

**RESPONSE TO MINISTRY OF JUSTICE CONSULTATION PAPER (CP14/08)**  
**PLEURAL PLAQUES by Sintons LLP**

**Introduction**

Sintons LLP is a broad based practice situated in the City Centre of Newcastle upon Tyne. The practice has a large personal injury department to include a dedicated team working on behalf of Claimants who suffer from a range of industrial diseases, to include all types of asbestos induced illness.

Prior to the decision of the Court of Appeal in *Rothwell –v- Chemical & Insulating Company Limited* the firm represented approximately 375 Claimants suffering from a range of asbestos induced illnesses. The majority of these Claimants had asbestos induced pleural plaques and/or pleural thickening and/or asbestosis giving rise to no or minimal respiratory disability.

Prior to formulating this response to the consultation paper we have canvassed the views of all clients who had a diagnosis of pleural plaques alone.

319 individuals (292 of whom had a diagnosis of pleural plaques only with the remainder having asymptomatic or minimal respiratory disability pleural thickening or asbestosis) were sent a detailed letter summarising the contents of the consultation paper and a short form response sheet, samples of which can be found at appendix 1 to this response to the consultation paper.

Of the 319 Claimants contacted, 283 responded.

The overwhelming response of our clients who were suffering from pleural plaques was that they would wish to see an overturn of the House of Lords decision on pleural plaques.

We set out below this firm's formal response to the consultation paper. We do so secure in the knowledge that the views expressed are those of our clients as well as of this firm.

Several clients took the opportunity to comment further on the consultation paper. The following are a selection of the observations made:-

"We should be treated the same as Scotland". (Mr B of Cowbridge).

"Postcode justice in action". (Mr B of Weymouth, Dorset).

"I feel let down by my government and the law system, which deny me the right to compensation for injuries yet allows my Scottish colleagues (some of whom I have worked with) the right to claim for theirs". (Mr C of Port Talbot).

"I feel it is totally unfair and unjust that employees who worked for British Gas (a nationalised company at the time) in Scotland would be able to claim if they lived in Scotland whilst myself who has worked and lived in Wales all my life will not". (Mr G of Swansea).

“How on earth can they justify that the workmen employed in Rosyth Dockyard are entitled to claim while those employed in Portsmouth, Chatham and Devonport Dockyard, whilst doing exactly the same work, cannot?” (Mr H of Abingdon, Oxon).

“If they get compensation in Scotland then so should the rest of the United Kingdom”. (Mr W of Tyne & Wear).

### **Question 1**

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

### **Response**

In our experience, the majority of pleural plaques sufferers are aware that the condition is benign and is not progressive.

It is our view that the overwhelming majority of chest conditions, Trade Union representatives and personal injury practitioners are both factually accurate and responsible when dealing with those who have a diagnosis of asbestos induced pleural plaques.

The concern which follows on from a diagnosis of pleural plaques does not, in our view, stem from any fundamental misunderstanding about the nature of plaques as a benign asymptomatic condition. Instead, it arises from the knowledge that past occupational negligent exposure to asbestos dust has caused a physiological change in the body and that the sufferer now has actual knowledge of the presence of an asbestos related condition and that some asbestos related conditions may be fatal. This concern is reinforced by an awareness that former work colleagues, friends and (in many cases) family members have also contracted other asbestos related conditions which have resulted in serious respiratory disability or death.

On the one hand there is an acceptance and understanding that pleural plaques are harmless and rarely produce respiratory disability. On the other hand, the knowledge that the condition has been detected inevitably prompts the sufferer to reflect on the fate of those who have developed more serious conditions. In our view it is the heightened awareness of the potential dangers associated with occupational exposure to asbestos which gives rise to the concern rather than any fundamental misunderstanding about the nature of pleural plaques itself.

It follows therefore that any proposal to raise awareness of the nature of pleural plaques will do little to allay concerns about the dangers associated with asbestos exposure which are real and which are known to all who have been negligently exposed in the past.

## **Question 2**

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

### **Response**

It is our firm view that the only equitable, practical and affordable solution to the widespread concerns and difficulties which have arisen as a consequence of the Court of Appeal and House of Lords' Judgments in the pleural plaques litigation is to overturn these Judgments and restore the law to the position it was in prior to the commencement of the litigation.

It is suggested in the consultation paper (paragraph 42 on page 19) that a reversal of the House of Lord's Judgment effectively amounts to a change in the law of negligence which has implications for the fundamental integrity of this element of the common law. A contrary view is that pleural plaques was acknowledged and accepted to be damage (in the legal sense) sufficient to attract an award of compensation for 20 years and all that is required is a declaration that, contrary to the view expressed by the Court of Appeal and the Law Lords, pleural plaques is a physiological change in the body amounting to damage which is more than minimal and should therefore be compensatable. This does not alter the law of negligence. Rather, it reinstates a view which was widely held and not challenged for two decades.

The decision of the Scottish Executive to reverse the House of Lord's Judgment and the likely passage of the Damages (Asbestos related Conditions) (Scotland) Bill into law later this year has given rise to a more fundamental issue. This is an issue of democratic legitimacy rather than the integrity of the law of negligence. Many clients have commented on the patent unfairness of separate legislation in Scotland as opposed to the rest of the United Kingdom. The absurdity of this position is highlighted by the fact that many sufferers from pleural plaques will have been employed by formally nationalised industries. There can be no justification for treating an MOD employee in Plymouth differently to an employee undertaking precisely taking the same kind of work in the same conditions in Rosyth. One Respondent has used the phrase "post code justice". We concur.

At paragraph 73 on page 25 of the consultation paper it is contended that it would be inappropriate to provide compensation within the context of a no fault scheme to those who suffer from asymptomatic pleural thickening and/or asymptomatic asbestosis. This firm's response to the proposal in relation to a no fault scheme is set out below. We take issue at this stage however with the suggestion contained in the consultation paper that asymptomatic pleural thickening and asymptomatic asbestosis will become actionable conditions and therefore compensatable upon "the development of symptoms".

We do not accept that this is an accurate reflection of the present law as previous (unchallenged) House of Lord's authority has made plain (*Cartledge –v- Jopling* [1963] A.C.758). Damage in a legal sense arises when there is evidence of a diminution in reserve lung capacity and/or elasticity of lung tissue. This is not the same thing as development of symptoms. As the consultation paper rightly points out the House of Lord's decision in *Johnston* did not specifically deal with these conditions and

accordingly *Cartledge* remains good law. However, this has not prevented the insurance industry or (regrettably) claims handlers acting on behalf of the former nationalised industries for which the state retains the historic liabilities from seeking to argue that the pleural plaques decision should prevent compensation being paid to those with no or minimal respiratory disabilities who have a diagnosis of pleural thickening or asbestosis.

In an open letter dated 2<sup>nd</sup> January 2008 (Appendix 2) addressed to this firm, Messrs Eversheds acting on behalf of British Shipbuilders (who were, it will be recalled, defendants at first instance in the pleural plaques litigation) signalled their intention to repudiate claims where the stated disability was less than 5%.

Their argument that “variances in individual physiology and life experience are such that a clinician cannot reasonably say that he can detect symptoms that have an actual impairing effect of less than 5%” highlights the wider implications of the *Johnston* Judgment. This firm does not accept the proposition advanced on behalf of British Shipbuilders for two reasons. First, they clearly seek to usurp the function of the Court as to what constitutes damage which, per Lord Pearce in *Cartledge*, is a “question of degree” in borderline cases. Second, it flies in the face of a clear willingness on the part of medical experts to undertake the exercise of apportioning the degree of respiratory disability which is asbestos induced and that which is attributable to non-asbestos related conditions. The Courts are well used to an evaluation of the clinical experience and cogency of the expert’s views in such cases.

The intention of British Shipbuilders to challenge entitlement to damages in cases of asbestosis and pleural thickening giving rise to no or minimal respiratory disability illustrates the importance of revisiting the House of Lords rejection of pleural plaques as damage. Were the Government to adopt the legislation presently going through the Scottish Parliament the ongoing uncertainty as to what constitutes an actionable condition (which, despite the acknowledgement of British Shipbuilders that *Cartledge* remains good law, is the practical effect of their position) would disappear.

Such uncertainty also runs wholly contrary to the Government’s stated aims of improving access to justice. Since the House of Lord’s Judgment in *Johnston* has been handed down this firm has experienced significant difficulties in securing funding and After the Event (ATE) insurance cover on behalf of Claimants who have a diagnosis from reputable clinicians of conditions such as pleural thickening and asbestosis which are giving rise to minimal respiratory disability. The ATE market, which was already limited in the case of complex occupational illness claims, has been badly affected by the pleural plaques decision and the reluctance to underwrite further claims which are the subject of sustained challenge by the insurance industry is understandable.

Only a reversal of the House of Lord’s Judgment will remove this uncertainty. When seen in the context of 20 years of legal practice and when viewed in the light of the fact that negligent exposure to asbestos dust is rarely an issue in these cases it is submitted that this is the only just and equitable response. To have former employees of nationalised industries being treated differently for purely geographical reasons is a wholly unsatisfactory and unsustainable situation.

### **Question 3**

**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.**

### **Response**

Sintons LLP do not consider that a no fault financial support scheme for pleural plaque sufferers would be appropriate.

There are several difficulties with the proposed no fault scheme. First, the proposal overlooks the fact that pleural plaques are caused by fault. It is the negligent exposure to asbestos dust which gives rise to the condition in the first place. The former employers of plaques victims carry EL insurance (where traceable) to indemnify the company against personal injury claims. In that context, it is submitted that a no fault scheme is neither appropriate or desirable. It is not appropriate because, following established principles in the law of negligence, those who negligently exposed sufferers to asbestos dust should be liable to compensate for the injury or harm occasioned. The establishment of such a scheme will do little to address the sense of disenfranchisement and injustice that followed on from the House of Lord's Judgment.

A no fault scheme is not desirable because it is unlikely that such a scheme would be able to provide payment at a level which most sufferers would consider to be just recompense for the injury that they have suffered. It is noted at paragraph 58 (page 22) of the consultation paper that a fixed payment of £5,000 is used for the purposes of the impact assessment accompanying the consultation paper but, to reflect the House of Lord's Judgment and in order to make the scheme affordable, "a lower figure may be more appropriate". Many sufferers of pleural plaques know of former work colleagues and family members who were receiving payments of up to £15,000 as recently as 2004.

The levels of payment under the terms of the scheme look paltry in comparison. Furthermore, whilst ruling against the Claimants in relation to actionability, the Court of Appeal in *Rothwell* accepted the Claimant's representations in relation to quantum. It would appear unjust and arbitrary for a relatively young man diagnosed with pleural plaques to receive broadly the same level of compensation as a much older individual. Sintons LLP believe that it is the judicial system which should be used to assess quantum having due regard to the medical evidence in a particular case in order to ensure that the level of compensation is appropriate in the circumstances.

Were a no fault compensation scheme to be established and were payments made within the terms of the scheme to be at modest levels, this would merely serve to heighten the sense of injustice experienced by pleural plaque sufferers in England and Wales, particularly given the fact that former work colleagues and friends in Scotland are to be given the right to pursue claims of common law for substantially higher sums.

#### **Question 4**

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

- a. Which of the above two schemes should be introduced, and why?**
- b. What level of payment should be appropriate?**
- c. How should the scheme be funded?**
- d. What limitation period should apply for each option?**

#### **Response**

For the reasons set out above Sintons LLP do not believe that a no fault payment scheme should be introduced. The specific questions posed serve to illustrate the arbitrary nature of such a scheme. Seeking to limit the class of sufferers who may be eligible within the terms of the scheme purely for financial and administrative ease would merely highlight the fact that sufferers of pleural plaques in England and Wales were being given a “second rate” remedy compared to their Scottish counterparts.

So far as an appropriate level of payment is concerned a no fault scheme cannot possibly deliver an award of damages which is appropriate in any given case.

Considerations as to how a no fault scheme should be funded also go to the heart of the injustice that the House of Lord’s Judgment has created. It is difficult to see why the tax-payer generally should pay for all Claimants who suffer from pleural plaques. Insofar as the exposure arose whilst the sufferer was employed by a former nationalised industry where the historical liabilities remain with the State then it is only right that the burden should be shouldered by the tax-payer. In cases where negligent exposure arose whilst in the employment of a non nationalised industry and where EL cover is in place to satisfy any Judgment it is difficult to understand the rationale for the tax-payer to assume responsibility for liabilities which ought properly to be met by such EL insurers.

In the absence of a fund of last resort, to be financed by the insurance industry in general, which could be used to assist those sufferers of all categories of industrial disease who cannot pursue claims because EL insurers are not traceable, it would appear inequitable to the insurance industry as a whole for them to be held liable for the failure of policy holders other than their own to take reasonable care of their employee’s safety.

To impose a cut off date on potential Applicants to such a no fault payment scheme would again accentuate the sense of injustice; the majority of those who receive a diagnosis of pleural plaques do so incidental to ongoing care and treatment, often for conditions which are unrelated to occupational exposure to asbestos. The essence of compensation is to recompense those who have suffered at the hands of the negligent conduct of another. As it is the conduct and consequent harm that is being compensated it is difficult to see why those who happen to receive a diagnosis after a certain date should not be granted a remedy.

## **Impact Assessment**

### **Response**

Sintons LLP have no firm estimates regarding the number of people currently diagnosed with pleural plaques or the future number of people who will develop pleural plaques and accordingly do not respond to this question.

Similarly, Sintons LLP have no estimates regarding the future distribution of pleural plaques cases including the period of time over which people will develop pleural plaques.

Finally, Sintons LLP have no estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lord's decision and who have not received compensation.

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