

Keoghs Client ALERT

4 August 2017

Asbestos Lung Cancer and Contributory Negligence Blackmore v Department for Communities and Local Government 2017 EWCA Civ 1136

The Court of Appeal has upheld a finding of **30%** contributory negligence for smoking in an asbestos lung cancer case. The way it did so has big implications.

The case

Mr Blackmore smoked 20 cigarettes a day for around 40 years. He was also exposed to 'significant' asbestos from stripping pipework. He contracted lung cancer from which he died in 2010.

The defendant conceded primary causation on the basis that the asbestos exposure had more than doubled the risk of cancer. The first instance court found that the smoking was a significantly greater contributor to the risk of cancer than the asbestos.

The defendant argued that:

1. Contributory negligence findings should closely reflect the much greater causative role of smoking, and result in a much higher deduction.
2. The *Heneghan* case on lung cancer causation created an anomaly to the disadvantage of single employers - as multiple employers were only liable to the extent of their contribution to the risk of cancer.

The Court of Appeal rejected these arguments, answering:

- Contributory negligence should reflect both causation and degree of fault. The defendant's breaches of statutory duty were contrary to Parliament's decision to impose responsibility on employers to prevent exposure to asbestos. Mr Blackmore's continued smoking was less blameworthy, and some of it occurred before the risks were generally known.
- This was a false analogy. The fact that each defendant under *Heneghan* is liable only to the extent of their contribution to the risk meant that questions of contributory negligence just did not arise. If this is correct as simply stated, it has a dramatic effect.

What this means for insurers

Finding 1

This decision should fix contributory negligence for smoking at **30%** - as against the **15** and **20%** found in earlier cases. Indeed, **30%** should reflect the high water mark for claimants, if 'fault' is such a major component.

It is difficult to see that any defendant would be more 'at fault' than this very large and well resourced employer.

By contrast, different claimants may be more blameworthy. Mr Blackmore had twice tried to give up smoking. Many do not.

Much of his smoking had already occurred by the time of his employment. That will not be the case with all claimants.

This crucial importance of blameworthiness must also mean that variations in asbestos exposure and smoking shouldn't make any difference. These would only change the causative factors, which the Court of Appeal tells us are much less important.

All of this should mean that **30%** should be the least that defendants can apply in asbestos lung cancer claims. In cases with, say, small employers and repeated unheeded medical advice to give up smoking, the deductions could be markedly higher.

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Finding 2

If this is correct, it has a dramatic effect on cases where employers are only found liable by *Barker/Heneghan* principles. If each employer is only liable to the extent of their contribution to the risk (taking the risk from smoking into account) these defendants would pay only minimal damages.

Applying the risk factors found in *Blackmore* to the divisible contributions found in *Heneghan* would have led to the latter claimant recovering around £12,000 instead of the £61,600 he actually received. At these figures, multiple exposer asbestos lung cancer cases will simply not be worth pursuing. Benefit recovery will all but extinguish the damages.

Keoghs' view

The question of asbestos lung cancer causation has always been a difficult one to unravel. Claim numbers have never matched HSE estimates of incidence. Properly understood, both findings in *Blackmore* are extremely advantageous to insurers and will drive down both claim numbers and outlay.

Time will tell whether claimants' representatives will accept this interpretation. In the meantime, insurers may see a marked increase in claims where the claimant suggests that liability can be established against one employer by 'doubling of the risk'.

This case will not be the last word on asbestos lung cancer.

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