

# Keoghs Client ALERT

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## Asbestos Lung Cancer - Where Next?

### *Heneghan v Manchester Dry Docks*

The Court of Appeal has handed down its judgment in *Heneghan*, covering asbestos lung cancer causation.

The claimant's appeal has failed. The Court accepted that once disease causation had been established by 'doubling of risk', each defendant must pay only according to their contribution to that risk. Unanswered questions remain - including the "51% point".

Insurers have always been concerned about asbestos lung cancer cases. According to the Health and Safety Executive, there are as many lung cancers caused by asbestos as there are cases of mesothelioma. Insurers currently receive far fewer claims than this suggests. Part of the explanation lies in uncertainty about how the law works. Most lung cancer claimants have smoked. How can the law decide what caused the cancer and who is to blame?

#### The case

Mr Heneghan had been exposed to asbestos in a number of employments. As is often the way with asbestos claims, not all the employers could be traced. Proceedings were issued against six of them. The employers sued had contributed about 35% of the total asbestos exposure. One of them had only been responsible for about 2.5% of Mr Heneghan's total asbestos exposure.

The claimant's legal team argued that asbestos from all of the employers had directly contributed to the cancer. They said that as cancer is an indivisible condition, this meant that all of the employers were separately liable for the whole loss. This, they said, was consistent with longstanding principles of law, going back to *Bonnington* in the 1950's. This would have profound implications for cancer claims. Many more cases would follow if the Court agreed with this argument.

The defendants accepted that asbestos had been the cause of Mr Heneghan's cancer. This, they said, was because the exposure had been enough to 'double the risk' of the disease. They disagreed that each employer had made a direct contribution to the disease. They said that all that could be proved against each employer was that it had contributed to the risk. This led to only two possible outcomes. Unless the claim failed against each employer, liability had to be based on contribution to risk. The only way that risk would be enough would be to invoke the mesothelioma case of *Fairchild*.

For lung cancer cases (to which the Compensation Act does not apply) this meant that risk had to be divisible under the subsequent case of *Barker*. This was what they suggested. At first instance the Judge agreed with the defendants. He added a further point. If exposure at any one defendant had more than doubled the risk, that defendant would be liable in full. This is the so called '51% point.'

#### The decision

The Court of Appeal has upheld the first instance decision. The Court rejected the argument that each employer could be shown to have contributed directly to the disease. It agreed that asbestos could be 'proved' to have caused the cancer by reference to doubling of the risk.

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It accepted the defendants' submission that asbestos lung cancer and mesothelioma were legally indistinguishable. It was therefore appropriate to divide liability relative to each employer's contribution to the risk of the cancer.

The Court of Appeal did not directly rule on the *51% point*, saying that this part of the first instance judgment was obiter. The main comment on it was supportive - with Lord Justice Sales saying that "*it is not immediately obvious to me that the Judge was wrong.*"

## The implications

For now, this judgment does good work for defendants. Claimants have to prove a doubling of the risk from asbestos, and will then only recover divisible damages. Many questions remain.

Is doubling of the risk even the right test for causation without further evidence? This has been doubted by the Supreme Court before. It was even doubted by the Privy Council in the very short period between the *Heneghan* hearing and today's judgment - in *Williams v Bermuda* on the 25th January.

If mesothelioma and asbestos lung cancer are legally indistinguishable why not apply *Fairchild* to both 'stages'?

What role does smoking play? Under this decision, it would not matter if a claimant had smoked 80 cigarettes a day so long as his asbestos exposure on its own had doubled the risk. If asbestos is shown to have doubled the risk, and 'caused' the cancer, can there be any discount at all for contributory negligence?

What about the *51% point*? Is it right? Could such a defendant recover against other minority employers? What happens in cases of concurrent liability? How does the *51% point* relate to insurance cover? Does cover even trigger if the risk has not been doubled during the policy period? How does this affect reinsurance treaties? How does it square with partial cover cases, and the *IEG* decision?

The Court of Appeal's judgment has been handed down very quickly on the hearing. It seems very unlikely that it will be the final word on asbestos lung cancer.

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