

# Asbestos related lung cancer and the apportionment of liability

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The question of how the courts should approach causation in a claim for asbestos-related lung cancer was considered by the Court of Appeal in *Heneghan v Manchester Dry Docks Ltd and others*, the judgment in which was handed down on 15 February 2016.

If the condition developed by the late Mr Heneghan had been mesothelioma, each employer which had exposed him to asbestos could have been pursued for the entirety of his claim pursuant to s.3 of the Compensation Act 2006. Accordingly, while his Estate was only able to pursue the employers responsible for 35.2% of his exposure, it would have recovered in full in a mesothelioma claim. However, this was a claim for lung cancer, not mesothelioma.

The medical evidence indicated that, whilst he was a smoker, Mr Heneghan would not have developed lung cancer if he had not been exposed to asbestos. It also indicated that the exposure to asbestos by all of the pursued employers more than doubled the risk of his contracting the cancer. However, it could not be proven that the exposure by any one of the Defendants had doubled that risk.

Before the implementation of the Compensation Act, in accordance with *Fairchild v Glenhaven Funeral Services Ltd* (which determined that proof an employer had materially contributed to the risk of developing mesothelioma was sufficient to satisfy the causal requirement for that employer to meet the claim) and following *Barker v Corus UK Ltd*, each Defendant would have been liable in proportion to its own contribution to the exposure. The position in relation to mesothelioma was changed by the Compensation Act but the question remained as to the position in relation to lung cancer which, like mesothelioma, is viewed by the courts as indivisible.

In *Heneghan*, the lead judgment was given by the Master of the Rolls who concluded that, as all of the Defendants had materially contributed to the risk of Mr Heneghan contracting lung cancer, the causation test was satisfied. However, as the evidence did not indicate that any one of the Defendants alone had doubled the risk of him developing the condition (and thereby made a material contribution) the Defendants should each contribute to the damages based on their proportionate period of exposure. His Estate's recovery was therefore restricted to 35.2% of the value of the claim.

Accordingly, the common law position remains in claims for the indivisible condition of asbestos-related lung cancer and, in the absence of evidence that an individual Defendant has more than doubled the risk of developing the condition, *Holtby v Brigham & Cowan (Hull) Ltd* discounts for unpursued periods of exposure should remain available to Defendants and their insurers.

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