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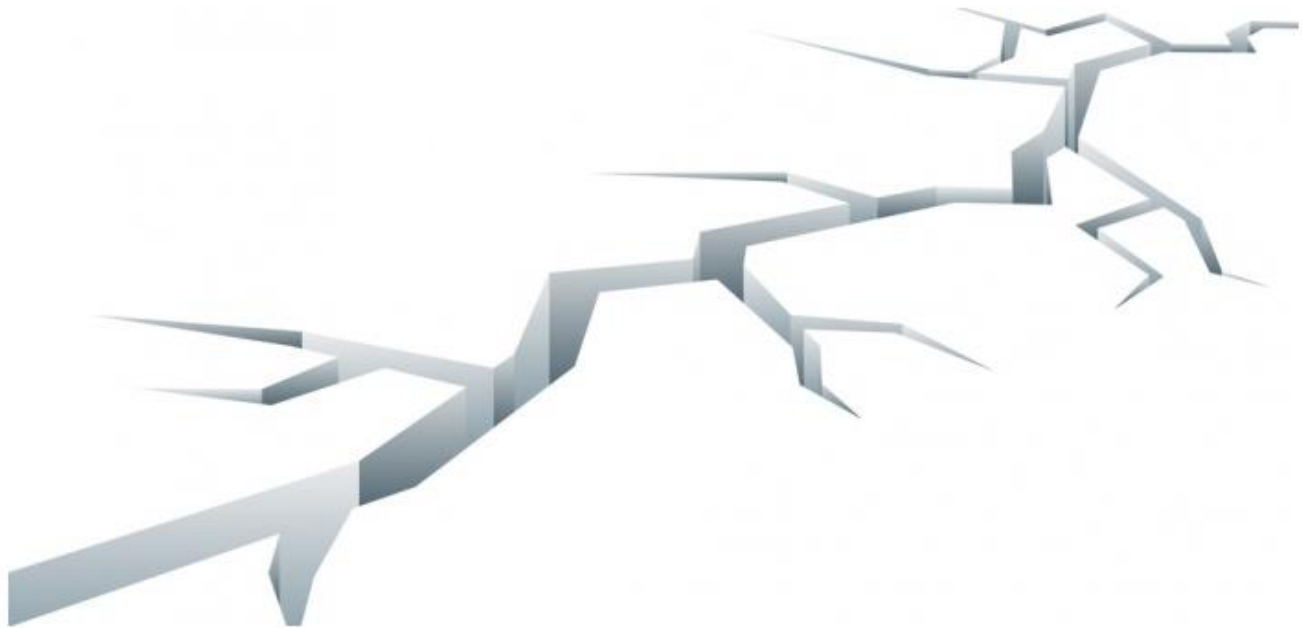

Assessing the asbestos lung cancer fault line

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A fault line has appeared in asbestos lung cancer claims, following the recent Court of Appeal judgment in the matter of *Department For Communities and Local Government v Blackmore* on the issue of contributory negligence for smoking in asbestos related lung cancer cases. Insurers will be keeping a close eye on how it ends up dividing the landscape, says David Pugh

The Health Safety Executive says that lung cancer caused by asbestos is as common as mesothelioma, yet there are far fewer compensation claims. However, the law on asbestos lung cancer is beginning to move. Where it ends up could be of critical importance to insurers.

The link between asbestos and lung cancer has been known for longer than the one between asbestos and mesothelioma. There is a critical difference. In almost all individual cases we know that the mesothelioma was caused by asbestos. In lung cancer cases we often don't know this. There are usually other factors involved – especially smoking. This makes it more difficult to prove how the cancer was caused. Different claimants have tried and failed to advance evidence to establish that particular carcinogens have directly caused disease. This would make all occupational cancer claims very much easier to win and more expensive to pay.

If direct contribution to disease cannot be proved, the legal approach becomes more difficult.

The accepted practical method of dealing with asbestos lung cancer (ALC) claims has always been to split the causation question into two separate parts. We first decide what caused the cancer. If the asbestos exposure has been enough to double the risk of cancer, this 'proves' that asbestos has caused the cancer.

We then decide who caused the cancer. Liability has usually been divided pro rata between whoever is responsible for the asbestos exposure. This approach mixes two very different legal approaches to causation. The 'doubles the risk' test supposedly satisfies the law's standard requirement that proof should be on the balance of probability. The divided liability is an offshoot of the famous *Fairchild* case about mesothelioma. This imposed a much lower standard of proof from mere contribution to the risk of disease.

In steps the Court of Appeal

The practice of combining a dosage threshold with divisible liability has controlled lung cancer claim numbers and cost. ALC cases have been more difficult to win and damages are lower when employers and insurers cannot be traced. The legal basis for this mixed approach has always been uncertain. It seemed to have been vindicated in another Court of Appeal case heard last year called *Heneghan.* Some uncertainties remained following that judgment. These have been magnified by the recent Court of Appeal judgment in a case called *Blackmore.*

The *Blackmore* claim was not directly about causation but the arguments used brought the important issues into sharp focus. *Blackmore* concerned a closely related question. If you accept that asbestos has been a cause of the cancer, then how do you deal with a claimant who has also smoked? In almost all individual cases smoking creates a much higher risk of cancer than asbestos exposure.

This issue has normally been addressed by using contributory negligence. The Courts have accepted that a claimant who smoked after the dangers were known was himself negligent. Earlier cases set the deduction between 15 and 20%. In *Blackmore*, the defendant argued that as smoking caused a much higher risk the deduction should be 80-90%. The Court of Appeal disagreed. It stressed the importance of fault in setting contributory negligence. As the employer was more at fault than the claimant, the deduction should be only 30%.

The way the defendant argued its case meant that the Court of Appeal had to consider the broader issues of causation. The answer given by the Court appears to have opened up a fault line in ALC cases.

The defendant in *Blackmore* was the claimant's only employer. They accepted that their actions had doubled the risk of cancer and so had caused the claimant's cancer. There was no need to invoke the *Fairchild* approach. This defendant was solely liable.

The Court drew a distinction between such cases where a single employer had doubled the risk and those where multiple employers had only contributed to the risk, as followed in *Heneghan*. In "risk" cases, said the Court, smoking would be taken into account as a contributor to that risk. It follows from this that smoking claimants who can only establish *Heneghan* risk iability will receive minimal damages. Those who can prove doubling of the risk against (at least) one party will get their full claim, less any deduction for contributory negligence.

A sharp division

This thinking creates a sharp division of ALC cases into those where a claimant can prove that at least one employer doubled the risk and those where he cannot. This approach also separates defendants into two categories – "doublers" and "riskers". In many cases there will be both categories.

The claimant will pursue the doublers first. Can the doubler pursue the riskers for a contribution? It seems likely that they cannot. There will be both doublers and riskers in underlying insurance cover too. How will that work? How, when, and for what, will reinsurance respond? Can insurers seek a contribution from policyholders for uninsured periods? Does an annual causation based policy trigger at all if exposure has to double the risk to cause the disease?

There are no easy answers to these and other questions. It took thirteen years after *Fairchild,* two separate hearings and a deeply divided panel for the Supreme Court to resolve the underlying insurance issues in mesothelioma in *Zurich v IEG.* The causation issues in lung cancer are more complicated.

When there are so many uncertainties about such basic questions of liability and cover response it is a sign that the law has taken the wrong turn. After all, the fundamental question is very simple. Can a claimant show that his loss has been caused by a defendant's breach of duty? The defendant side may argue that if the claimant cannot prove his case, he fails. The claimants may try again to prove direct contribution to disease, or argue that the *Fairchild* test should answer both the what, and the who, question.

Which of these three simple arguments succeeds could hardly be less important for insurers with legacy liabilities.

David Pugh, is a member of FOIL's Disease focus team and partner at Keoghs