

# General Damages for Mesothelioma: Determining the Correct Figure

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Whether assessing the likely award of general damages for pain, suffering and loss of amenity ("PSLA") on behalf of a Claimant, setting a reserve or considering a Part 36 offer for a Defendant, it is important to ensure that one can be as accurate as possible in the assessment of general damages for PSLA.

In many cases, a practitioner's starting point (and sometimes their finishing point) in that assessment in accordance with the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (the "JCG"). These are now in their 16<sup>th</sup> edition, last updated in late 2021, and contain guideline figures correct as at the date that edition went to press. The bracket for mesothelioma was £63,650 to £114,460.

This is a particularly large range, with the figure at the top being almost 80% higher than the figure at the bottom of the bracket.

Before considering the reasons for this and the available guidance as to how to determine the level of award within that wide bracket, a word about inflation.

Each new edition of the JCG contains an adjustment of the figures reflective of the changing Retail Price Index ("RPI"). Between the 15<sup>th</sup> and 16<sup>th</sup> editions the general increase in RPI was 6.56% and this resulted in such an increase in the figures between those editions.

The 16<sup>th</sup> edition is now more than 18 months old, which is not a particular issue in times of low inflation. However, since the end of September 2021 inflation has continued to rise at levels not seen since the 1980s. The change in the RPI between October 2021 and June 2023 (the latest data available at this time) is a rather staggering increase of 20.6%. This means that the 16<sup>th</sup> edition bracket for mesothelioma updated to June 2023 would actually be about £76,780 to £138,075. The updated figures within *Kemp & Kemp* (updated to March 2023, and so themselves some five months out of date) also support awards at the very top end of more than £130,000.

Whilst the rate of inflation has started to reduce slightly, one can anticipate that the 17<sup>th</sup> edition of the JCG, when produced later this year, will see a significant increase from the current figures. Practitioners cannot responsibly simply await the next updating edition and ignore the reality of inflation but must do the updating necessary at the time. It is to be noted, however, that a figure correctly adjusted for inflation at any given time is likely, in times of changing rates of inflation, to be rendered out-of-date quite quickly. A keen eye will need to be kept on inflation and the RPI.

Turning then to the relevant considerations, the narrative in the JCG says:

*Mesothelioma causing severe pain and impairment of both function and quality of life. This may be of the pleura (the lung lining) or of the peritoneum (the lining of the abdominal cavity); the latter being typically more painful. There are a large number of factors which will affect the level of award within the bracket. These include but are not limited to duration of pain and suffering; extent and effects of invasive investigations; extent and effects of radical surgery, chemotherapy, and radiotherapy; whether the mesothelioma is peritoneal or pleural; the extent to which the tumour has spread to encase the lungs and where other organs become involved causing additional pain and/or breathlessness; the level of the symptoms; domestic circumstances; age, level of activity, and previous state of health; extent of life loss; and concern for spouse and/or children following death. Most reported decisions other than those involving extremely short periods of symptoms or very elderly claimants fall within the middle and upper parts of the bracket.*

This text, which has been revised and added to considerably over the years since its original publication, provides pretty comprehensive and extremely useful guidance and will, without more, assist practitioners in making a proper assessment in the vast majority of cases. However, it must be remembered that the assessment is necessarily fact specific and a particular factor that in one case may suggest the value heading in one direction may, on a particular set of facts, suggest an award moves in the other direction.

From a court's perspective (or indeed for anyone having to make an assessment), it would be of great assistance to have the various relevant considerations mentioned within the JCG addressed in terms in witness evidence from the individual with the disease (a witness statement taken in life) and/or from the widow/widower, as well as being addressed to the extent possible within the medical report dealing with condition and prognosis. Solicitors acting for claimants would be well advised to use the guidance as a blueprint for that part of their client's witness statement dealing with the condition and the impact on them/family etc. Also, aspects perhaps not covered sufficiently in a medical report might be clarified by Part 35 questions or an addendum report.

The quantification of general damages for PSLA is an art not a science, but a comparables-based assessment, supported by the JCG, is intended to and should largely ensure consistency between awards, insofar as the peculiarities of individual cases allow.

Beyond general damages PSLA, an award for loss of intangible benefits may well be sustainable if the evidence is available to support it. A claim for service dependency in relation to a deceased, who was prior to illness useful around the home, garden or otherwise in respect of services provided to their partner, can provide the basis for an additional sum to compensate for the fact that after death it will be necessary for the dependent to find, choose and make all arrangements in relation to those employed to do that which needs to be done. The inconvenience of this organisation for the dependent in this situation justifies a modest additional award. Again, the amount will be fact specific, with the period over which and the extent to which this will be required being the two most relevant factors. The loss is not assessed on a multiplier/multiplicand basis but is a lump sum award. Awards range from £2,000 to £4,000. Such a claim will need to be supported by the relevant evidence of fact, and is almost always parasitic on a services dependency claim.

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