucrative contracts, but who were later rejected following a medical that showed pleural plaques. Such members can no longer recover for their loss after 17 October 2007. Provision for recovery of financial loss should include that associated with higher insurance premiums for life cover or health insurance and the like.

c) how should the scheme be funded?

37. Unite strongly believes that is right that employers and their insurers should pay in full. Alternatives should be the subject of further consultation, including Government funding to reflect the historical employers' liability of Government departments in the former nationalised industries.

38. Anything less results in claimants, their representatives and supporters paying for the consequences of the widespread and indiscriminate use of asbestos in many industries until the early 1980s and a failure by employers to protect workers.

d) what limitation period should apply for each option?

39. There is no good reason to limit claims by dint of time. At least three years from the date of requisite knowledge – with provision for discretion – continues to be considered appropriate for other personal injury cases.

Impact Assessment

40. The first thing to be aware of in relation to the impact assessment in monetary terms, is that the cost of reversal of the House of Lords decision is equivalent to the saving to insurers and employers from the decision. Anything less than reversal still gives a substantial saving to the insurers and employers which is the cost in monetary terms of a new scheme deducted from the monetary impact of reversal.

Q5: Do you have any estimates regarding:

a) the number of people currently diagnosed with pleural plaques?

41. Pleural plaques, which are dose related, constitute a “long tail disease” of limited duration. In 10 years the number of cases is expected over time to decline to almost zero. The records and analysis by insurers *of their existing claims* and the epidemiological evidence and research by those at Stirling University and others provide reasonably accurate predictions, which are not reflected in the consultation paper.

42. Unite the union is concerned about “wild speculation” by the insurance industry regarding the potential number of cases. This speculation – including numbers based on an increased use of scan vans” – is used by the insurers to suggest figures to deter a just response to this issue. The speculation is explained in evidence given to the Scottish Justice Committee, for example on 2 September 2008 (see <http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-1902.htm>).

b) the future number of people who will develop pleural plaques?

43. See answer to Q5 a)

Q6: Do you have any estimates regarding the future distribution of pleural plaques cases, including the period of time over which people will develop pleural plaques?

44. See answer to Q5 a)

Q7: Do you have any estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation?

45. The records and analysis by insurers and the epidemiological research can help provide reasonably accurate predictions, which are not reflected in the consultation paper.

Other issues

Medical evidence

46. In relation to pleural plaques, the medical evidence has not changed substantially over time and is not expected to change. The Industrial Injuries Advisory Board will not change its view in relation to disablement benefit. It is not in the nature of disablement benefit for it to be extended to such a disease.

“Scan Vans”

47. Unite the union considers that the Ionising Radiation (Medical Exposure) Regulations 2000 and the Justification of Practices Involving Ionising Radiation Regulations 2004 should be further considered to make it clear to those who arrange for or carry out x-rays or scans to identify potential asymptomatic conditions for the purposes of making a claim that they are committing a criminal offence.

48. Further, rules should be put in place to prevent such evidence being used in support of any claim.

An equivalent to the Motor Insurers' Bureau

49. The insurers have sought to argue that there is no precedent for an insurance funded compensation scheme. “The MIB was established in 1946 as a private company limited by guarantee for the purpose of entering into Agreements with the Government to compensate the victims of negligent uninsured and untraced motorists.” (See <http://www.mib.org.uk/Default.htm>.)

The insurers took this step “voluntarily” to avoid legislation to provide for national (state operated) compulsory road traffic insurance.

50. It was not until 1974 that legislation required every insurer underwriting compulsory motor insurance to be a member of MIB and to contribute to its funding. This compulsion is not a prerequisite for the existence of the scheme to provide proper compensation to those injured on the roads by untraced or uninsured drivers.

51. The desirability of and justification for compulsory motor insurance and employer's liability compulsory insurance is the same. The problems associated with a failure to have traceable or effective insurance cover are analogous.

52. An Employers Liability Insurance Bureau would benefit all those who could not otherwise claim as a result of a failure by an employer to have in place compulsory insurance, or a failure to trace an insurer. Such a Bureau should also provide interim awards for those diagnosed with pleural plaques.

53. Prior to the Employers' Liability (Compulsory Insurance) Act 1969 the unions argued for compulsory insurance, but the employers' side sought to argue that compulsion was unnecessary as 90% of employers had insurance. They also argued on that basis that an Employers Liability Insurance Bureau was not needed. The current insurance industry voluntary tracing agreement only has a 30% success rate.

54. This would solve a number of problems and injustices, including the need for an EL insurance database, the retention of insurance certificates and the “trigger” issue being fought through the courts at present.

Conclusion

55. Unite the union is prepared to be an enthusiastic participant in relation to further steps towards a remedy for the injustices caused by the House of Lords decisions and other injustices caused by a lack of effective insurance cover to pay appropriate compensation to those adversely affected by the negligence and breach of duty by employers and others.

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Appendix – A Case Study – The Human Impact of Pleural Plaques

Mr. Ron Marsh – a unique experience: one of thousands

Mr. Marsh had been diagnosed with pleural plaques after a drawn-out process following a routine, unrelated operation. X-rays revealed a shadowing of the lungs which his GP later referred to as pulmonary fibrosis. It wasn't until Mr. Marsh later moved that a visit to the Chest Specialist at the local hospital confirmed pleural plaques which were a marker for asbestos exposure.

Mr. Marsh had worked since his early twenties to retirement age in white collar employment but during his teenage years in the late 1950s / early 1960s he had worked in an iron foundry. Employed as a labourer he routinely handled and cut asbestos sheeting without any protective equipment. In his 50s, Mr. Marsh recognised he was becoming increasingly breathless as maintaining his active lifestyle became more difficult. It wasn't until the diagnosis of pleural plaques was made that the pieces came together.

Mr. Marsh was able to carry-on his occupation until retirement but the seeds of anxiety were sown: "Pleural Plaques is a time-bomb. The Doctor could call me tomorrow to tell me I have mesothelioma and sufferers have to live with that prospect every minute of every day. It's undoubtedly deteriorated my quality of life – I'm more worried, anxious, lethargic...my health is poorer."